part of the husband to maintain his wife the Magistrate has to go into the *bona fides* of the offer made by the husband during the proceedings under sub-section (1), in the light of the reasons given by the wife for refusing to live with him. Considering, therefore, the proper scope of the expression "neglect or refusal" I am clearly of the view that proviso to sub-section (3) along with its amendment is applicable to sub-section (1) of section 488.

(24) For the foregoing reasons I find that the trial Magistrate had erred in not considering the offer made by the husband to maintain his wife on the condition of her living with him, and in the event of her refusal to accept the offer, in not examining the grounds of her refusal. The reference is, therefore, accepted and the order of the trial Magistrate dated 31st July, 1967, is set aside and the case is remanded for decision in accordance with law.

H. R. SODHI, J.—I agree.

N.K.S.

INCOME TAX REFERENCE.

Before Prem Chand Pandit and S. S. Sandhawalia, JJ.

M/S R. B. JODHAMAL KUTHIALA,—*Applicant*

versus

THE COMMISSIONER OF INCOME-TAX,—*Respondent.*

Income Tax Reference No. 43 of 1966

October 14, 1970.

Income Tax Act (XI of 1922)—Sections 10 and 12—Excess Profits Tax Act (XV of 1940)—Section 14-A (1)—Amount refundable under—Nature and character of—Such amount along with interest—Whether to be assessed as "other sources" under section 12 or as "business profits" under section 10—Interest paid on the refundable amount—Whether forms integral part of the amount.

Held, that in determining as to what is the character of the payment originally made as excess profit tax and also of the amounts refunded subsequently under section 14-A(7) of the Excess Profits Tax Act, the origin and the ancestory of the principal amount to which statutory accretions are made under sub-section (7) cannot possibly be lost sight of. Undoubtedly when

the amount is originally paid as Excess Profits Tax under a provisional assessment under section 14-A of the Act, it is paid out of Business Profits. It bears the imprint undeniably of the character of a business income. That being so, this imprint continues when the assessee gets it back from the Department as a refund under section 14-A(7) of the Act. Hence the amount refunded along with the accretions thereto continues to bear the character of business income and therefore, it is subjected to tax as business income or profit under section 10 of the Income-Tax Act, 1922, and not under "other sources" under section 12 of the Act. (Paras 12 and 15)

Held, that the language of section 14-A(7) of the Act makes it plain that the amount of interest forms an integral and necessary part of the amount refundable under this sub-section. Consequently under this provision what is refunded is in terms the excess of tax paid along with a statutory accretion or appendage thereto worked out at a calculated rate. The amount of refund is one consolidated amount and though it may be paid in parts, its character would not alter by the mode or manner of repayment. The sum refunded thus is an inseparable amount which retains its integral identity. The payment to the State revenue of excess profits levied under sections 14 and 14-A are not investments made by the tax payer at his own volition. They have not the remotest analogy to a voluntary deposit of money with the purpose of earning interest thereon. Despite the use of the word 'interest' in the statute it is not possible to equate the rate of compensation provided by law for an excessive tax exaction with interest earned on a voluntary loan, deposit or investment. These payments under sections 14 and 14-A of the Excess Profits Tax Act, therefore, are exacted under the compulsive taxing power given under the statute to the State and are refunded under the same power. (Para 11)

Reference under section 66(1) *of the Income Tax Act*, 1922 *made by the Income Tax Appellate Tribunal (Delhi Bench)*,—vide *his order dated the 5th February*, 1966, *for opinion on the following questions of law arising out of the I.T.A. No.* 7034 *of* 1959-60, *and I.T.A.* 6847, 7031 & 7034 *of* 1959-60, *regarding the assessment years* 1957-58, 1953-54, 1954-55 *and* 1957-58.

For the Assessment years 1957-58:

"(*i*) *Whether on the facts and in the circumstances of the case the interest of Rs.* 68,268 *was liable to be assessed under the head 'other sources' in the assessment year* 1957-58 ?

(*ii*) *Whether on the facts and in the circumstances of the case the assessee continued to be the owner of the property for the purposes of computation of income under section* 9 *of the Indian Income-tax Act*, 1922 ?"

For the Assessment years 1953-54, 1954-55:

"Whether on the facts and in the circumstances of the case the assessee continued to be the owner of the property for the purposes of computation of income under section 9 of the Indian Income-tax Act, 1922 ?'

D. N. AWASTHY AND B. S. GUPTA, ADVOCATES, for the petitioner.

MADAN MOHAN PUNCHHI, ADVOCATE, for the respondents.

JUDGMENT

SANDHAWALIA, J.—(1) The Income-tax Appellate Tribunal, Delhi Bench 'C', consolidating four reference applications moved before it by the assessee and the Commissioner of Income-tax, has referred the following two questions of law for the opinion of this Court :—

(i) Whether on the facts and in the circumstances of the case the interest of Rs. 68,268 was liable to be assessed under the head 'other sources' in the assessment year 1957-58 ?

