INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Tendolkar.

1952 April 1

THE COMMISSIONER OF EXCESS PROFITS TAX, BOMBAY (APPLICANT) *v.* THE INDIAN UNITED MILLS LTD., (RESPONDENTS).*

Excess Profits Tax Act (XV of 1940), ss. 15, 26 (3)—Representation by the assessee that certain buildings plant and machinery would not be required for purposes of its business after war—Relief granted by the Central Board of Revenue under s. 26 (3)—Termination of war—Such buildings plant, etc. used for the purposes of its business—Re-opening of the assessment under s. 15 by the Excess Profits Tax Officer—Whether the Officer justified in taking action under s. 15—"Discovers", meaning of.

On the representations by the assessee that certain buildings, plant and machinery would not be required for the purposes of its business after the termination of war, the Central Board of Revenue passed orders granting certain relief to the assessee under s. 26 (3) of the Excess Profits Tax Act, 1940. After the termination of war the Excess Profits Tax Officer found that the building, plant and machinery in respect of which relief under s. 26 (3) was granted were being used by the assessee for the purposes of its business. He therefore took action under s. 15 of the Act and revised the assessments for relevant years. On the question whether the officer was justified in taking such action in the face of the Orders of the Central Board of Revenue,

Held, that the assessee was only entitled to relief under s. 26 (3) of the Act provided it did not use the buildings, plant or machinery belonging to it for the purpose of its business after the termination of the war. The orders of the Central Board of Revenue postulate relief being granted on the basis of this fact which could only be determined at a subsequent date. The validity of the assessments made in conformity with those orders also depended upon the existence or non-existence of this fact which by its very nature could not have existed at the date when the assessments were made and whose existence or non-existence could not be discovered except at a later date.

Held, therefore, that the Excess Profits Tax Officer was entitled to proceed under s. 15 of the Act and revise the assessment orders under which the assessee had obtained excessive relief.

The word "discovers" used in s. 15 of the Act connotes finding out subsequently not only a fact which was already in existence at the date of the assessment but also a fact which though forming the basis of the assessment could not be in existence at the time but comes into existence subsequently.

Dodworth (H. M. Inspector of Taxes) v. *Dale*[1] and *Anderson and Halstead, Ltd.* v. *Birrel (H. M. Inspector of Taxes)*[2] distinguished.

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* Income Tax Reference No. 49 of 1951.

[1] (1936) 20 T. C. 285. [2] (1931) 16 T. C. 200.

The United India Mills Ltd. (Assessee) applied to the Central Board of Revenue claiming relief under s. 26 (*3*) of the Excess Profits Tax Act, 1940, representing to the Board that certain buildings, plant and machinery belonging to it would not be required for its business after the termination of the war. The applications were for the chargeable accounting periods 1941, 1942 and 1943. The Board after making certain inquiries passed orders under s. 26 (*3*) granting an allowance of Rs. 4,06,394 for each of the three accounting periods. The war terminated on 31st March 1946. In 1948 the Excess Profits Tax Officer discovered that the buildings, plant and machinery in respect of which relief under s. 26 (*3*) was granted were being used by the assessee for the purposes of its business after the termination of the war. He therefore issued the notices under s. 15 of the Act in respect of the chargeable accounting periods 1941, 1942 and 1943 and revised the assessments for these periods. It was contended before the Income-tax Appellate Tribunal that the Excess Profits Tax Officer was not justified in invoking the provisions of s. 15 of the Act in the face of the orders passed by the Central Board of Revenue under s. 26 (*3*). The President of the Tribunal was of the opinion that the Officer was justified in so doing while the Accountant Member was of a contrary view. The Judicial Member to whom the matter was referred agreed with the Accountant Member.

At the instance of the Applicant the following questions were referred to the High Court by the Tribunal.

(1) whether the revised assessments for the chargeable accounting periods 1941, 1942 and 1943 are liable to be cancelled on the ground that the Excess Profits Tax Officer erred in invoking the provisions of s. 15 of the Excess Profits Tax Act?

(2) whether the Excess Profits Tax Officer, having found that some of the assets which were not intended to be used after the war were used after the war, could legally reduce the allowance made to the assessee Company by the Central Board of Revenue under s. 26 (*3*), Excess Profits Tax Act?*

The reference was heard.

G. N. Joshi and *P. R. Sunkersett,* for the applicant.

Sir J. B. Kanga with *Shanker Narayan* and *S. P. Mehta,* for the respondent.

* The second question was reframed by the High Court as under:

(2) Whether in view of the orders passed by the Central Board of Revenue under s. 26 (*3*), it was competent to the Excess Profits Tax Officer to revise the order under s. 15 of the Act?

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CHAGLA C. J. There is absolutely no merit in the case of the assessee, but Sir Jamshedji rightly reminds us that the Income-tax Act does not concern itself with equity, and that we must strictly construe the provisions of the Act as the Legislature has enacted them, and, if the tax-payer is entitled to a relief, whether equity is on his side or not, he should be given that relief. Fortunately in this case we can reconcile both law and equity.

