CALCUTTA HIGH COURT

Mcgregor and Balfour Ltd

Vs

Commissioner of Income-Tax

(Chakravartti, C.J.)

26.08.1954

JUDGMENT

Chakravartti, C.J.

1. This reference involves a short but intriguing point which afforded an opportunity for arguments of some subtlety.The assessees, McGregor & Balfour Ltd., Calcutta, are a limited registered office there. The control and management is also not wholly situated in India. They however trade in this country as well and had to pay excess profits tax under the relevant Acts both in India and in England. In respect of the tax paid in this country, they availed themselves of the provisions of section 12 (1) of the Excess Profits Tax Act and in respect of the tax paid in the United Kingdom, they availed themselves of the provisions of section 12 (2) and so deducted appropriate amounts in computing their profits and gains of the relevant years for the purposes of income-tax and super-tax. In the accounting year ended on the 31st October, 1946, relative to the assessment year 1947-48, they obtained in the United Kingdom a repayment of a sum of Rs. 2,31,009, out of the excess profits tax paid there under the English Act. That repayment was made to them under section 28 (1) of the Finance Act of 1941 (4 & 5 Geo. 6, c. 30). The Income-tax Officer included the amount in the taxable profits of the assessee for the accounting year, purporting to do so under the provisions of section 11 (14) of the Indian Finance Act, 1946; and upon adding that amount to the assessees business income in Calcutta which was Rs. 4,03,928 and treating the whole of the total of Rs. 6,34,937 as their Indian income, he found that it exceed their foreign income which was Rs. 4,29,620. Accordingly, the Income-tax Officer applied section 4A (c) (b) of the Indian Income-tax Act and held the assessee to be resident in British India and assessed them on the whole of their world income. The assessment was upheld successively by the Appellate Assistant Commissioner and the Appellate Tribunal. The assessees resisted the assessment on two grounds. They contended, in the first place, that the amount of the repayment was not chargeable to tax all, because the only provision under which a refund of excess profits tax obtained in the United Kingdom could be brought to charge in India was

contained in the Finance Act of 1946, which was limited in its operation to the assessment year 1946-47 and did not apply to the assessment year 1947-48. In the second place, they contended that, in any event, the amount of the repayment could not be taken into account for the purpose of section 4A (c) (b), inasmuch as it was not income arisen in India as required by that section, but only an amount deemed to be income for the purposes of the Income-tax Act and treated as the income of the year in which the repayment was made.The contentions of the assessee having rejected by the Income-tax authorities and the questions to be referred to this Court. They have been referred in the following form :-

"(1) Whether on the above facts and circumstances of this case the Tribunal was right in holding that the sum of Rs. 2,31,009 was income of the assessee during the assessment year under consideration and was liable to be assessed under the Indian Income-tax Act ?

(2) If so, whether this amount could not be taken into consideration for determining the residence of the assessee under section 4A (c) (b) of the Indian Income-tax Act ?The first question challenges the very assessability of the amount of repayment. As a question arising out of the appellate order, the only contention involved in it is that a provision in the Finance Act of 1946 could not apply to the assessment year 1947-48 and since there was no corresponding provision in the Finance Act of 1947, there was no provision at all which made the amount liable to the Indian tax. In my opinion, that contention is entirely misconceived. The Finance Acts, though annual Acts, are not temporary Acts, not has the Act of 1946 ever been repealed. It is true that, in the main, the annual Finance Acts make provision for the rate at which tax is to be charged or sometimes the manner in which income is to be computed in assessment for the financial year to which the Acts relate, but if such provisions are limited to the particular assessment year, it is not because the Act itself is a temporary Act, limited for all purposes to a single year, but because the particular assessment year is specifically mentioned in the provisions as the year to which they solely relate. There may, however, be and often are provision of a general character which are of permanent operation and which they are, by their terms, applicable. It is not unoften that the Income-tax Act or some other Act is amended by a Finance Act or that some principle of taxation or computation of income is laid down in a Finance Act, which is intended to form part of the general law of the country. It is clear that section 11, sub-section (14), of the Finance Act of 1946 is a provision of that character. The Act in which it occurs is still on the statute book as an operative enactment and it was continuing to say in 1947-48, as it is continuing to say even to-day, that all refunds or excess profits tax obtained in England, if they be of the kind mentioned, shall be treated for the purposes of the Indian Income-tax Act in the manner laid down. The very fact that such refunds could not be obtained in other years in future, is sufficient to indicate that section 11 (14) could not have been intended to be limited to the accounting year 1946-47 and, in fact, the language in which it was expressed shows that it was not so limited, I should add in fairness to Mr. Mitra that he himself conceded that there were weighty considerations against the