(ii) Whether on the facts and in the circumstances of the case the assessee continued to be the owner of the property for the purposes of computation of income under section 9 of the Indian Income-tax Act, 1922 ?

(2) We would first take up the second question above-said and briefly the relevant facts in this context are that the assessee in the year 1946, acquired the property known as Nedous Hotel in Lahore for a sum of Rs. 46 lacs. To arrange the requisite finance, Rs. 30 lacs were raised as loan from Messrs Bharat Bank Ltd., and about Rs. 18 lacs from Raja Rana Sir Bagat Chandra of Jubbal. Whilst the loan of Messrs Bharat Bank Ltd. was partly repaid, the assessee came to an agreement with the Raja above-said whereby the latter accepted half share in the said property in lieu of the loan and also one-third of the outstanding liability to Messrs Bharat Bank Ltd. What deserves particular notice is that this arrangenment was effected on the 1st of November, 1951, that is, after the creation of Pakistan within whose territory the property fell and had been declared an evacuee property vesting in the Custodian there.

(3) For the relevant assessment years the Income-tax Officer disallowed the assessee's claim to take into consideration the income from the said property and the loss pertaining to the same. The

Appellate Assistant Commissioner confirmed the said order. On appeal the Tribunal, however, accepted the assessee's case that he continued to be the owner of the property for the purposes of computation of loss under section 9. of the Income-tax Act, 1922.

(4) The identical question between the same parties pertaining to Nedous Hotel was raised before the Delhi High Court in a Full Bench case reported as *Commissioner of Income-tax* v. *R. B. Jodha Mal* (1). We are of the view that that decision fully covers the reply to question No. (ii) and accordingly we would answer the same in the negative with the result that neither the annual letting value could be included in the income nor could the assessee be allowed the reduction claimed under section 9.

(5) Adverting to the first question we notice that the assessee was carrying on extensive business during the second World War from 1939 to 1945, and had paid Excess Profits Tax under the relevant Act. The assessments in regard to the Excess Profits Tax were set aside by the appellate orders of the Tribunal and as a result thereof fresh assessments were made. Consequently the assessee not only received back the Excess Profits Tax paid under section 14-A(7) of the Excess Profits Tax Act, but under the same provision an amount of interest aggregating to Rs. 68,267 was also paid to the assessee. This amount was received in pursuance of the order passed by the Excess Profits Tax Officer on the 1st of December, 1956. The Income-tax Officer sought to tax the said amounts in the assessment for the year 1957-58 as the interest had been ordered to be paid on the date above-said.

(6) It appears, however, that the assessee claimed that the amount above-said should be split up and protective assessments were made for the years 1953-54 and 1954-55 as under :—

"1953-54 ... A sum of Rs. 22,363 was brought to tax.

1954-55 ... The balance of Rs. 45,895 was brought to tax."

(7) The assessee appealed to the Appellate Assistant Commissioner who, however, upheld the view of the Income-tax Officer. Against this order a further appeal to the Tribunal was carried.

(1) 69 I.T.R. 598.

However, the Tribunal negatived the assessee's claim that the amount should be assessed under section 10 as business profits and held that it should be taxed only under the head "other sources" under section 12 of the Act as the interest arose from the excess tax paid and not from the business carried on by the assessee.

(8) The core of the controversy, therefore, is whether the refunded amount of Rs. 68,267 is a business profit or business income assessable under section 10 of the Income-tax Act, and hence not falling under the head "other sources" under section 12 of the same.

(9) Mr. Punchhi for the assessee contends that the payments under the provisional assessments made by virtue of section 14-A of the Excess Profits Tax Act are paid out of the business profits of the assessee and when subsequently a portion thereof is refunded with the statutory appendages thereto, such an amount cannot lose its original character of being a business income. It is plausibly argued that originally the amount was business profits in the hands of the assessee and when it comes back by way of refund in the same hands it would continue to retain its original identity. Primary reliance was placed on *Donald Miranda etc.* v. The *Commissioner of Income-tax, Bombay City* (2).

(10) Mr. Awasthy has primarily relied on the contentions which were raised for the revenue and accepted by Chief Justice Chagla and Desai J., in *The Commissioner of Income-tax* v. *Donald Miranda and others* (3). However, at this very stage it may be mentioned that despite its contended plausibility, the view expressed by the Division Bench was reversed on appeal by the Supreme Court.

(11) To appreciate the rival contentions it is necessary to set down the relevant portion of section 14-A of the Excess Profits Tax Act :—

> "14-A(7) If, when a regular assessment is made in due course under section 14, the amount of excess profits tax payable thereunder is found to be less than that determined as payable by the provisional assessment, any excess of tax paid, as a result of the provisional assessment shall

(2) A.I.R. 1961 S.C. 1233.
(3) A.I.R. 1959 Bom. 33.

be refunded to the assessee *together* with interest at 5 per cent per annum calculated from the date of payment of such excess tax to the date of the order of refund, both days inclusive."

