

1940

Present : Keuneman J.

## NADAR v. ATTORNEY-GENERAL.

143—C. R. Colombo, 51,583.

*Income tax—Claim for refund—Double tax relief—Prescription—Income Tax Ordinance, ss. 46 and 84 (Cap. 188).*

A claim for relief under section 46 of the Income Tax Ordinance is barred by section 84 of the Ordinance.

**T**HIS was an action brought against the Commissioner of Income Tax claiming a refund of a sum of Rs. 154.80 under section 46 of the Income Tax Ordinance. The only question tried was whether the claim was prescribed under section 84 of the Income Tax Ordinance. The Commissioner of Requests dismissed the plaintiff's action.

*N. Nadarajah* (with him *K. S. Aiyer* and *H. A. Koattegoda*), for plaintiffs, appellants.—This is an application for relief and not for a refund and is therefore not covered by section 84 of the Income Tax Ordinance. The present claim is under section 46 of the Income Tax Ordinance and is not prescribed within the period mentioned in section 84 but is bound only by the Prescription Ordinance. A refund can therefore be claimed at any time within three years from the date of payment.

It is admitted by the Commissioner that a refund is due and that he would have paid it but for the fact that the claim is made after the period mentioned in section 84. Section 46 gives an independent right apart from the right to refund provided by section 84 and the Commissioner is wrong in thinking that section 84 prevents him from making a refund of the amount claimed by way of double tax relief.



*H. H. Basnayake, C.C.*, for defendant, respondent.—This is a claim for a refund of income tax overpaid. The only provision under which a refund can be made is section 84 of the Income Tax Ordinance. Sections 45 and 46 of the Ordinance provide for the granting of relief against double taxation but do not provide for a refund. An examination of the scheme of the Ordinance indicates clearly that claims for refunds can be admitted only if made within the period prescribed in section 84. Section 84 is a provision designed for the benefit of the taxpayer. Under the English Income Tax Acts too double tax relief is given by refund under the provision corresponding to our section 84 (*Snelling's Dictionary of Income Tax and Sur Tax*, pp. 74-75, 89 and 135). Were it not for that section the taxpayer would be without a remedy where money is overpaid under a mistake of law (*Crown Mines, Ltd. v. Commissioner for Inland Revenue*; *Law of Income Tax in South Africa by Ingram*, p. 237).

The Income Tax Ordinance is a complete Code and any claim for refund of tax must be made under the Ordinance which provides for refund in case of overpayment. If a right is given to an individual by a statute and the mode of obtaining that right is provided in the statute itself a suit to enforce the right is not maintainable in the Civil Court (1936, *A.I.R. Patna*, p. 87 at 91; *Craies on Statute Law*, p. 314. 4th ed.; *Passmore and Others v. Oswaldtwisth U. D. C.*)

*N. Nadarajah*, in reply.—Commissioner is not sole judge even under section 84. Cites *N. Ramaswamy Chettiar v. The Attorney-General*<sup>3</sup>.

*Cur. adv. vult.*

February 21, 1940. KEUNEMAN J.—

The plaintiffs, who were partners of the firm of Kana Gnavena Ena & Co., brought this action alleging that they had paid to the Commissioner of Income Tax the sums of Rs. 297.40 and Rs. 342.10 as income tax for the years ending March 31, 1934, and March 31, 1935, respectively, and that they were entitled to a refund of the sum of Rs. 154.80 under section 46 of the Income Tax Ordinance. The action was instituted on February 23, 1939. At the trial, it was agreed that if the plaintiffs were entitled to a refund, the sum to be refunded was Rs. 136.01. The only issue framed ran as follows:—

“Is the plaintiffs' claim for a refund barred by section 84 of the Income Tax Ordinance?”

The plaintiffs' action was dismissed with costs, and the plaintiffs appeal.

It is clear that, if section 84 applies, the plaintiffs' claim is out of time, as it was not made within three years of the end of the years of assessment.

It was argued that section 84 did not apply. Under that section, where any person has paid, by deduction or otherwise, in excess of the amount with which he is properly chargeable for any year, he is entitled to a refund of the amount so paid in excess.

In this case the plaintiffs, who were non-resident partners, have undoubtedly paid the sums mentioned in the plaint as income tax. They

<sup>1</sup> (1922) *A. D.* 100.

<sup>2</sup> 38 *N. L. R.* 313.

<sup>3</sup> 78 *L. T.* 569 at 570.



claim that they are entitled to relief from Ceylon tax to the extent of Rs. 136.01 in virtue of the fact that they have paid income tax in India in respect of the corresponding period.

It was argued that section 84 only applied to claims for refunds made in respect of assessments made under section 20 of the Income Tax Ordinance, and did not apply to a refund claimed under section 46. In other words, it was contended that the plaintiffs were "properly chargeable" for the full sums paid by them, but the claim for refund was made in consequence of the special case created by section 46.