contention he was advancing and he instanced cases where one finance Act had been amended by another. In my opinion, there is no substance in the contention that section 11, sub-section (14), of the Finance Act of 1946 could not apply to the sum of Rs. 2,31,009 refunded in the accounting year ended on the 31st October, 1946.In addition to the ground taken on behalf of the assessee before the authorities below, Mr. Mitra pressed for a negative answer to the first question on another ground. He contended that assuming section 11 (14) of the Finance Act of 1946 applied, still the maximum effect of that section was to make the amount of the repayment income for the purposes of the Income-tax Act and further to make it income of the year in which it was repaid, but the effect was not also to make it taxable income. The argument was that even after the amount had been brought into the computation as income, it had to be decided by the application of the relevant provisions of the Income-tax Act, whether it was liable to tax or exempt from taxation and if liable to tax, to what extent liable. The amount, it was contended, was not income which had arisen in India and it was nobodys case that it had been received here. If it was not income arising in India, it could not be taken into account in determining the residence of the assessee under section 4A (c) (b) and, without that amount, the Indian income of the assessee would not exceed their foreign income, with the result that they would be non-residents. If they were non-residents, the amount would not be taxable at all, since it was not income accrued or risen in India, nor income received here.The new ground taken as to the first question, which I have just summarised, is really consequential to the contention of the assessee embodied in the second question. I shall, therefore, deal with it, although, as a ground in support of the first question, it does not, strictly speaking, Mitra sought to reinforce his new ground was that what was repaid under the English Act of 1941 was not purely excess profits tax, but some National Defence Contribution also and since there was thus no necessary connection between the amount deducted in India as paid on account of the English excess of profits tax and the amount repaid in England, the Legislature could not have intended that any amount refunded would ipso facto become liable to the Indian tax.

I shall like to dispose of the last small point first. Mr. Mitra was not right in contending that the repayment which was to be taken as income under section 11 (14) of the Finance Act was not repayment purely of excess profits tax. What is to be repaid under section 28 (1) of the English Finance Act of 1941 is the amount by which the total sum paid by ways of excess profits tax at the rate of one hundred percent, and the National Defence Contribution would be reduced if, instead of one hundred per cent, the excess profits tax was paid at the rate of eighty per cent. The difference between the two sums, which is to be repaid, is thus the difference between excess profits tax at the rate of one hundred per cent. and the same tax at the rate of eighty per cent, and, therefore wholly an amount of excess profits tax - the sum paid as National Defence contribution remaining unaffected. Secondly, even assuming that a portion of the repayment is National Defence Contribution, still what section 11 (14) of the Indian Finance Act, 1946, annexes is not

the whole of the repayment as it, is but repayment "in respect of those profits", that is profits and gains of the business computed for the purposes of the Indian Income-tax Act, and, therefore, only such repayment as has been made in respect of the Excess Profits Tax Act charged and paid on the Indian income. What was deducted under section 12 (2) of the Excess Profits Tax Act was the amount of any excess profits tax payable in a country outside British India on the profits of the business to the extent to which such profits were liable to excess of the business to the extent to which such profits were liable to excess profits tax under the Indian Act. Thus, there is a direct connection between what was deducted in computing the taxable profits and the repayment which is to be taken as income under the Finance Act of 1946. What was deducted was taxable and would be taxed, it was not deducted and, therefore was nothing inappropriate in providing that when the amount or a portion of it was repaid and resorted to the assessee, it would then be brought to tax.To explain and appreciate the main contention of Mr. Mitra, it is necessary to set out the relevant provisions of the two Acts. The first provision is section 12 (2) of the Excess Profits Tax Act which says that in computing for the purposes of income-tax or super-tax the profits and gains of a business, "there shall also be deducted the amount of any excess profits tax payable under any law in force in a country outside British India on the profits of the business in respect of any chargeable accounting period to the extent to which such profits are liable to excess profits tax under this Act." The rest of the section is not material Thus, what is to be done is that a sum equivalent to the amount of excess profits tax paid in another country in respect of the profits chargeable under the Indian Act is to be taken out of the taxable profits and left out of the taxation. It is clear that since the reason for the exemption was a payment in another country, it was thought that if any part of the amount, so paid was refunded, the reason for the exemption would disappear and that it would be right that the amount refunded should be then brought to tax. So the Finance Act of 1946 enacted what was, in fact a supplementary provision. Section 11 (14) of that Act provides as follows :