The language of the provision above-said makes it plain that the refundable amount is "excess of tax paid .....*together* with interest at 5 per cent per annum." The amount of interest, therefore, forms an integral and necessary part of the amount refundable under this sub-section. Consequently under this provision what is refunded is in terms the excess of tax paid along with a statutory accretion or appendage thereto worked out at a calculated rate. The amount of refund is one consolidated amount and though it may be paid in parts, its character would not alter by the mode or manner of repayment. The sum refunded thus is an inseparable amount which retains its integral identity. It is well to remember that the payment to the State revenue of excess profits levied under sections 14 and 14-A are not investments made by the tax payer at his own volition. They have not the remotest analogy to a voluntary deposit of money with the purpose of earning interest thereon. Despite the use of the word 'interest' in the statute it is not possible to equate the rate of compensation provided by law for an excessive tax exaction with interest earned on a voluntary loan, deposit or investment. These payments under sections 14 and 14-A of the Excess Profits Tax Act, therefore, were exacted under the compulsive taxing power given under the statute to the State and are refunded under the same power. The issue, therefore, is as to what is the character of the payment originally made and also of the amounts refunded subsequently under section 14-A(7).

(12) In determining this issue, the origin and the ancestory of the principal amount to which statutory accretions are made under sub-section (7), cannot possibly be lost sight of. Undoubtedly when the amount is originally paid as Excess Profits Tax under a provisional assessment under section 14-A, it is paid out of Business Profits. It bears the imprint undeniably of the character of a business income. That being so, the question is whether this imprint would continue when the assessee gets it back from the Department as a refund under sub-section (7) of section 14-A. We are inclined to the view that when refunded along with the accretions thereto the amount refunded continues to bear the same character and it would

be subject to tax as business income or profits and in no other capacity.

(13) We are fortified in the view we take by a consistent line of authority. In *A. and W. Nesbitt Ltd.* v. *Mitchell* (4), a similar question arose under the analogous provisions of the English statute. The Excess Profits Duty was refunded to the assessee company on a date when it had gone into liquidation and ceased trading and the issue was as to what was the character of the refunded amount. Lord Hanworth, M. R., in this context observed as follows :—

> "It is not a legacy it is not a sum which has fallen from the skies; it is a sum which is repaid because there was too large a sum paid by the Company to the Revenue Authorities over the whole period during which Excess Profits Duty was paid, and that sum means and is intended to represent a repayment of a sum which was paid by them in respect of the duty charged upon the excess profits of their trading. It comes back, therefore, not having lost its character but being still the repayment of a sum too much, it is true, — but a sum taken out of the profits which were made by the Company in the course of its trading, profits which at the time they were made were subject to Income-tax and subject to Excess Profits Duty, and that is the character of the repayment that has been made."

The above-said view has received repeated acceptance by the Supreme Court and was noticed with approval in *McGrefor and Balfour Ltd.* v. *Commissioner of Income-tax, West Bengal,* (5).

(14) In *Donald Miranda's* case (2) (supra), the assessee-firm had become entitled to repayment of a portion of the Excess Profits Tax which was duly apportioned to its three partners. The issue was whether the amount refunded was business profit and consequently

(4) 11 Tax Cases 211.
(5) A.I.R. 1959 S.C. 771.

would be exempt from tax under section 25(4) of the Act. In this context their Lordships after observing as follows held that the amount deposited came back without losing its original character—

> "When it was deposited with the Central Government it was a portion of the profits of the business of the assessee and when it was returned to the assessee it must be restored to its character of being a part of the profits of a business. It cannot be said that its nature changes merely because it is refunded as a consequence of some provisions in the Finance Act, or the Excess Profits Tax Ordinance. Its nature remains the same. The effect of the deposit under the Acts above-mentioned was as if a slice of the business profits was taken and deposited with the Central Government Treasury and then when it was found that a larger amount had been deposited than was exigible a portion of it was returned. By being put in a Government Treasury it does not cease to be what it was before, i.e., profits of a business."

The ratio of this observation, therefore, bears directly on the point and lays down in categorical terms the basic principle. The point which now arises in the present case appears to us to be merely a logical corollary to the aforesaid principle. If the amount deposited and subsequently refunded under section 14-A(7) continues to retain its original character of a business profit, it seems to follow that a statutory accretion to the same must necessarily partake of the same character.

(15) We would, therefore, return the answer to the first question in the negative and hold that the amount is not liable to be assessed under "other sources" but falls within the ambit of section 10 of the Income-tax Act, 1922.

P. C. PANDIT, J.—I agree.

N. K. S