

(1991) 03 KAR CK 0003

In the Karnataka High Court

Case No : Income-tax Reference Case No. 115 of 1987

K.G. Subramanyam

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 16-03-1991

Acts Referred:

Income Tax Act, 1961 — Section 10, 256 (1), 28, 30, 37

Citation : (1991) 100 CTR 135 : (1992) 195 ITR 199 : (1992) 1 KarLJ 51

Hon'ble Judges : N. Venkatachala, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : G. Sarangan, for the Appellant; G. Chander Kumar, for the Respondent

Judgement

K. Shivashankar Bhat, J.—The questions referred to us u/s 256(1) of the Income Tax Act, 1961 ("the Act" for short), read thus :

"(1) Whether, on the facts and in the circumstances of the case the Tribunal was correct in holding that the provisions of section 41(1) were applicable for bringing to tax a sum of Rs. 1,67,221 being the refund of litre fee collected by the State Government pursuant to certain legislation declared to be invalid by this Hon"ble Court ? and

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the judgment of this Hon"ble Court in CIT v. Guruswamy and Co., ITRC No. 11 of 74, dated June 16, 1976, were on dissimilar facts and that the ration therein would not be applicable to the present case ?"

2. Though there are two questions, ultimately the answer lies in the interpretation of section 41(1) of the Act which reads thus :

"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."

3. The relevant assessment year is 1975-76. During the said period ending with the accounting year March 31, 1975, the assessee credited a sum of Rs. 2,11,773 to his capital account out of which a sum of Rs. 1,67,221 represented the amount received from the excise department which had been earlier paid by the assessee as litre fee pertaining to the assessment year 1970-71 to 1973-74.

4. The State of Karnataka a levied litre fee which was under challenge. The challenge was upheld in the decision in K. H. K. Rahaman v. State of Mysore ILR 1973 Kant 124. During the pendency of the challenge, the assessee had paid the litre fee during various years which were allowed as a deduction while computing the assessee's income during the assessment year 1970-71 to 1973-74. After the law was declared unconstitutional, the litre fee collected was refunded. During the year in which the refund was obtained by the assessee, the said amount was assessed to tax by invoking section 41(1) of the Act. The assessee's contention that section 41(1) is not applicable failed throughout and hence this reference.

5. The assessee strongly relied on an unreported decision of this court in I.T.R.C. 11 of 1974, CIT v. Guruswamy and Co., dated June 16, 1976. The facts of the said case resemble the present facts of the assessee and hence require to be stated. Guruswamy was following the mercantile system of accounting. The Government Of Mysore had levied health cess on toddy shop rental. This levy was shown as a liability during three assessment years and Guruswamy claimed the amounts as deduction. In the meanwhile, the said assessee had challenged the levy of health cess and the Supreme Court upheld the assessee's contention by declaring the levy unconstitutional. The assessment proceedings were still pending in the meanwhile. After the judgment of the Supreme Court, the Income tax Officer, while concluding the assessments, did not allow the claim for deduction to the full extent of the provision made by the said assessee; similarly, he did not allow deduction of the amounts actually paid by the said assessee; those were in respect of the assessment years 1965-66 to 1967-68. The Commissioner of Income Tax opined that the deductions during the assessment year 1968-69. The subject of reference to the court arose out of this order pertaining to the assessment year 1968-69, since the Appellate Tribunal therein held that since the levy of health cess was illegal from the very inception, no liability was incurred by Guruswamy and, therefore, section 41(1) could not invoked. The Revenue came to this court by way of reference. The Bench was not concerned therein whether the deduction claimed by the assessee was by way of expenditure or as a trading liability. It was assumed by the parties as well as by

the Bench that the deduction was in respect of a trading liability. It is on this assumption that the Bench observed, after quoting section 41(1) thus :

"This sub-section provides that where an allowance is granted in any year in respect of any loss, expenditure or trading liability and subsequently during any previous year, the assessee receives, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or the assessee is benefited by "remission" or "cessation" or trading liability, the amount received or the amount of liability which is extinguished, is chargeable as business profits of that previous year.