> "Where under provisions of sub-section (2) of section 12 of the Excess Profits Tax Act, 1940 (XV of 1940), excess profits tax payable under the law in force in the United Kingdom has been deducted in computing for the purposes of income-tax and super-tax the profits and gains of any business, the amount of any repayment under sub-section (1) of section 28 of the Finance Act, 1941 (4 & 5 Geo. 6, c. 30) as amended by section 37 of the Finance Act, 1942 (5 & Geo. 6, c. 21), in respect of those profits, shall be deemed to be income for the purposes of the Indian Income-tax Act, 1922, and shall, for the purpose of assessment to income-tax and super-tax be treated as income of the previous year during which the repayment is made."

The section was obviously enacted to meet the case where the assessee, having paid some excess profits tax in the United Kingdom, had an equivalent sum removed from his taxable profits and

was not taxed thereon and would, when any part of the excess profits tax was refunded to him, escape Indian income-tax on that sum altogether, unless a provision for the taxation of such amount was made. Section 11 (14) supplied such a provision.The next question is as to the effect of the section. The amount of the refund is a kind of a gift from the British Treasury, but the section prevents the assessee form saying that it is not an income amount and says that it shall be deemed to be his income for the purposes of the Income-tax Act. Even so, the difficulty of fitting the amount of the refund into the scheme of the Indian Income-tax Act remains and without some special provision, it would not be an easy matter at all to apply the general law and to deal with the amount as pertaining to the income-tax of the years out of which it was originally taken. Section 11 (14) therefore makes a straight provision and says that it shall be treated as the income of the year in which it was repaid. The section amount and also prevents him from saying that it is not an income of the year of repayment. So far Mr. Mitra had no contention of the contrary to urge and did not dispute that such indeed was the effect of the section. But he urged that while the section made the amount of the refund income, it did not make it assessable income and that its liability to tax has been left to be determined by the general provisions of the Income-tax Act. I am unable to accept that contention. The section is obviously concerned with assessee who had a business income in the United Kingdom and paid excess profits tax there and, out of such tax paid, had received credit for an amount appropriate to their Indian income in the shape of a reduction of their taxable profits by an equivalent amount. The object of the section is to provide that when any part of the amount of excess profits tax, paid in the United Kingdom and exempted from taxation here, is refunded to the assessee, it will be brought back under assessment and made to suffer the tax from which it had previously been exempted. It the general principles of the Income-tax Act were to apply to the amount of such a repayment, it would escape taxation altogether, unless their Indian income wash, without the aid of the amount of the repayment, anger than their foreign income, I apprehend, in the majority of the case, the assessee would be found to be a non-resident and the result would be that section 11 (14) would be found to have wholly failed in its object in those cases and the position would be that though designed to bring refunds of excess profits tax to charge, it was in fact, ineffective for doing so. I am not prepared to accept such a construction of the section unless the language used leaves no other course open. In my view, the language points to quite the opposite construction.A question of a similar nature has arisen in England more than once and it will be instructive to see how it has been decided there. The finance (No. 2) Act of 1915 had a provision in section 35 to the effect that a person who had paid excess profits tax should be allowed for the purpose of income-tax to deduct the sum so paid in computing the profits or gains of the year which included the end of the accounting period. Then there was another provision contained in section 38 (3) which provided that where a trader could show that he had sustained a loss in his trade or business, he would be entitled to a refund of a corresponding amount paid by him as excess profits tax in

respect of any previous accounting period or to set it off against any excess profits was payable by him in respect of any succeeding accounting period, so as to make the total amount paid by him during the whole period accord with his profits and losses during the period. There was lastly a third provision contained in the second part of section 35 which said that when an amount of excess profits tax was repaid, it would be treated as profit for the year in which the repayment had been received. The two provisions of section 35 of the Finance (No. 2) Act of 1915 have since been in corporate in the Income-tax Act of 1918 in rule 4 of the Rules applicable to Cases I and II of Schedule D. The rule reads as follows :-

> "Where any person has paid excess profits duty, the amount so paid shall be allowed as a deduction in computing the profits or gains of year which included the end of the accounting period in respect of which the excess profits duty has been paid; but where any person has received repayment of any amount previously paid by him by way of excess profits duty, the amount repaid shall be treated as profit for the year in which the repayment is received."

