

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITR No. 106 of 1996

Date of Decision: 5.7.2010

The Commissioner of Income-tax, Patiala

....Petitioner.

Versus

Surinder Mohan Jalota

...Respondent.

**CORAM:- HON'BLE MR. JUSTICE ADARSH KUMAR GOEL.
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.**

PRESENT: Ms. Urvashi Dhugga, Advocate for the revenue.

None for the assessee.

AJAY KUMAR MITTAL, J.

1. The Income Tax Appellate Tribunal, Chandigarh Bench (hereinafter referred to as "the Tribunal") has referred the following question of law on a direction issued by this Court in ITC No. 83 of 1992 for opinion of this Court under Section 256 (2) of the Income Tax Act, 1961 (for short "the Act") for the assessment year 1987-88:-

"Whether on the facts and in the circumstances, the Appellate Tribunal was right in law in deleting the addition made on account of receipt of Excise Duty Refund when the provisions of section 41(1) read with section 43B of the Income-tax Act, 1961 are applicable in the case of the assessee?"

2. The facts as noticed in the statement of case are that the assessee filed its return on 30.7.1987 declaring net loss at Rs.3,28,179/-. During the course of assessment proceedings, the

Assessing Officer observed that the assessee had credited a sum of Rs.17,73,999/- in the suspense account and the said amount was refund of custom duty (wrongly mentioned as excise tariff by ACIT) which was charged to profit and loss account in the earlier years. The Assessing Officer relying on the judgment of the Hon'ble Supreme Court in the case of **Kidar Nath Jute Manufacturing Co. 82 ITR 363** made an addition of Rs.17,73,999/- as per the provisions of Section 41 (1) of the Act. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who vide order dated 9.8.1990 confirmed the said addition. On further appeal by the assessee to the Tribunal, it was pleaded that the refund in pursuance to order of Bombay High Court was conditional as the assessee was bound to repay the amount in question within sixty days of the order of Hon'ble Supreme Court in case the decision was against the assessee in the appeal filed by the Government against the order of the Bombay High Court. Accordingly, relying upon decision of the Apex Court in **Commissioner of Income-tax, West Bengal v. Hindustan Housing & Land Development Trust Limited [1986] 161 ITR 524**, it was urged that the right to receive the income had not accrued to the assessee within the meaning of Section 41(1) of the Act as the cessation of liability in the case will be on the date of final verdict by the Hon'ble Supreme Court. The Tribunal accepting the plea of the assessee, partly allowed the appeal vide order dated 10.12.1990.

3. We have heard the learned counsel for the revenue.
4. Learned counsel for the revenue submitted that in view of Section 41(1) of the Act, since there was cessation of the liability in the year under consideration, the same was exigible to tax and placed

reliance upon the judgment of the Apex Court in **Polyflex (India) Pvt. Ltd. v. Commissioner of Income-tax, 257 ITR 343**. Learned counsel further submitted that the reliance of the Tribunal on the Apex Court judgment in Hindustan Housing & Land Development Trust Limited's case (supra) was misplaced. According to the learned counsel, once the liability had ceased during the previous year relating to the assessment year in question, the same was exigible to tax.

5. We have considered the submission of the learned counsel for the revenue. We find force in the submission made by the learned counsel for the revenue.

6. Section 41 (1) of the Act as it stood at the relevant time reads thus:-

“41. Profits chargeable to tax- (1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee, and subsequently during any previous year the assessee has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by him or the value of benefit accruing to him, shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or

profession in respect of which the allowance or deduction has been made is in existence in that year or not.”

7. The Apex Court in Polyflex (India) Pvt. Ltd.'s case (supra) while interpreting the aforesaid provision held that the following conditions and circumstances are required to be fulfilled for application of Section 41(1) of the Act:-

“In the assessment for the relevant year an allowance or deduction has been made in respect of any loss, expenditure or trading liability incurred by the assessee. This is the first step. Coming to the next step the assessee must have subsequently (i) obtained any amount in respect of such loss or expenditure, or (ii) obtained any benefit in respect of such trading liability by way of remission or cessation thereof. In case either of these events happen, the deeming provision enacted in the closing part of sub-section (1) comes into play. Accordingly, the amount obtained by the assessee or the value of benefit accruing to him is deemed to be profits and gains of business or profession and it becomes chargeable to income-tax as the income of that previous year.”