From the facts set out in the earlier part of this judgment, it is seen that for the assessment year 1965-66, provision had been made by the assessee towards health cess in a sum of Rs. 3,90,005; the whole of the amount was disallowed by the Income Tax Officer. When no such allowance was granted in respect of the liability towards health cess during the assessment year 1965-66, the question of adding any amount u/s 41(1) does not arise. For the assessment year 1966-67, the provision made was in a sum of Rs. 4,76,513; the assessee actually paid a sum of Rs. 1,19,128. The amount paid by the assessee has been disallowed by the Income Tax Officer. The amount allowed by the Income Tax Officer was Rs. 3,57,385. The assessee did not receive, whether in cash or in any other manner, any amount in respect of the said sum of Rs. 3,57,385. Therefore, no question of remission u/s 41(1) arises in respect of allowances made for the assessment year 1965-66 and 1966-67 even assuming that section 41(1) can be applied to the facts of the case.

Section 41(1) of the Act cannot be invoked when the levy is struck down as unconstitutional. In order to attract section 41(1), allowance should have been granted in any year in respect of a liability and in a subsequent year, the assessee should have obtained benefit in respect of such liability by way of remission or cessation thereof. The benefit received by the assessee by reason of remission or cessation of a trading liability is deemed to be profits and gains of business or profession and accordingly chargeable to Income Tax as income of that previous year in which such benefit is received. The section presupposes the existence of a liability and the assessee deriving benefit by reason of remission or cessation of the liability and not a liability never legally imposed in the eye of the law."

6. Since the law was void ab initio and the levy was illegal from its very inception, Bench observed that it cannot be said that there was any liability on the assessee initially. Mr. Sarangan, learned counsel for the assessee strongly relied on the aforesaid Bench decision of this court and contended that the Appellate Tribunal erred in distinguishing the said decision as inapplicable to the facts of the present case. It was contended that section 41 refers to an allowance or deduction under any of the three heads, loss, expenditure or trading liability. If the assessee obtains any amount in respect of such loss or expenditure during any subsequent year the said amount is liable to be taxed u/s 41(1). Similarly, if

there has been any allowance or deduction in respect of a trading liability, section 41(1) is attracted only when the assessee obtain some benefit in respect of the same by way of remission or cessation hereof. When the law impose a tax, payable in the course of a trade it will be a trading liability. But if such a law unconstitutional, legally there is no liability at all from the very inception, and the allowance or "deduction permitted in respect of such unconstitutional liability can never be called an allowance or deduction in respect of a trading liability and, therefore, section 41(1) is not attracted. When such law is declared unconstitutional, it is not a case wherein the assessee obtains the benefit of any remission or cessation of liability because the liability never existed from the very beginning in the eye of law.

7. Learned counsel for the Revenue, however, contended that the tree heads, "loss", "expenditure" and "trading liability", are not watertight compartments and an allowance or deduction may fall either under the concept of "trading Liability" in contradiction to the concept of "expenditure". Learned counsel also contended that, in the field of accountancy, trading liability is something which is incurred in connection with the carrying on of the trade and in the course of the trade, such as a liability incurred for the goods purchased or debt incurred as incidental to a trading transaction. Secondly, it was contended that the very assumption by the earlier Bench that the payment of tax was a trading liability is not correct. It is not necessary for us to go into this second contention advanced by Mr. Chanderkumar, learned counsel for the Revenue. The said question was not examine by the earlier Bench in contradiction to the concept of expenditure. The Bench assume that the deduction claimed by the assessee towards health cess was a trading liability and the parties before the Bench did not challenge the said assumption.

8. The relevant provisions of the Act regarding allowances and deductions are found in Part D of Chapter IV, commencing with section 28 of the Act. The income from profits and gains of business are to computed by reference to various relevant provisions starting with section 30. Most of the allowances or deductions are referred to as expenditure but there are a few provisions which permit allowances or deductions by way of investment allowance, development rebate, rehabilitation allowance, depreciation allowance, etc. Section 37 preserves the deductibility of any other expenditure (not being expenditure of the nature described in section 30 to 36) laid out or expended, wholly and exclusively for the purpose of business or profession. In the very nature of things, Parliament cannot catalogue all items specifically by enumerating them as items of allowances or expenditure laid out or expended wholly and exclusively for the purposes of business or profession shall have to be allowed as a deduction and, therefore, section 37 has preserved the said deductibility.

