1961

March 1.

DONALD MIRANDA

v.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY-II

(and connected appeals)

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Refund of excess profits tax—Liability to income-tax—Discontinuance of business—Profits for accounting year exempt from tax—Excess Profits Tax Act 1940 (15 of 1940), s. 12(1)—Indian Finance Act, 1946 (7 of 1946), s. 11(11)—Indian Income-tax Act, 1922 (11 of 1922), ss. 10, 12.

The appellants were partners in a registered firm which was dissolved on March 24, 1945. A private limited company succeeded to the business of the firm from March 25, 1945. For the accounting period April 1, 1944, to March 24, 1945, the firm was assessed to excess profits tax under the Excess Profits Tax Act, 1940. It had deposited certain sums of money as required under s. 10 of the Indian Finance Act, 1942, read with s. 2 of the Excess Profits Tax Ordinance, 1943, and in accordance with those provisions became entitled to repayment of a portion of the excess profits tax. The appellant's claim before the Income-tax Officer under s. 25(4) of the Indian Income-tax Act, 1922, that no tax was payable on the profits of the firm for the period between April 1, 1944, to March 24, 1945, was allowed, but their plea that the amount of refund of the excess profits tax was business profit and therefore similarly exempt from tax, was rejected. The High Court, on a reference, took the view that the amount refunded was income from other sources taxable under s. 12 of the Indian Income-tax Act, 1922, and that, therefore, the appellants were not entitled to the benefit of s. 25(4) of that Act.

Held, that in view of s. 12(1) of the Excess Profits Tax Act, 1940, and s. 11(11) of the Indian Finance Act, 1946, the amount refunded was income from business for the purposes of the Indian Income-tax Act, 1922, and did not lose its character which it had before the deposit. It fell under s. 10 of the Indian Income-tax Act and was, therefore, exempt under s. 25(4) of that Act.

Mc Gregor and Balfour Ltd. v. *Commissioner of Income-tax, Bengal*, [1959] 36 I.T R. 65 and *A. & W. Nesbitt Ltd.* v. *Mitchell*, [1926] 11 T.C. 211, relied on.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 173 to 175 of 1960.

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Appeals from the judgment and orders dated March 11, 1958, of the Bombay High Court in I. T. R. No. 36 of 1957.

A. V. Viswanatha Sastri, S. M. Dubash and *G. Gopalakrishnan*, for the appellants.

K. N. Rajagopal Sastri and *D. Gupta*, for respondents.

1961. March 1. The Judgment of the Court was delivered by

Kapur J.

KAPUR, J.—These are three appeals pursuant to a certificate under s. 66A(2) of the Indian Income-tax Act, 1922 (hereinafter called the 'Act'), against the judgment and orders 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 and Co. Ltd. succeeded to the business of the firm. A claim made under s. 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 required certain sums of money under s. 10 of the Finance Act, 1942, read with s. 2 of the Excess Profits Tax Ordinance, 1943. In accordance with those provisions the firm became entitled to repayment of a portion of the excess profits tax amounting to a sum of Rs. 2,35,704. The shares of the three partners who are respective appellants in

the three appeals were James Miranda Rs. 58,926, Donald Miranda Rs. 58,926 and Mrs. N. Q. Miranda Rs. 1,17,854. It was submitted that the amount refunded, was business profit and therefore exempt from tax under s. 25(4) of the Act. The Income-tax Officer rejected that submission and the share of each of the appellants was assessed to income-tax and super tax and the balance after deducting the same he repaid to each of the partners but he computed the rate applicable to the tax by including the appellants' total business income which was exempt under s. 25(4) of the Act. On appeal this assessment was confirmed but on further appeal the Income-tax Appellate Tribunal held that the sum which was refunded was income from business and was therefore exempt from income-tax under s. 25(4) of the Act. At the instance of the Commissioner of Income-tax, the Tribunal referred the following question of law for the opinion of the High Court:

> "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 s. 12 of the Act and the appellants were therefore not entitled to the benefit of s. 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 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 s. 10 of the Act and was therefore exempt under s. 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:—

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S. 12(1) "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 11-A 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 s. 11(11) of the Indian 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, 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 s. 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 s. 11(11) of the Indian Finance Act, 1946, any excess profits refunded under the provisions of Indian Finance Act, 1942, or of s. 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 s. 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 tax 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, *Mc Gregor and Balfour Ltd.* v. *Commissioner of Income Tax, West Bengal* (1), 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 R. 4(1) of the Rules applicable to cases I and II of Schedule 'D' of the English Income Tax Act, 1918 (8 and 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 s. 11(14) of the Indian Finance Act, 1946, which was the section applicable in that case and of R. 4(1) of the English Income Tax Act was the same. The operative words of s. 11(11) of the Finance Act, 1946, and of s. 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 s. 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

(1) [1959] 36 I.T.R. 65.

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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 Government Treasury it does not cease to be what it was before i.e. profits of a business. As we have said it is significantly clear from the very preamble of the Excess Profits Tax Act i.e., it was a tax imposed on profits arising out of certain businesses. An argument was raised on behalf of the Commissioner that the tax was not paid out of the profits of the business, but in respect of the profits. That is immaterial; it was charged, levied and paid on the amount by which the profits during any chargeable accounting period exceeded the standard profits. It would be mere quibbling with words if one were to say that it was not a slice taken out of the profits of a business.

In the case *Mc Gregor and Balfour Ltd.* v. *Commissioner of Income Tax* (1) this Court quoted with approval the observation of the Master of the Rolls in *A. & W. Nesbitt Ltd.* v. *Mitchell* (2) 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 but being still the repayment of a sum too much, it is true,—but a sum taken

(1) [1959] 36 I.T.R. 65. (2) (1926) 11 T.C. 211, 217, 218.

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 s 11(11) of the Indian Finance Act, 1946, such sum has to be treated as income of the previous year but as pointed out by this Court in *Balfour and Mc Gregor case* (1), the intention underlying the two provisions is the same and even the language used in the two provisions is substantially the same.

Counsel for the Commissioner drew our attention to *Kirke's Trustees* v. *Commissioners of Inland Revenue* (2), and it was submitted that the Lord Chancellor held at p. 329 that for the amount so received the assessment falls to be made under Case VI of Schedule 'D'. Lord Shaw of Dunfermline at p. 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 to decide whether the charge was to be made under Case I 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 s. 12 of the Act and not under s. 10. If it was income falling under s. 10, as in our opinion it was, then the appellants were entitled to get the benefit of s. 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.

(1) [1959] 36 I.T.R. 65.

(2) (1926) 11 T.C. 323.