The assessee company was assessed to excess profits tax for the years 1941, 1942 and 1943 and in respect of all these three years of assessment he succeeded in getting an order of the Central Board of Revenue under s. 26 (*3*) of the Act. That section provides that

> "If on an application made to it through the Excess Profits Tax Officer the Central Board of Revenue is satisfied that the computation in accordance with the provisions of Schedule I of the profits of a business during any chargeable accounting period would be inequitable."

owing to any of the circumstances therein mentioned (and the relevant circumstance in this case is that the provision of buildings, plant or machinery which will not be required for the purposes of the business after the termination of the present hostilities) "the Central Board of Revenue may direct that such allowances shall be made in computing the profits of the business during that chargeable accounting period as the Central Board of Revenue thinks just." Now, it was represented by the assessee to the Central Board of Revenue in respect of its assessment for all the three years that provision for buildings, plant or machinery would not be required for the purposes of its business after the termination of the war; and in view of this statement made by the assessee an order was made by the Central Board of Revenue giving certain allowances to the assessee in respect of the three assessments under the Excess Profits Tax Act. The order of the Central Board of Revenue expressly states that

> "by reason of the following circumstances, viz. that the provision of buildings, plant or machinery which will not be required for the purposes of the business after the termination of the present hostilities the computation of the profits of that business during the chargeable accounting period.....in accordance with the provisions of Schedule I of the Act would be inequitable.....an allowance shall be made in respect of such circumstances in computing the profits of such chargeable accounting period."

The Excess Profits Tax Officer discovered in 1948 that in fact the buildings, plant and machinery had been used for the purposes of the business of the assessee after the termination of the

war (the war having terminated on March 31, 1946). Thereupon he purported to act under s. 15 of the Act and revised the assessment for the three years 1941, 1942 and 1943. What is challenged before us is that the Excess Profits Tax Officer could not act under s. 15 as that section was not applicable looking to the fact of the present case. Section 15 provides that

"If, in consequence of definite information which has come into his possession, the Excess Profits Tax Officer discovers that profits of any chargeable accounting period chargeable to excess profits tax have escaped assessment, or have been underassessed, or have been the subject of excessive relief, he may at any time within five years of the end of the chargeable accounting period in question serve on the person liable to such tax" a notice as therein provided, "and may proceed to assess or re-assess the amount of such profits liable to excess profits tax."

Now, the contention of Sir Jamshedji is that s. 15 only applies when a fact which was in existence at the date of the assessment was subsequently discovered by the Excess Profits Tax Officer. He contends that that section does not apply when a new fact subsequently comes into existence. He emphasizes the expression "discovered" and he says that you can only discover something which is already in existence but which is concealed or unknown to you and of the existence of which you come to know at a future date. Now, it seems to me that on a true construction of s. 15 if an assessment was valid at the date it was made, its validity cannot be challenged by reason of subsequent facts which come into existence. The validity of an assessment can only be judged in the light of the facts then existing which are either known to the Officer or which he subsequently comes to know. But when the validity of the assessment cannot be determined at the date when it was made, but can only be determined in the light of subsequent facts, it is useless to contend that even so the validity of the assessment must be determined as of the date when the assessment was made. Now, take this very case. The assessee was only entitled to relief provided it did not use the buildings, plant or machinery belonging to it for the purposes of its business after the termination of the war. If the assessee used the buildings, plant or machinery for its business after the war, it would not be entitled to any relief. The validity of the relief given to it depended upon the buildings, plant or machinery not being used for the purposes of its business after the war. How is it possible to judge whether the assessee was entitled to relief or not till after the war came to an end and till it was ascertained whether in fact the assessee did or did not use the buildings, plant or machinery for its

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business. This was a fact which was not in existence and could not be in existence at the date of the assessment. But perhaps that would not be enough, if irrespective of this fact the assessment was valid; but in this case the very validity of the assessment depended upon the existence or non-existence of this fact, and the validity could only be determined when it was known whether the fact existed or not. I see no difficulty in giving to the expression "discovered" a meaning which does not necessarily confine it to the finding out of an already existing fact; you may also find out a fact which has come into existence for the first time and that is as much discovering a fact as in the other case.