9. In the course of a trading activity, the assessee may have to pay several kinds of taxes; such taxes are allowed as a deduction from the gross income while computing the income of the assessee, so long as the liability to the said tax

arose in the course of, or as incidental to, the carrying on the trading activity. Liability to tax is purely statutory. Its incidents are also statutory. For example, sales tax is levied on the sale of goods; the measure of the tax may depend upon the sale price, but, liability to pay the tax arises because of the sale or purchase and that liability is towards the state; the liability does not arise because of any bargain in the sale transaction.

10. The law does not compel the seller to collect the tax element from the purchase; however, there is a compulsion on the seller (or the purchase, as the case may be) to pay the tax, irrespective of the fact that the one who is liable to the state collects it or not from the other party to the transaction. The tax collected from the customer becomes the trading receipt of the dealer since it is collected as part of the consideration for the transaction of sale or purchase. Litre fee levied was duty of excise. If the levy was valid, then its imposition depended on the manufacture or production of goods (as referred to in entry 51 of List II, seventh Schedule, to the Constitution); liability to pay litre fee was fixed by the relevant law, having regard to the convenience of collection of the tax. Irrespective of any bargain or terms of dealings between the private parties, the charge to the tax was fixed statutorily and liability to the State arose when the terms of the charging sections were satisfied. In these circumstances, it cannot be held that liability to tax is a "trading liability", in the sense the phrase is understood in commercial accountancy. Tax collected becomes part of the trading receipt and, therefore, when it is paid or becomes payable to the Government, it will be an outgoing from the trading receipt and hence is an expenditure.

11. However, Mr. Sarangan referred to the decision of the Supreme Court in *Indian Molasses Co. (Private) Ltd. Vs. Commissioner of Income Tax, West Bengal*, to contend that the payment of any amount under an unconstitutional law can never be an expenditure because the payment is liable to be refunded to the assessee and, therefore, there was no spending of the said amount and the amount was never lost to the assessee irretrievably. While considering the concept of expenditure, the Supreme Court observed at page 75 :

"The Income Tax law does not allow as expenses all the deduction a prudent trader would make in computing his profits. The money may be expended on ground of commercial expediency but not of necessity. The test of necessity is whether the intention was to earn trading receipts or to avoid future recurring payments of revenue character. Expenditure in this sense is equal to disbursement which, to use a homely phrase, means something which comes out of the trader's pocket. Thus in finding out what profits there be, the normal accountancy practice may be to allow as expense any sum in respect of liabilities which have accrued over the accounting period and to deduct such sums from profits. But the Income Tax laws do not take every such allowance as legitimate for purposes of tax. A distinction is made between an actual liability in present and a liability *de futuro* which, for the time being is only contingent. The former is deductible but not the latter. The case which illustrates this distinction is *Peter*

Merchant Ltd. v. Stedeford [1948] 30 TC 496(CA). No doubt, that case was decided under the system of income tax laws prevalent in England, but the distinction is real. What a prudent trader sets apart to meet a liability, not actually present but only contingent, cannot bear the character of expense till the liability becomes real".

12. Again at page 79, it was observe that :

"To be a payment which is made irrevocably, there should be no possibility of the money forming, once again, a part of the funds of the assessee-company. If this condition be not fulfilled and there is a possibility of there being a resulting trust in favour of the company, then the money has not been spent, i.e., paid out or away, but the amount must be treated as set apart to meet a contingency. There is a distinction between a contingent liability and a payment depending upon a contingency. The question is whether in the years of account, one can describe the assessee company's liability as contingent or merely depending upon a contingency. In our opinion, the liability was contingent and not merely depending upon a contingency.

13. From these observation, learned counsel for the assessee contended that the deduction claimed by the assessee towards the unconstitutional levy was not a real expenditure and it was only contingent depending for its finality on the levy being upheld by the Supreme Court. Since the law was declared as unconstitutional, the declaration goes back to the very inception of the levy and, therefore, the payment was not towards any real liability. This contention is no doubt very attractive. But a taxing provision has to be understood and applied in a working manner. The realities of the situation cannot be ignored. No doubt the concept of expenditure has been stated by the Supreme Court in Indian Molasses Co. (Private) Ltd. Vs. Commissioner of Income Tax, West Bengal, but the question is whether the said concept controls the scope of section 41(1). Apart from the principle that the meaning attributable to a word varies with the context, the said concept of expenditure by itself will not control the operation of section 41(1). Entire section 41(1) will have to be understood in meaningful way. Section 41(1) operates where an allowance or deduction has been made "in respect of loss, expenditure or trading liability". The key to this part of the provision lies in understanding the phrase "in respect of". Section 41(1) does not say that it is confined to the case of an allowance or deduction made under the head actual "loss, expenditure or trading liability." The phrase "in respect of "has to be understood in a broader sense as conveying the idea of "purporting to be" or "considered as". If so understood, section 41(1) would effectuate the purpose for which it was enacted. Therefore, if there has been any deduction or allowance "purporting to be" or "considered as" a loss, expenditure or trading liability, the initial test to apply section 41(1) will be satisfied. Thereafter, we have to examine whether the assessee had obtained any amount in respect of such loss or expenditure (and this amount may be in cash or in any other manner). If the earlier allowance or deduction was a trading liability, then also, section 41(1) is

