

Court does not improve his position. He is, therefore, not entitled to an order directing the security to be realized.

The application must be dismissed with costs which I assess at five gold mohurs.

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INCOME-TAX APPLICATION.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Ba U.

ADAMJEE HAJEE DAWOOD & CO., LTD.

v.

THE COMMISSIONER OF INCOME-TAX,
BURMA.*

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July 1.

Income-tax—Assessee exempt from tax on account of losses—Tax paid at source on dividends—Assessee's application for refund time-barred—Extension of time—Application to High Court to require Commissioner to state a case—Income-tax Act (XI of 1922), ss. 48, 50, 50A, 66 (2) and (3)—No application to High Court on order under s. 48—Specific and adequate remedy of assessee—Specific Relief Act (I of 1877), s. 45.

For the year of assessment, 1932-33, the Income-tax Officer found that the assessee, a limited company, had suffered a heavy loss and declared the company to be non-assessable to income-tax in respect of that year. The order was made on the 22nd June 1934. On the 12th June 1933 the assessee applied to the Commissioner of Income-tax for a refund of income-tax paid at source on dividends in respect of shares which the assessee held in certain companies. The application had become barred on the 1st April 1933 by virtue of s. 50 of the Income-tax Act. The assessee asked for an extension of time in view of the fact that the assessee's assessment was still pending at the date of the application. The Commissioner rejected the application stating that he had no power to extend the time. The assessee then purported to appeal to the Assistant Commissioner of Income-tax from the order of assessment of the 22nd June 1934 with a view to obtain a refund; but that appeal also was rejected. The assessee then applied to the Court for an order directing the Commissioner of Income-tax to state a case under s. 66 (3) of the Act.

Held, that (1) s. 66 (3) of the Act is controlled by s. 66 (2), and under s. 66 (2) an assessee is not entitled to require the Commissioner to state a question of law arising out of an order under s. 48;

* Civil Misc. Application No. 35 of 1935.

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(2) the Commissioner of Income-tax was right in holding that the application for a refund was time-barred under s. 50, and that he had no power to extend the time ;

(3) the application to the Assistant Commissioner was likewise time-barred;

(4) the assessee had a specific and adequate remedy under s. 50A of the Income-tax Act, and for that reason the assessee was precluded from taking advantage of s. 45 of the Specific Relief Act.

In re The Commissioner of Income-tax, Burma v. C.P.L.L. Firm, I.L.R. 12 Ran. 322 ; *N.A.S.V. Chettiar v. The Commissioner of Income-tax, Madras*, I.L.R. 58 Mad. 367 ; *Tata Hydro-Electric Agency, Ltd. v. The Commissioner of Income-tax, Bombay*, I.L.R. 48 Bom. 361 ; *V.E.A. Chettyar Firm v. The Commissioner of Income-tax*, I.L.R. 7 Ran. 581—*referred to*.

A. Eggar (Government Advocate) for the Crown. The assessee, a limited company, was declared non-assessable for the year 1932-33, but certain dividends payable to the assessee by another company of which the assessee was a shareholder were assessed at the rate applicable to the company, and paid by the company under s. 20 of the Income-tax Act. The present application arises out of the failure of the assessee to obtain a refund of the tax deducted by the company at source. S. 48 allows such refunds to be made, but s. 50 sets a time limit for applications for the refund. The assessee in the present case was admittedly out of time.

Further, s. 66 (3) is to be read with s. 66 (2) and is controlled by the latter. An assessee is not entitled to appeal to the Commissioner on a question of refund, and s. 66 (2) does not include orders under s. 48 on which the Commissioner of Income-tax can be asked to state a case to the High Court. S. 66 (3), therefore, cannot entitle the assessee to require the Commissioner to state a case. *N.A.S.V. Venkatachalam Chettiar v. The Commissioner of Income-tax, Madras* (1).