Broadly speaking and from the point of view from which we are looking at the matter, rule 4 is a combination of section 12 (2) of the Indian Excess Profits Tax Act and section 11 (14) of the Indian finance Act of 1946. With regard to the provision that the amount repaid shall be treated as the profit of the year in which the repayment was received, it was contended in certain case in England that the effect of the section could not be to make the repayment a taxable profit, because when applied to the case of an assessee who was no longer carrying on any business in the year of repayment, such meaning of the section would lead to an incongruous result, inasmuch as it would make the assessee have obeisance income, although there was no business carried on by him at the relevant time or the effect would be that although, under the general law, the assessee would be entitled to have the profit only brought in to the accounting and then averaged over three years, he would be deprived of the advantage of averaging and made to pay tax on the basis that the whole of the amount was the income of a single year. Dealing with such a contention in the case A. and W. Nesbitt, Limited (in liquidation) v. Mitchell (H. M. Inspector of Taxes) Lord Hanworth, M. R., Explained that rule 4 merely brought back to charge an amount which was taxable profit at the time it had been educated in the competition and that when it was repaid, it came back in its old taxable character and therefore it was not necessary that it should be shown to be capable of arising again as taxable profits in the year of repayment in order to be liable to tax. The previous taxability was sufficient to make it taxable and therefore when rule 4 said that it would be treated as the profit of the year of repayment, it meant that it would be dealt with as taxable profit, irrespective of any other circumstance. "But in respect of what," observed his Lordships, "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.... It comes back, therefore, not having lost its character but 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." And again : "we are told by the Statute that when such a sum is repaid it is to be treated as a profit, but it ought not to be treated as an assessable profit. The answer, to my mind, is that it is paid back not by way of a sum which has no origin or ancestry; it is a sum which represents a repayment of the amount previously paid by that company an the form of excess profits duty upon their trading. If it is to have that character and is to be treated as such a profit, although it be a repayment of sums paid in respect of profits, it is to be treated as a profit for the year in which the repayment is received." And further : "When it is repaid, treating it as a profit, we find that the company has for some years ceased to trade. Does that prevent it being possible to tax it to income-tax ? If it is treated, as I think it is intended to be treated as an assessable profit for the year the reasons which I have given and for the very purpose for which its repayment has been made, then it is possible to do so".The same principle was laid down by Rowlatt, J., in the case of Olive and Partington Ltd. v. Rose (H. M. Inspector of Taxes). "This amount," observed his Lordship, "was taken out of the income-tax total either in one year or in three. At any rate, it is an amount which goes out of the income-tax and takes its income-tax with it, and when it comes into the accounts again it brings its income-tax back with it." Lastly, when the question came to be considered by the House of Lords in the case of Kirkes Trustees v. Commissioners of Inland Revenue, observation in the same sense were made by all the noble and learned Lords. Viscount Cave, L. C. pointed out that rule 4 made the amount dealt with by it income without reference to any other condition and as to the meaning of the expression "treated as profit", his Lordship observed that "the meaning is that, while a payment of excess profits duty is only to come into the computation of profits, a repayment of duty is itself to be treated as assessable profit for the year in which it is received." More illuminating and perhaps more pertinent to the present point were the observation of Lord Summer. Referring to the last sentence in rule 4, he observe as follow :-

> "The express mandatory terms of the sentence who, in carefully chosen language, that he is to submit to something by reason of his having previously enjoyed this advantage in the shape of repayment of an amount previously paid by was of excess profits duty. Something which is not a profit, but is only a money repayment, something which may not result in a profit, because although trading goes on there is so great a loss on the year that this repayment does not make up the deficit, something which may not be a trading profit, because trading for the year. Treated is a fresh word fee from Legal technicality. It is the widest word that could be chosen. The Legislature avoided saying shall be assessed as or shall be brought into the computation of profit and loss, and simply says that

something which is not profit but mere payment shall be treated as profit, which it may or may not be, and as profit for the year. I think, therefore, that the word treated is an apt word to impose a charge."