attracted when the assessee obtains subsequently some benefit in respect thereof, by way remission or cessation of the said liability.

14. The purpose of section 41(1) is quite clear. Its idea is to levy tax on any amount received by the assessee subsequently or on any benefit received by an assessee during any subsequent year in respect of which he had earlier obtain an allowance or deduction while computing his income. In other words, what was taken advantage of by an assessee during an earlier year for tax purpose should not go untaxed, if the assessee receives the said money or some benefit which is attributable to his income. Learned counsel for the assessee, however, contended that it is possible to reopen the assessments for those years and add back these receipts by applying the principle governing the mercantile system. That may be so, but it is not possible to do so in all cases. The assessee may receive the refund of the tax paid under an unconstitutional law after several years by which time his earlier completed assessment for Income Tax purposes cannot be reopened due to the bar of limitation. A lump sum received by the assessee after several years which clearly would go to augment his income is treated u/s 41(1) as taxable during that year of receipt, and Parliament has obviously thought it fit to impose tax on this receipt during the year in which it is received to avoid reopening of the concluded assessment by unearthing the previous concluded proceedings. The assessee, in the instant case, claimed deduction of the litre fee and it was certainly allowed only u/s 37 of the Act as an expenditure. The litre fee paid was treated as an expenditure as claimed by the assessee. For the purpose of the deductibility, if the payment can be claimed as expenditure by the assessee, it is not permissible for the same assessee now to contend that it was not an expenditure. That such deductions are allowed normally u/s 37 of the Act as an expenditure is clear from the decision of the Supreme Court in *The Kedarnath Jute Mfg. Co. Ltd. Vs. The Commissioner of Income Tax, (Central), Calcutta*, . The assessee therein claimed deduction, while computing its income, of the amounts equivalent to the sales tax payable by the assessee. The Revenue contended that only the actual payment are to be deducted as expenditure. It was held by the Supreme Court that the liability towards sales tax was deductible u/s 10(2) (xv) of the Indian Income Tax Act, 1922 (which is equivalent to the present section 37). The Supreme Court stated at page 365, that "it is undisputable that the amount of sales tax paid or payable by the assessee in an expenditure within the meaning of section 10(2) (xv). The amount in question was thus a kind of expenditure about which there can be no doubt that it had been laid out or expended wholly or exclusively of the purpose of business carried on by the assessee." The Supreme Court also observe that, alternatively, such liability should be excluded while computing the real income by applying the ordinary principles of commercial trading and commercial accounting.

15. From the above, its clear that normally, the payment of a statutory liability incurred while earning an income is an expenditure. It is also possible in some case that such payment may have to be excluded from computing the income as a liability incurred in the course of trade also. This only indicates that there

cannot be a strict bifurcation of the concepts of expenditure and trading liability.

16. Therefore, we have no hesitation in holding that the deduction given to the assessee in respect of the litre fee paid by him was by way of an expenditure; therefore, the amounts refunded on the levy being held unconstitutional were the amounts received by him in respect of the said expenditure and those receipts are liable to be taxed u/s 41(1).

17. Now, a few decisions cited by both learned counsel require to be noticed.

18. In *Kejriwal Iron Stores Vs. Commissioner of Income Tax*, the Rajasthan High Court held that payment towards purchase of goods by a dealer were by way of expenditure for purposes of section 40A(3) of the Act and hence in order to seek deduction. In this context, the court held that the word "expenditure" in section 40A(3) should not be given a restricted meaning having regard to the object behind the said provision, so as to check tax evasion by claims of cash expenditure.

