

The view we take of the matter is that that case is certainly of no assistance to us and that, with regard to this case, this was an isolated transaction in no way connected with any other trade or business activities of the assessee. That being so, we are unable to hold that it was an adventure in the nature of trade and, if that is so, then the sum in question clearly was not assessable to income-tax. The question referred to us must, therefore, be answered in the negative. Costs Rs. 250 to the assessee.

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MADRAS.

BEASLEY C.J.

RAMESAM J.—I agree.

KING J.—I agree.

A.S.V

INCOME-TAX REFERENCE.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Ramesam and Mr. Justice King.

N. A. S. V. VENKATACHALAM CHETTIAR,
PETITIONER,

1934,
December 4.

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 48—Refund of income-tax under—Order of Income-tax Officer refusing—Order of Commissioner under sec. 33 refusing to interfere with—Application under sec. 66 (2) in case of—Competency of—Specific Relief Act (I of 1877), sec. 45—Remedy under—Availability of.

An application by the petitioner to the Income-tax Officer for a refund of income-tax under section 48 of the Indian

* Original Petition No. 128 of 1934.

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Income-tax Act was refused and in review the Commissioner of Income-tax, by an order made under section 33 of the Act, refused to interfere with the order of the Income-tax Officer.

Held that, as the order of the Commissioner was not one enhancing the assessment or otherwise prejudicial to the petitioner, an application by him to the Commissioner under section 66 (2) of the Act was incompetent.

Held further that the remedy under section 45 of the Specific Relief Act was not open to the petitioner because a remedy was provided by section 50 (a) (1) of the Amended Act.

R. Kesava Ayyangar for petitioner.

M. Patanjali Sastri for Commissioner of Income-tax.

PETITION under section 66 (3) of the Indian Income-tax Act (XI of 1922) and section 45 of the Specific Relief Act (I of 1877).

JUDGMENT.

BEASLEY C.J.

BEASLEY C.J.—This is a petition under section 66 (3) of the Indian Income-tax Act as amended. The petitioner applied to the Income-tax Officer for a refund of income-tax under section 48 of the Act. This application was refused. The petitioner then got the Commissioner of Income-tax to take the matter up in review under section 33, and in review the Commissioner refused to interfere with the order of refusal of the Income-tax Officer. It is common ground that the order made by the Commissioner was one under section 33. The petitioner then required the Commissioner of Income-tax to refer the matter which he suggested was a question of law to the High Court under section 66 (2) of the Income-tax Act. The Commissioner took the view that that

application to him under section 66 (2) was incompetent because his order under section 33 was not one enhancing the assessment or otherwise prejudicial to the applicant (the assessee). Section 66 (2) which contains an amendment affecting this question reads as follows :—

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“ Within sixty days of the date on which he is served with notice of an order under section 31 or section 32 or of an order under section 33 enhancing an assessment or otherwise prejudicial to him . . . the assessee in respect of whom the order or decision was passed may by application . . . require the Commissioner to refer to the High Court any question of law arising out of such order”

The view taken by the Commissioner is that his order is not one which comes within the words “ otherwise prejudicial to him (the assessee)”. With that view we entirely agree. What section 33 clearly contemplates is an order made by the Commissioner which alters the position of an assessee or an applicant to that person’s prejudice. In this particular case, his position had been prejudiced already by the refusal of the Income-tax Officer to grant him the refund which he required. The Commissioner’s order did no more than leave him in that position and, it is quite clear to us, was not an order which was prejudicial to the petitioner in the sense intended, namely, that his position at that time, that is, the date of the Commissioner’s order, was altered by that order to one of prejudice to him. That being so, he could not apply under section 66 (2) to the Income-tax Commissioner, no order to his prejudice having been passed. He, however, alternatively now asks that the matter may be dealt with under section 45 of the Specific Relief Act. This remedy is clearly not open to

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him because a remedy is provided by section 50A (1) of the amended Act (XVIII of 1933). That provides that

“ any person objecting to a refusal of an Income-tax Officer to allow a claim to a refund under section 48 or 48A or 49 or to the amount of the refund made in any such case, may appeal to the Assistant Commissioner.”

That provision was in force at the time when the order of the Income-tax Officer in this case refusing a refund was made and that was the assessee's remedy and, having that remedy open to him, he did not avail himself of it. Section 45 of the Specific Relief Act cannot, therefore, be invoked to the relief of the petitioner here.

For these reasons, the petition must be dismissed with costs Rs. 150 to the Commissioner of Income-tax.

RAMESAM J.—I agree.

KING J.—I agree.

A.S.V.