Sir Jamshedji has strongly relied on the observations in "Simon on Income-Tax," at p. 134 where the learned author points out that there can be no discovery, as the word is used in s. 125 of the English Act, by virtue of facts arising subsequently to the first assessment or the year of assessment concerned and for this proposition the learned author has relied on *Dodworth* (*H. M. Inspector of Taxes*) v. *Dale.*[1] When we turn to the facts of that case they are rather significant. In that case certain relief was given to the tax-payer in the nature of marriage allowance on the ground that he was a married man in 1921. The tax-payer then filed a suit against his wife for nullity of marriage and the marriage was declared null and void in 1933. The Income-tax authorities thereupon contended that the tax-payer had wrongfully obtained the relief inasmuch as he was never married, because the Court had held that the marriage was null and void from its inception. The English Court held that the marriage was not void from its inception but it was voidable and it had to be avoided and it was only when the marriage was avoided that it had become void *ab initio* and that it was not void for all purposes. The Court further held that there was a *de facto* marriage between the tax-payer and his wife and the tax-payer was entitled to relief in respect of the *de facto* marriage also. Therefore, the finding of the Court was that the assessment was valid when it was made and that the mere fact that the *de facto* marriage was subsequently held to be void did not deprive the tax-payer of his relief. Therefore, in that case the validity of the assessment and the right of the tax-payer to obtain relief could be determined at the date when the assessment was made. A distinction, and a

[1] (1936) 20 T. C. 285.

very vital distinction, between that case and the case before us was that the validity of the assessment and the right of the tax-payer to relief could not be determined at the date when the assessment was made. The other case relied upon by Sir Jamshedji is the case of *Anderton & Halsteed, Ltd.*, v. *Birrell (H. M. Inspector of Taxes)*.[1] That was a case where assessee company wrote off certain debts as bad debts and deductions were allowed by the taxing authorities in respect of those debts. It was then found that the assessee company continued to trade with the debtor and further extended the credits to him. Thereupon the taxing authorities revised the assessment on the ground that the debts which were written off as bad debts were really not bad debts in view of the subsequent conduct of the assessee company. Rowlatt J. held that the assessee could not be re-assessed under s. 125 of the English Act, because there was no discovery within the meaning of that section. The learned Judge has taken pains to point out that a mere change of opinion on the same facts and figures upon some question of accountancy does not amount to a discovery of a fact. Whether a debt is a debt or not is a matter of estimate and the company estimated at the relevant date that a particular debt was a bad debt. That estimate was accepted by the taxing authorities and it was not open to the taxing authorities subsequently to change their mind and to say that the change of opinion constitutes discovery of a new fact. At p. 200 Rowlatt J. observes that—

"...What the statute requires, therefore, is an estimate to what extent the debt is bad, and this is for the purpose of a profit and loss account. Such an estimate is not a prophecy to be judged as to its truth by after events, but a valuation of an asset *de presenti* upon an uncertain future to be judged as to its soundness as an estimate upon the then facts and principles."

This case would have applied in the present case if the relief granted to the tax-payer depended upon the opinion or estimate of the Excess Profits Tax Officer. But it is clear that the relief granted to the assessee did not proceed upon any estimate or opinion of the Excess Profits Tax Officer; it depended upon a fact which was to come into existence at a subsequent date. Therefore, we are concerned here, not with any opinion held at one time by the Taxing Authority, which was subsequently revised or changed. But we are here concerned with the existence or non-existence of a fact, which fact, by its very nature, could not have existed at the date when the assessment was

[1] (1931) 16 T. C. 200.

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made and whose existence could not be decided upon except at a later date.

Sir Jamshedji has further argued that the effect of our judgment would be to make the original assessment made a conditional assessment, and according to him law does not permit conditional assessment. Now, it is true that in a sense every assessment is conditional—in the sense that it is liable to be re-opened if the conditions of s. 15 are satisfied—and it is only in that sense that we call this assessment a conditional assessment. If s. 15 did not apply and if the taxing authority had no power given to it under s. 15, then the assessment would be final and conclusive; but, inasmuch as the Legislature has provided machinery for re-opening an assessment under s. 15, and has given power to the taxing authority to assess or re-assess the assessee, the assessment is a conditional assessment.

Sir Jamshedji says that the order made by the Central Board of Revenue still stands and it was the duty of the Excess Profits Tax Officer to carry out that order in assessing the assessee to excess profits tax for the years 1941, 1942 and 1943, and the taxing authority has carried out that order which was a valid order under the Act. But in deciding the case in the way in which we are going to decide it we are not going behind the order of the Central Board of Revenue. That order itself postulates relief being granted on the basis of a fact which can only be determined at a subsequent date. When that fact is determined it is found that the assessee is not entitled to the relief granted to it by the Central Board of Revenue. Therefore, it is found that the assessee has obtained excessive relief and under s. 15 it has been deprived of that excessive relief upon discovery of the fact that it has used the buildings, plant or machinery for the purposes of its own business after the war. We, therefore, answer the first question submitted to us in the negative. The second question has not been properly framed. We, therefore, reframe that question as follows:—

"Whether in view of the order passed by the Central Board of Revenue under s. 26 (3) it was competent to the Excess Profits Tax Officer to revise the order under s. 15 of the Act?"

and having reframed it, we answer the question in the affirmative. The assessee must pay the costs of the reference.

Attorney for Commissioner: *N. K. Petigara.*

Attorney for respondent: *S. P. Mehta.*

Answer accordingly

P. M. P.