19. The Madhya Pradesh High Court in *M.P. Financial Corporation Vs. Commissioner of Income Tax*, held that the expression "expenditure" use in section 37 may in the circumstances of a particular case, cover an amount which is really a loss and the said amount has not gone out of the assessee's pockets; the view of the Calcutta High Court in *Commissioner of Income Tax Vs. Indian Jute Mills Association*, giving a wider meaning to the expression "expenditure" : depending on the facts of a particular case, was accepted by the Madhya Pradesh High Court.

20. The trend of judicial decisions is in favour of taxing such tax refunds u/s 41 and, in all such case, taxes were paid under an unconstitutional levy or unnecessarily assumed to be an allowance or deduction made in the year in which such taxes were paid, in respect of expenditure and, therefore, the refund or adjustment made subsequently was treated as falling u/s 41 for taxation under the Act.

21. *Motilal Ambaidas v. CIT* [1977] 108 ITR 136, is a decision of the Gujarat High Court, Earlier, the levy of sales tax was held unconstitutional by the High Court which was affirmed by the Supreme Court. Consequently, the assessee obtained refund of the tax paid under the unconstitutional levy. The assessee contended that he never claimed the tax paid earlier as an expenditure, but totally excluded it while filing the return and hence there was no deduction claimed earlier; further, the refunded amount received by the assessee was liable to be repaid to the customers from whom the assessee had collected it as sale tax. The Gujarat High Court held that sales tax collected by the assessee was part of the trading receipts, irrespective of the manner in which it was shown in the books of the assessee and hence its exclusion from the receipts while computing the income could not alter its character as an allowance or deduction. At page 147, the Bench held :

"The amount of the sale tax payable in respect of the sale effected by a particular assessee forms part of his trading receipts and has to be shown on the credit side. As and when he pays the sales tax to the authorities, he can claim deduction for the sales tax paid; in case he has to refund the sales tax to the original purchase who purchased the goods from him then the amount so refunded will also be a deduction on the expenditure side. Thus it is obvious that in the instant case the assessee-firm which was maintaining its accounts on mercantile basis was bound to show as trading receipts all the amounts which accrued due to it or which were collected by it as sales tax and it was bound to show on the debit side of the accounts, the amounts which it paid by way of sales tax. The fact that no such entries showing credits and debits in respect of sales tax collected and sales tax paid were made by the assessee-firm does not alter the real substance of the transaction nor does it alter the real character of what was required to be done by the assessee in this case".

22. The learned judges pointed out that section 41(1), being a machinery section, should be understood in a manner so as to make the charging provision effective and the sales tax collected by the assessee earlier ought to be shown on the receipts side and the payments made or payable to the Government on the debit side, resulting in a deduction. *Commissioner of Income Tax, Gujarat-I Vs. Rashmi Trading*, is also a decision of the Gujarat High Court wherein the refunded sales tax amount was held taxable u/s 41(1). The refund obtained was held to be the "amount of refund in respect of the expenditure of sales tax incurred by him in the previous year" *K.V. Moosa Koya and Co. Vs. Income Tax Officer and Another*, is a decision of the Kerala High Court. The Government had levied a surcharge which was declared unconstitutional resulting in refund of the surcharge to the assessee. The inclusion of this refunded amount for the levy of tax u/s 41(1) of the Act was resisted by the assessee unsuccessfully. The Bench, at page 124, held that the liability to pay the surcharge ceased only on the declaration by the court that the levy of surcharge was illegal and hence there was a cessation of liability from that day. The ratio of this decision no doubt runs counter to the earlier decision of this court in *Guruswamy's* case. However, it reflects the trend of judicial thinking giving a wider scope to the word in section 41(1). An earlier decision of the same High Court in *CIT v. Marikar (Motors) Ltd.* [1981] ITR 1, also is to the same effect. In *Rameshwar Prasad Kishan Gopal Vs. V.K. Arora, Income Tax Officer and Another*, the Allahabad High Court had to consider a slightly different problem u/s 41(1). Here, the assessee had obtained refund of the security made in the High Court, during the pendency of the writ petition, challenging the levy of excise duty. Though the assessee succeeded in the challenge to the excise duty before the High Court, the said decision did not become final, as the state went up in appeal to the Supreme Court; therefore, the refunded security the assessee objected to its inclusion for the levy of Income Tax u/s 41. This objection was upheld by the High Court. The High Court held that the allowance made earlier towards excise duty payable to the government was towards a trading liability, but that liability did not cease in view of the

matter being pending in the Supreme Court.

