HINDUSTAN CONSTRUCTION CO. LTD.

v.

INCOME TAX OFFICER (COMPANIES CIRCLE) BOMBAY & ANR.

December 10, 1964

[P. B. GAJENDRAGADKAR, C. J., M. HIDAYATULLAH, J. C. SHAH, S. M. SIKRI and R. S. BACHAWAT, JJ.]

Indian Income-tax, 1922 (11 *of* 1922), *s.* 49E—*Claim of Set-off—Prior adjudication of amount of refund due whether necessary—"found to be due", meaning of—"In lieu of payment", meaning of—Set-off can be given only when there is subsisting obligation to make refund.*

The appellant company made a claim under s. 5 of the Income-tax (Double Taxation Relief) (Indian States) Rules, 1939, for refund of the income-tax paid by it in an Indian State. The claim was rejected by the Income-tax Officer as time-barred. The Commissioner of Income-tax and the Central Board of Revenue refused to interfere and the appellant sought no further legal remedy against their orders. Subsequently on certain tax demands being made by the Income-tax Officer, the appellant made representation that the amounts in respect of which application had earlier been made under r. 5 should be set off against the demand as provided by s. 49E of the Indian Income-tax Act, 1922. The Income-tax authorities having rejected this claim also, the appellant went to the High Court under Art. 226 of the Constitution. The High Court held that the expression "found to be due" in s. 49E clearly meant that there must be, prior to the claim of set off, an adjudication whereunder an amount is found due by way of refund to the person claiming set-off. Since there was no such adjudication in the appellant's favour, the writ petition was dismissed. However a certificate of fitness under Art. 133(1)(c) was granted to the appellant.

HELD : (i) It is not necessary that there should be a prior adjudication before a claim can be allowed under s. 49E. There is nothing to debar the Income-tax Officer from determining the question whether a refund is due or not when an application is made to him under s. 49E. The words "is found" do not necessarily lead to the conclusion that there must be a prior adjudication. [419 D-E]

(ii) The set-off under s. 49E must however be "in lieu of payment" which expression connotes that payment is outstanding *i.e.* there is a subsisting obligation on the Income-tax Officer to pay. If a claim to refund is barred by a final order, it cannot be said that there is a subsisting obligation to make the payment. [419 F-G]

Stubbs v. *Director of Public Prosecutions* 24 Q.B.D. 577, relied on.

(iii) In the present case the orders of the Commissioner and the Central Board of Revenue rejecting the appellant's claim under r. 5 of the Indian State Rules had become final. They were not challenged even in the petition under Art. 226. There was thus no subsisting obligation on the part of the Income-tax Officer to make payment to the appellant, and the claim of the appellant under s. 49E must therefore, fail. [419 G-H]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 136 of 1964.

A Appeal from the judgment and order dated February 24, 1961 of the Bombay High Court in Misc. Application No. 333 of 1960.

A. V. Viswanatha Sastri, T. A. Ramachandra, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain*, for the appellant.

B *R. Ganapathy Iyer, R. H. Dheber* and *R. S. Sachthey*, for the respondent.

The Judgment of the Court was delivered by :

Sikri, J. This is an appeal on a certificate granted by the C High Court of Bombay against its judgment dated February 24, 1961, dismissing the petition filed by the appellant under Art. 226 of the Constitution of India. This appeal raises a short question as to the construction of s. 49E of the Indian Income-Tax Act, 1922, hereinafter referred to as the Act. Before we deal with this question, it is necessary to set out the relevant D facts.

The appellant, at the material time, carried on business not only in India but also outside India, *i.e.* Ceylon, the former States of Kolhapur and Kapurthala and other places. It is not necessary to give the facts relating to the income in Ceylon and Kolhapur E because if the facts relating to the income made in Kapurthala are stated, these will bring out the real controversy between the appellant and the Revenue. We may mention that it is common ground that the facts relating to Ceylon income and Kolhapur income are substantially similar.