While the language of the English Act is only that "the amount repaid shall be treated as profit for the year in which the repayment is received," the Indian section is expressed in far stronger, language and says that it shall "for the purpose of assessment to income-tax and super-tax, be treated as income of the previous year during which the repayment is made." As I pointed out just now, even by itself the word "treated" has been construed in England as a word creating a charge, but the Indian section adds the words "for the purpose of assessment to income-tax and super-tax" and thereby says directly that the amount is to be dealt with as assessable income. In my view, the words "for the purpose of assessment to income and super-tax" do not mean for the porpoise of an assessment proceeding in accordance with the provision of the Income-tax Act", but they mean "for the purpose of the actual assessment of the amount" in other words, "for the purpose of its assessment to income-tax and super-tax." Mr. Mitra contended that all that the words meant was that the amount was to be treated as income and brought into the computation in respect of the relevant accounting year, but it seems to me that purpose has been served by an earlier phrase which is "shall be deemed to be income for the purposes of the Indian Income-tax Act." The words "for the purpose of assessment to income-tax and super-tax" add something further and, to my mind they add assessability. I have already explained the justification for treat in an amount of repayment as assessable income. It appears to me that the income contemplated by section 11 (14) is a class by itself, made assessable by the section without reference to the various conditions laid down in the Income-tax Act and so treated, because of the income. In that sense, the income contemplated by section is sui generis and it is not appropriate to apply to it the various test laid down in the Income-tax Act. I am, therefore, of opinion that the effect of section 11 (14) is to make the amount of repayment not only income but also assessable income and that Mr. Mitras contention to the contrary must fail. The amount of Rs. 2,31,009 referred to in the first question was, therefore, rightly brought under assessment.The second question is whether the amount could be taken into consideration for determining the residence of the assesses under section 4A (c) (b) ? The test laid down in section 4A (c) (b) is that the income arising in India should exceed the income arising outside India. As I have said, taken as an income amount, the income contemplated by section 11 (14) is sui generis. If it is related to anything at all, it is only relate as to time to the year in which the repayment is received but otherwise it stands alone, unrelated to any place as the place of its accrual or arising and unrelated to any method or manner in which it is to accrue or arise. Section 11 (14), while it says that the amount of repayment shall be deemed to be income of the year in which the repayment was made, does not say that it is income arising in India or shall be deemed to be such income Directly considered the income does not satisfy the test laid down in section 4A (c) (b). Mr. Meyer however

contended that since the amount was virtually the amount which had been deducted from the Indian profits of the assesses, it must, upon its restoration, be treated as income arisen in India. I do not consider that contention to be correct and that for two reasons. In the first place, section 11 (14) is expressed not by reference to the amount deducted originally, but by reference to the repayment and although the two sums may be similar and for the purposed of taxation intended to be treated in the same way they are really not identical. To treat an amount repaid in England as an income arising in India is thus not possible. In the second place, even assuming that the amount was income which had arisen in India, because it was quite possible that the profits from which it was deducted was composed partly of income arising in India partly of income deemed to arise here, partly of income received and partly of income arisen outside India. Without an elaborate operation of analysis and allocation it cannot be possible to discover how much of the amount deducted, assuming that the amount subsequently refunded is identical with it, really income arising in India. To my mind, section 11 (14) does not intend that in addition to the amount of repayment being treated as taxable in come and being taxed as such it should be further utilised for roping in further sums by being taken in account under section 4A (c) (b). It appears to me that the section is content with bringing the amount back to charge and leaving it there. There is no warrant in the language of section 11 (14) for the view that an amount of repayment can be treated as income arisen in India and that not only can it be itself taxed, but it can also be utilised for the purpose of determining the residence of a company.In my view, the amount of Rs. 2,31,009 was rightly brought under assessment, but it was wrongly taken into consideration for the purposes of section 4A (c) (b). The answers to the questions referred must, therefore, be as follows :-

Question (1) - `Yes.

Question (2) - `No.

As the success has been equally divided, there will be no order for costs.There is a connected application by which the assessee prayed for a direction on the Tribunal to refer certain other questions or the same question in an amended form. No orders are necessary on that application.

LAHIRI, J. - I agree.

Reference answered accordingly.