(1952) 04 BOM CK 0012

Bombay High Court

Case No: Income-tax Reference No. 49 of 1951

COMMISSIONER OF EXCESS PROFITS TAX, BOMBAY		APPELLANT
	Vs	
THE INDIA UNITED MILLS LTD.		RESPONDENT

Date of Decision: April 1, 1952

Acts Referred:

- Excess Profits Tax Act, 1940 - Section 15

Citation: (1952) 22 ITR 71

Hon'ble Judges: Chagla, C.J

Bench: Division Bench

Judgement

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 taxpayer 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 year 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 u/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 provisions for buildings, plant or machinery would not be required for the purposes of the 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 assessment 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 building, 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 u/s 15 of the act and revised the assessments of the three years 1941, 1942 and 1943. What is the challenged before us is that the excess profits tax Officer should not act u/s 15 as that section was not applicable looking to the facts of the present case. Section 15 provides that "if, in consequence of definite information which has come into 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 under assessed ,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 Section 15 only applies when a fact which was in existence at the assessment was subsequently discovered by the Excess Profits Tax Officer. He contends 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 Section 15 if an assessment was valid at the date it was made its validity cannot be challenged by reason of subsequent facts which comes 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 and machinery belonging to it for the purposes of its business after the termination of the war. If the assessee used the buildings, plant and 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 and machinery not being used for the purposes of its business after the war. How it is 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 used the buildings, plant and machinery for its business. This was a fact which was not in existence and could not be existence at the date of assessment. But perhaps that would not be enough if irrespective of this fact the assessment depended upon the existence or non-existence of this fact, and the validity could not 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 page 134 where the learned author point out that there can be no discovery, as the word is used in Section 125 of the English Act, by virtue of Facts arising subsequently to the first assessment or the year of assessment concerned and for its proposition the learned author has relied on Dodworth v. Dale. When we turn to the facts of that case they are rather significant. In that case certain relief was given to the taxpayer in the nature of marriage allowance on the ground that he was a married man in 1921. The taxpayer then filled 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 taxpayer had wrongfully obtained the relief inasmuch as he was never married, because the Court had held that the marriage was null and the 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 taxpayer and his wife and the taxpayer was entitled to the 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 mare fact that the de facto marriage was subsequently held to be void did not deprive the taxpayer of his relief. Therefore, in that case the validity of the assessment and the right of the taxpayer to obtain relief could be determined at the date when the assessment was made. A distinction, and a very vital distinction, between that case and the case before us was that the validity of the assessment and the right of the taxpayer to relief could not be determined at the date when the assessment was made. The other case relied upon Sir Jamshedji is the case of Anderton and Halstead v. Birrell (H.M. Inspector of Taxes). That was where the assessee company wrote off certain debts as bad debts

and deduction 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 subsequent conduct of the assessee company. Rowlatt, J., held that the assessee could not be re-assessed u/s 125 of the English Act, because there was no discovery within the meaning of that section. The learned Judge has taken pain to points out that a mare change of opinion on the same facts and figures upon some question of accountancy does not amount to a discovery of fact. Whether the debts is a bad debt or not is a matter of estimate and the company estimated at the relevant date that a particular debt was 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 new fact. At page 209 Rowlatt, J., observes that "What the statute requires, therefore, is an estimate to what extent the debt is a bad, and this is for the purpose of a profits 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 praesenti upon an uncertain future to be judged as to its soundness as an estimate upon the then facts and the probabilities." This case would have applied in the present case if the relief granted to the taxpayer depended upon the opinion or estimate of the Excess Profit Tax Officer. But it is clear that the relief granted to the assessee did not proceed upon any estimate or opinion of the excess profit 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 a fact, which fact, by its very nature could not have existed at the date when the assessment was 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 condition of the Section 15 are satisfied - and it is only in that sense that we call this assessment a conditional assessment. If Section 15 did not apply and if the taxing authority had no power given to it u/s 15 then assessment will be final and conclusive; but, inasmuch as the Legislature has provided machinery for re-opening an assessment u/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 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 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 was 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 u/s 15 it has been deprived of that excessive relief upon discovery of the fact that it has used the buildings, plant and machinery for the purposes of the 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 u/s 26(3) it was competent to the Excess Profits Tax Officer to revise the revise the order u/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.

Reference answered accordingly.