F On July 9, 1954, the appellant wrote a letter to the Income Tax Officer, Companies Circle, Bombay, stating that for the assessment year 1949-50, it was entitled to refund on the income taxed in Kapurthala State. It attached an original certificate for tax showing payment of Rs. 37,828/11/-, and requested that a refund order be passed at an early date. On June 27, 1956, the G Income Tax Officer rejected the claim on the ground that the claim filed by the appellant was not within the time limit of four years laid down in r. 5 of Income-Tax (Double Taxation Relief) (Indian States) Rules 1939—hereinafter called the Indian States Rules. On December 18, 1956, the appellant filed a revision, under s. 33A of the Act, against the said order, before the Com-H missioner of Income-Tax, Bombay. The appellant stated in the petition that "unfortunately the Company's assessment for the year in question was completed by the Income-Tax Officer on

the last day of the financial year 1953-54, *i.e.*, 31-3-1954 being the last date on which their claim for double income-tax relief should have been lodged. In absence of the assessment order being received by the Company it was not physically practicable for the assessee to lodge its claim for double income-tax relief and as such the time prescribed under Section 50 had already expired when the assessment order was received by the company." The Commissioner made some enquiries. The appellant, in its letter dated June 30, 1958, replied that no provisional claim for double income-tax relief was made by the appellant within the time prescribed. The appellant reiterated its own plea that it was not "physically practicable" for the assessee to lodge its claim for double-tax relief within the time prescribed. The Commissioner, however, rejected the petition. He observed that "the assessment in the Kapurthala State was made on 20-3-1950, *i.e.*, much before the assessment was completed by the Bombay Income-tax Officer. Nothing prevented the petitioner, therefore, from filing a provisional claim before the period of limitation was over. At least, it should have made such a claim before the Income Tax Officer at the time of assessment. I regret I cannot condone the delay in filing the claim as there is no provision under Section 50 for such condonation." The appellant then approached the Central Board of Revenue. The Central Board of Revenue, by its letter dated December 31, 1958, declined to interfere in the matter. The appellant did not take any steps to apply to the High Court under Art. 226 for quashing the above orders of the Commissioner of Inocme-Tax or the Central Board of Revenue.

On August 28, 1959, the Income-Tax Officer issued three notices of demand under s. 29 of the Act in respect of the Assessment years 1949-50, 1950-51 and 1951-52. The appellant then wrote a letter dated September 4, 1959, requesting the Income-Tax Officer to set off the refunds to which the appellant was entitled pursuant to the provisions of Income-Tax (Double Taxation Relief) (Ceylon) Rules, 1942, and read with the provisions of ss. 49A and 48 of the Income-Tax Act, in respect of the assessment years 1942-43, 1943-44 and 1944-45, relating to Ceylon, and the assessment year 1947-48 and 1949-50 relating to Kolhapur and Kapurthala, against the said demands. In this letter the appellant gave arguments in support of its request. In short, the argument was that although the applications claiming those refunds were submitted beyond the prescribed time limit, nevertheless the appellant had a right still, pursuant to the the provisions of s. 49E, to call upon the Income-Tax Officer to

A set off the refunds found to be due to the appellant against the tax demands raised by the Income-Tax Officer on the appellant. The appellant also approached the Central Board of Revenue, urging similar points. The Central Board of Revenue, however, by its letter dated June 24, 1960, declined to interfere in the matter.

B

The appellant then on October 7, 1960, filed a petition under Art. 226 of the Constitution. After giving the relevant facts and submissions, the appellant prayed that the High Court be pleased to issue a writ in the nature of *Mandamus* or a writ, direction or order under Art. 226 of the Constitution, directing C the respondents to set off the refunds due to the petitioner under the aforesaid double taxation relief rules against the tax payable by it for the assessment year 1955-56. It appears that in the meantime the petitioner had paid tax for the assessment years 1949-50 and 1950-51, and the demand for Rs. 89,000.58 for the D assessment year 1951-52 was kept in abeyance, and later when the assessment for 1955-56 was completed, the Income-Tax Officers had agreed to keep in abeyance Rs. 79,430.19 out of the total demand relating to the assessment year 1955-56, till the decision of the Central Board of Revenue. The second prayer was that the High Court be pleased to issue writs in the E nature of Prohibition or other direction or order under Art. 226 of the Constitution prohibiting the respondents, their officers, servants and agents from demanding or recovering from the petitioner the tax payable by it for the assessment year 1955-56 without first setting off against that tax the refunds due to the petitioner under the aforesaid double tax relief rules. It will F be noticed that no prayer was made for quashing the order of the Commissioner, dated August 23, 1958, and the order of the Central Board of Revenue dated December 31, 1958. It was indeed contended by Mr. S. P. Mehta, the learned counsel for the appellant before the High Court that the appellant was not challenging the orders of the Income-Tax Officer rejecting his G application for refund, but was only challenging the orders made by them rejecting its application for grant of set off.