8. The issue in Polyflex (India) Pvt. Ltd.'s case (supra) before the Hon'ble Supreme Court was similar as in the present case. The assessee therein had claimed deduction on account of payment of excise duty in the year 1986. However, in the assessment year 1989-

90, excise duty amounting to Rs.9,64,206/- was refunded by the Department which was brought to tax by invoking provisions of Section 41 (1) of the Act. The plea of the assessee was that there was no remission or cessation of trading liability within the meaning of Section 41(1) of the Act so long as the issue was pending determination by the Supreme Court. The first appellate authority and the Tribunal had adjudicated the matter in favour of the assessee but the said decision was reversed by the High Court and it was held that the Tribunal was not right in holding that the refunded amount was not assessable under Section 41(1) of the Act. On further appeal, the Supreme Court while dismissing the appeal of the assessee held that the amount obtained by the assessee shall be deemed to be profits and gains of business or profession and it becomes chargeable to income-tax under Section 41 (1) of the Act as the income of that previous year and had laid down as under:-

“We are of the view, apart from what has been laid down in Thirumalaiswamy Naidu's case [1998] 230 ITR 534 (SC), that the ingredients of section 41(1) are satisfied in the instant case and, therefore, the amount of excise duty refunded becomes taxable during the year in question. This is a case in which the assessee can be said to have obtained the amount by way of refund in respect of the business expenditure incurred by it during an earlier year, for which the assessee had the benefit of deduction or allowance. Normally, the payment of certain amount

to discharge the statutory levy such as sales tax, excise duty in the course of carrying on business is an expenditure. If authority is needed, we may refer to Kedarnath Jute Manufacturing Co. Ltd. v. CIT [1971] 82 ITR 363, wherein this court held that the amount of sales tax paid or payable by the assessee is an expenditure within the meaning of section 10 (2) (xv) of the Act.

We are inclined to think that in a case where a statutory levy in respect of goods dealt in by the assessee is discharged and subsequently the amount paid is refunded, it is the first clause that more appropriately applies. It will not be a case of benefit accruing to him on account of cessation or remission of trading liability. It will be a case which squarely falls under the earlier clause, namely, "obtained any amount in respect of such expenditure". In other words, where expenditure is actually incurred by reason of payment of duty on goods and the deduction or allowance had been given in the assessment for earlier period, the assessee is liable to disgorge that benefit as and when he obtains refund of the amount so paid. The consideration whether there is a possibility of the refund being set at naught on a future date will not be a relevant consideration. Once the assessee gets

back the amount which was claimed and allowed as business expenditure during the earlier year, the deeming provision in section 41(1) of the Act comes into play and it is not necessary that the Revenue should await the verdict of higher court or Tribunal. If the court or Tribunal upholds the levy at a later date, the assessee will not be without remedy to get back the relief.

True, expenditure and trading liability may be overlapping concepts; but the law-makers apparently intended to deal with allied concepts separately and specifically so as to make the provision as comprehensive as possible in order to effectuate the objective underlying the provision. The anatomy of the section and the collocation of the words employed therein would suggest that the test of cessation or remission of liability has to be applied vis-a-vis trading liability and it cannot be projected into the previous clause.”

9. We may now advert to the judgment of the Apex Court in Hindustan Housing & Land Development Trust Limited's case (supra) on the basis of which the Tribunal had adjudicated the issue in favour of the assessee. In that case certain lands of the company were compulsorily acquired by the Government. Award was announced by the Land Acquisition Collector granting Rs.24,97,249/- as compensation and thereafter arbitrator had fixed the quantum of compensation at

Rs.30,10,873/-. State Government had challenged the award of the arbitrator by filing an appeal before the High Court and during the pendency of the said appeal, an amount of Rs.7,36,691/- deposited by the Government in that appeal was allowed to be withdrawn by the company on furnishing a security bond which was credited by it in its books of accounts. The question then arose in that case was whether this amount which was received by the company in pursuance to the arbitrator's award which was in dispute in appeal filed by the State Government, could the same be treated to be assessee's income during the previous year when the same was received. The Hon'ble Supreme Court in those facts held that the amount so received by the assessee was not exigible to tax as there was no absolute right to receive the amount at that stage. If the appeal was allowed by the High Court, the extra amount of compensation of Rs.7,24,914/- was to be returned. Section 41 (1) of the Act was not under consideration in this case.

10. In view of authoritative pronouncement of the Apex Court in Polyflex (India) Pvt. Ltd.'s case (supra), the judgment in Hindustan Housing & Land Development Trust Limited's case (supra) shall not come to the rescue of the assessee-respondent.

11. Accordingly, the question of law referred to above, is answered in favour of the revenue and against the assessee.

(AJAY KUMAR MITTAL)
JUDGE

July 5, 2010
gbs

(ADARSH KUMAR GOEL)
JUDGE