S. 45 of the Specific Relief Act cannot be relied on by the assessee, because s. 50A of the Act gives

[(1) I.L.R. 58 Mad. 367.]

the assessee a special remedy which was open to the assessee at the time of assessment. Moreover, where it was not obligatory on the part of the Commissioner to state a case under the income-tax Act itself he cannot be compelled to do so by an order under s. 45 of the Specific Relief Act. *Tata Hydro-Electric Agency, Ltd. v. The Commissioner of Income-tax, Bombay* (1).

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The Commissioner of Income-tax has no power to extend the time prescribed by s. 50. Whenever the Legislature thought fit to allow an extension of time in proper cases it has expressly said so; see, for instance, ss. 66 (7A) and s. 49. It has not done so in the case of an application under s. 48.

Daniel for the applicant. The assessment in the present case was not made till the 22nd June 1934, and consequently the applicant could not have known whether a refund was obtainable before that date. In such circumstances the limitation prescribed in s. 50 should not be held to operate. Under the directions on p. 242 of the Manual it is for the assessee to show that he is entitled to the refund asked for, and how can he discharge his burden until the assessment is made?

There was no formal application for refund as required by rule 36 of the Rules, but in the circumstances of this case the appeal of the 13th July 1934 should be treated as an application for refund. The appeal to the Commissioner was in fact under s. 33 of the Act asking him to exercise his discretionary powers in revision, and to allow the refund.

PAGE, C.J.—In this case the assessee, a limited company carrying on business under the style of

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Adamjee Hajee Dawood & Co., Ltd., has applied to the Court under section 66 (3) of the Income-tax Act for an order requiring the Commissioner of Income-tax to state a case and refer the following question for determination by the High Court :

“ In a case in which the assessment upon the total income of the assessee is made more than a year after the last day of the year in which the tax on the profits of a company was recovered, and after the last day of the financial year commencing after the expiry of the previous year as defined in clause 11 of section 2 in which the income arose on which the tax was recovered, does section 50 of the Income-tax Act, 1922, preclude a claim for a refund of income-tax under section 48 (1) if made after the expiration of the period mentioned in section 50, when it is preferred before the assessment upon the total income of the assessee was made ? ”

The material facts are few and not in dispute. For the year of assessment, 1932-33, the Income-tax Officer found that the net loss suffered by the assessee was Rs. 11,50,343 and declared the company to be non-assessable to income-tax in respect of that year. That order was made on the 22nd of June 1934.

It appears that the assessee was entitled to dividends in respect of shares which it held in certain companies, and that income-tax upon these dividends had been deducted at the source at the rate at which the company's profits and gains were assessable. Now section 48 (1) of the Act runs as follows :

“ If a shareholder in a company who has received any dividend therefrom satisfies the Income-tax Officer or other authority appointed by the Governor General in Council in this behalf that the rate of income-tax applicable to the profits or gains of the company at the time of the declaration of such dividend is greater than the rate applicable to his total income of

the year in which such dividend was declared or that his total income in such year is below the minimum chargeable with income-tax he shall, on production of the certificate received by him under the provisions of section 20, be entitled to a refund on the amount of such dividend (including the amount of the tax thereon) calculated at the difference between those rates or at the rate applicable to the profits and gains of the company at the time of the declaration of such dividend, as the case may be."

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It is apparent from the assessment that the income chargeable to income-tax in the hands of the assessee, which was nil, fell to be assessed under section 48 (1) at a lower rate than that at which the dividends were chargeable at source in the hands of the company, and the assessee contends that in fact the Crown has obtained income-tax upon the assessee's dividends at a rate higher than that to which the Crown was entitled, thereby diminishing the amount of the dividends received by the assessee.

The first answer to the case presented on behalf of the assessee is that section 66 (3) of the Income-tax Act is controlled by section 66 (2); and under section 66 (2) an assessee is not entitled to require the Commissioner to state a question of law arising out of an order under section 48. Section 66 (3) therefore does not entitle the assessee to apply to the Court to require the Commissioner to state a case and refer the question which the assessee seeks to have answered. That in itself is sufficient to dispose of the present application.