Mr. Viswanatha Sastri, the learned counsel for the appellant first urged that as compliance with r. 5 of the Indian States Rules, 1939 was physically impossible, r. 5 did not apply, and H consequently the refund due to the appellant notwithstanding r. 5. But we cannot go into the question whether r. 5 was rightly or wrongly applied by the Income-Tax authorities. The

orders dated August 23, 1958 and December 31, 1958, cannot be attacked in these proceedings. Therefore, we must proceed on the basis that those orders were validly passed. We express no opinion whether the view of the Income-Tax authorities that r. 5 was applicable in the circumstances of the case was correct or not.

This takes us to the construction of s. 49E. Section 49E reads thus :

> "49E. *Power to set off amount of refunds against tax remaining payable.*—Where under any of the provisions of this Act, a refund is found to be due to any person, the Income-tax Officer, Appellant Assistant Commissioner or Commissioner, as the case may be may, in lieu of payment of the refund, set off the amount to be refunded, or any part of that amount against the tax, interest or penalty if any, remaining payable by the person to whom the refund is due."

The High Court held that s. 49E of the Act did not give any assistance to the appellant because, according to it, there must be prior adjudication in favour of the appellant. The High Court observed that "the expression found to be due" clearly means that there must, prior to the date set off is claimed, be an adjudication whereunder an amount is found due by way of refund to the person claiming set off."

Mr. Sastri contends that it is not necessary that there should be a prior adjudication to enable a person to claim set off. He says that the Income-Tax Officer can decide the question whether refund is due or not when an application for refund is made to him. On the facts, he says that it is clear that the appellant is entitled to refund under r. 3 of Indian States Rules, 1939, and the Income-Tax Officer has only to calculate the relief due and then set it off. The learned counsel for the respondent, Mr. Ganapathi Iyer, on the other hand, contends that the orders of the Commissioner and the Central Board of Revenue having become final, there was no obligation on the Income-Tax Officer to make any payment of refund, and he says that it is a condition precedent to the applicability of s. 49E that the Income-Tax Officer must be under an obligation to make a payment. He points out that the expression "in lieu of payment of the refund" clearly indicates that the Income-Tax Officer must be under an obligation to make a payment of refund. He further contends

A that the refund is not due under the Act but under the said Rules, and therefore, s. 49E does not apply.

There is no difficulty in refuting the contention of the learned counsel for the Revenue that the refund, if due, was due under the provisions of the Act. Section 59(5) provides that the rules B made under this section shall have effect as if enacted under this Act. This provision thus makes the Indian State Rules, 1939, part of the Act, and consequently if a refund is due under the Rules, it would be refund due under the Act within the meaning of s. 49E.

C

The question then arises as to whether there should be a prior adjudication existing before a set off can be allowed under s. 49E, and whether there is any other condition which is necessary to be fulfilled before the section becomes applicable. We are of the opinion that it is not necessary that there should be a D prior adjudication before a claim can be allowed under s. 49E. There is nothing to debar the Income-Tax Officer from determining the question whether a refund is due or not when an application is made to him under s. 49E. The words "is found" do not necessarily lead to the conclusion that there must be a prior adjudication. But this is not enough to sustain the claim of the E appellant. It must still show that a refund is due to it. The words "found to be due" in s. 49E may possibly cover a case where the claim to refund has been held barred under r. 5 of the Indian State Rules but that this is not the correct meaning is made clear by the expression "in lieu of payment". This expression, accord- F ing to us, connotes that payment is outstanding, *i.e.* that there is subsisting obligation on the Income-Tax Officer to pay. If a claim to refund is barred by a final order, it cannot be said that there is a subsisting obligation to make a payment. The expression "in lieu of" was construed in *Stubbs* v. *Director of Public Prosecutions*(1). It was held there that where a liability has to be dis- G charged by A in lieu of B, there must be a binding obligation on B to do it before A can be charged with it. In our opinion, there must be a subsisting obligation to make the payment of refund before a person is entitled to claim a set off under s. 49E. In this case, in view of the orders of the Commissioner and the Central Board of Revenue mentioned above there was no subsisting obli- H gation to pay, and therefore, the claim of the appellant must fail.

(1) 24 Q. B. D. 577

Therefore, agreeing with the High Court, we hold that s. 49E of the Act is of no assistance to the appellant and that the petition was rightly dismissed by the High Court. The appeal accordingly fails and is dismissed, but in the circumstances of the case there will be no order as to costs. A

Appeal dismissed. B