Great stress was laid by Counsel for the appellants on the words "charge" and "chargeable" which occur in section 20 of the Ordinance. If we look at the Ordinance, we find, under section 5, that income tax, subject to the provisions of this Ordinance, shall be charged at specified rates in respect of the income of every person. Under section 6, "profits" and "income" are defined, and sections 7 and 8 contain certain exemptions.

Chapter III. deals with the "Ascertainment of Profits and Income". Section 9 deals with certain deductions which are allowed, and section 10 with deductions which are not allowed.

Chapter IV. deals with the "Ascertainment of Statutory Income". Section 11 sets out what the "statutory income" of a person from each source of his profits and income in respect of which tax is charged shall be.

Chapter V. sets out in section 13 that the "assessable income" of a person shall be "the statutory income" subject to certain deductions which are set out.

Chapter VI., in section 14, sets out that the "taxable income" of the person shall be his assessable income, except as provided by the subsequent sections 15 to 19. These latter sections deal with certain exemptions, allowances, &c.

Chapter VII. deals with the charge and rates of tax. Section 20 provides that the tax shall be charged upon taxable income at certain rates for resident and non-resident persons. This section contains several phrases such as, "an individual is chargeable", "no tax is chargeable under sub-section (1)", "tax charged", "tax payable", &c.

Chapter VIII. refers to special cases, and items A to L—sections 21 to 53—related to such special cases. The section with which we are concerned, namely, section 46, relates to relief in respect of Empire Income Tax, and falls within item K, namely, relief in cases of double taxation.

A later Chapter XII. deals with payment of tax. Chapter XIV. deals with repayment and contains section 84.

The argument addressed to me on behalf of the appellants amounted to this, namely, that the words in section 84, "in excess of the amount with which he was properly chargeable" for that year, referred only to the charges made under section 20 and had no relation to the special case under section 46.

In the first place, I find it difficult to understand how the special cases in Chapter VIII. can be regarded otherwise than as supplementary to section 20, and as amplifying the terms of that section.



Further, where this Ordinance has gone out of its way to provide machinery for repayment, I do not think I am justified in placing any unduly restrictive construction on the words of the section so as to make it apply only to certain classes of repayment.

Again, taking account of the scheme of the Ordinance and the position in which section 84 appears in that Ordinance, I am of opinion that the words, "amount . . . properly chargeable", cover the circumstances of this case. It may be remembered that the word "chargeable" is used in several senses even in section 20. As pointed out by Lord Wrenbury with regard to a similar case relating to the Income Tax Acts in England: "In these Acts it is not possible to rest any conclusion upon a particular word. The same word is in one section used in one sense and in another in a different sense"—*King v. The Kensington Income Tax Commissioners*<sup>1</sup>.

On examination of section 46 itself, it will be found that where the person establishes to the satisfaction of the Commissioner that he has paid or is liable to pay both Ceylon tax and Empire tax in respect of the same period of time he "shall be entitled to relief" from Ceylon tax for one half of the Ceylon tax or Empire tax whichever is less, subject to certain provisions. It follows that when the person has established his claim to the satisfaction of the Commissioner, he has a statutory right to relief and that the amount of the tax payable by him must be diminished to that extent. Where he has paid the full amount without the diminution, I think it follows that he has paid "in excess of the amount with which he was properly chargeable". I do not think the word "chargeable" is used in section 84 in any other sense than "liable". No technical significance should be attached to the word "chargeable" so as to restrict the term only to "charges" mentioned in section 20.

Counsel for the appellants conceded that at any rate one of the "special cases", namely, section 43 relating to dividends (Item I.), where the tax had been deducted at the source in regard to the dividend, and tax has by inadvertence been paid on the dividend by the individual, a claim for a refund would fall under section 84. This is a typical case of "payment by deduction" mentioned in section 84. Now, under section 43, where the tax has been deducted at the source, what the person is entitled to is a "set-off against the tax"—*vide* section 43 (3) and (4).

If a person who is entitled to a "set-off" and has failed to claim it can be regarded as having made a payment "in excess of the amount with which he is properly chargeable", I fail to understand how a person who has a statutory right to relief and has failed to claim it can be regarded as falling into any other category.

I think the argument for the appellants fails, and that section 84 applies to the present case and that the time limit mentioned therein is operative.

Counsel for the respondent further argued that if section 84 did not apply, the subject was devoid of any remedy. I do not think it is necessary for me to consider this argument, nor is it possible for me to do so in view of the single issue which was framed in this case.

The appeal is dismissed with costs.

*Appeal dismissed.*

<sup>1</sup> 6 *Tax Cases* 613 at 622.