The learned Government Advocate on behalf of the Crown, however, pointed out that there were further objections to the grant of an order in the nature of a mandamus to the Commissioner of Income-tax in the circumstances of the present case. He submitted that, if the facts of the case did not bring the present application within section 66 (3) of

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the Act, it was not open to the assessee to have recourse to section 45 of the Specific Relief Act by reason of the provisions of sections 50 and 50-A which are to the following effect :

" 50. No claim to any refund of income-tax under this Chapter shall be allowed, unless it is made within one year from the last day of the year in which the tax was recovered or before the last day of the financial year commencing after the expiry of the 'previous year', as defined in clause (11) of section 2 in which the income arose on which the tax was recovered, whichever period may expire later : Provided that a claim to refund under section 49 may be admitted after the period of limitation herein prescribed, when the applicant satisfies the Commissioner, or an Assistant Commissioner of Income-tax specially empowered in this behalf by the Central Board of Revenue, that he had sufficient cause for not making the claim within such period.

50-A. (1) Any person objecting to a refusal of an Income-tax Officer to allow a claim to a refund under section 48 or 48-A or 49 or to the amount of the refund made in any such case, may appeal to the Assistant Commissioner.

(2) The appeal shall be presented within thirty days of the date on which the refusal of the refund or the amount of the refund allowed was communicated to the appellant.

(3) The appeal shall be made in the prescribed form and shall be verified in the prescribed manner.

(4) The Assistant Commissioner may, after giving the appellant an opportunity of being heard, pass such orders as he thinks fit."

Now, it is common ground that the application for a refund in the present case was made on the 12th of June 1933, and that at that date the application was time-barred under section 50. In these circumstances the learned advocate for the assessee has invited the Court to treat the appeal of the 13th of July 1934 to the Assistant Commissioner from the order of assessment of the 22nd of June 1934 as an application for a refund ; but if the Court were to do so the result would be that the application for a

refund would be more completely barred than it would be if it had been made on the 12th June 1933. The learned advocate for the assessee further contended that as it is in fact impossible for an assessee to ascertain whether or not he is entitled to a refund under section 48 (1) until the assessment has been made upon him an assessee ought not to be held bound to present his application for a refund within the period limited by section 50 where the assessment has not been made until after the expiry of that period. That may be so, but the remedy lies not with the Courts but with the Legislature. The Commissioner of Income-tax on the 12th of July 1934 rejected the application for a refund which had been made to him on the 12th June 1933 upon the ground that it was time-barred under section 50, and that there was no power given to him under the Act to extend the period prescribed in that section. In my opinion in so holding the Commissioner was plainly right. Indeed, it appears to me to be apparent that the view that he took was correct from the terms of section 50 itself. It is to be observed that in section 50 an extension of the time within which an application may be made for relief in respect of United Kingdom income-tax under section 49 is permitted; but although it is clear that the Legislature had both sections 48 and 49 in mind when section 50 was enacted it deliberately refrained from permitting any extension of the time within which the application for a refund should be made in respect of a claim under section 48. In my opinion upon that ground also the present application must fail. The learned Government Advocate also contended that in any event the present application must fail both because it does not fall within section 66 (3) and

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because a specific and adequate remedy was available to the assessee under section 50-A, and for that reason he was precluded from taking advantage of section 45 of the Specific Relief Act. [*V.E.A. Chettyar Firm v. The Commissioner of Income-tax* (1); *In re The Commissioner of Income-tax, Burma v. C.P.L.L. Firm* (2); *N.A.S.V. Venkatachalam Chettiar v. The Commissioner of Income-tax, Madras* (3) and *Tata Hydro-Electric Agency, Ltd. v. The Commissioner of Income-tax, Bombay* (4).]

For these reasons, in my opinion, the rule must be discharged and the application for a mandamus dismissed with costs, ten gold mohurs.

It is no part of the function of this Court to express any opinion as to whether the Government should make a refund in whole or in part *ex gratiâ*, and we express no opinion about it.

BA U, J.—I agree.

(1) (1929) I.L.R. 7 Ran. 581.

(2) (1934) I.L.R. 12 Ran. 322.

(3) (1934) I.L.R. 58 Mad. 367.

(4) (1933) I.L.R. 58 Bom. 361.