23. The assessee had not paid the excise duty to the Government, but challenge the levy; hence, there was no actual refund of the tax to the assessee; what was obtained by the assessee was the security deposit made in High Court; the ratio of the decision could be inferred from the following passage at page 770 :

"It would appear that the Income Tax Officer was conscious of the fact that both the government of Uttar Pradesh and the Central Government had filed appeals by special leave before the Supreme Court, that these appeals were admitted and the court directed the petitioner to furnish security for the sum of Rs. 2,58,984 to the satisfaction of the Registrar of the court and that the assessee complied with that direction. It is not correct on the part of the Income Tax Officer to state that the High Court allowed the writ petition and directed the State Government to refund the excise duty. The Excise duty had been deposited by the petitioner in the court itself and that amount was directed to be refunded to it. The amount, therefore, was refunded to the petitioner by the court and not by the State Government. It is also not correct for the Income Tax Officer to state that there is no present liability existing against the assessee. It is clear, therefore, that since the assessee followed the mercantile system of accounting, it was allowed deduction in respect of its liability to excise duty. The petitioner challenge its liability to pay the excise duty and during the pendency of the writ petition deposited the excise duty in the court. That payment was not by way of discharge of the liability but was only by way of security and when the writ petition was allowed by the court the amount was refunded to the petitioner. It was not, therefore, a case where an allowance had been made in respect of any expenditure incurred by it or reimbursement of the expenditure subsequently. It was an allowance in respect of a trading liability and in view of the fact that the decision of this court had not become final and is the subject-matter of appeals before the Supreme Court, there has been no remission or cessation of the liability so as to attract 41(1) of the Act.

24. This was not a case where duty was paid and, in the regard, deduction had been obtained and subsequently the assessee obtained the refund. In an earlier decision of the Allahabad High Court in Jagatnarain Durga Prasad v. CIT [1970] 79 ITR 214, the assessee had paid certain amounts as sales tax on forward contracts and these payments were excluded from assessment under the Income Tax Act. Subsequently, it was held that the levy of sales tax was not attracted to the forward contract and, consequently, the assessee obtained refund of those amounts from the government. During the year of refund, these amounts were sought to be taxed under the earlier Indian Income Tax Act, 1922. The assessee contended, at page 216 :

"... that the refund made by the State Government is on account of sales tax deposited by the assessee previously. Sales tax was never the income of the assessee. It was merely an amount collected by the assessee in order to deposit the amount with the State Government later. Secondly, it was urged for the

assessee that the amount so refunded to the assessee would later be refunded by the assessee to the respective constituents."

25. The second contention was negated on the assurance of the revenue that as and when the constituents were paid, appropriate deduction would be given to the assessee. Regarding the first contention, the Bench held (pp. 216, 217) :

"The Tribunal stated that the amount previously deposited by the assessee in the Treasury was claimed by the assessee as a deduction in computing its business income u/s 10 of the Act, and the claim for deduction was allowed in former years. This position was not disputed by Mr. K. M. Dayal. Thus, the first part of sub-section (2A) of section 10 of the Act is satisfied in the instant case. Admittedly, the assessee received the sum of Rs. 13,272.37 from the State Government by way of refund. So, the latter part of sub-section (2A) of section 10 is also satisfied. It may be that the amount so received by the assessee is not income in the strict sense. But, we may point out that under sub-section (2A) of section 10 of the Act, such receipts shall be deemed to be profits and gains of business, profession or vocation."

26. Section 10(2A) of the earlier Act was in pari materia with the present section 41(1).

27. A Bench of the Patna High Court adopted a similar approach in *Sheikh Rahmat Ali Vs. The Commissioner of Income Tax*, . Licence fee paid to government was subsequently refunded, as it was not payable by the assessee. The refund was sought to be taxed in the year of refund. Objection thereto by the assessee was negated and the High Court observed, at page 512 :

"It seems quite plain that when the amount paid as licence fee was deductible from the profits, any refund out of that amount by the government for whatsoever reason must be considered as a part of the revenue gain and not as a capital receipt. The assessee cannot have it both ways. He cannot claim the payment of the licence fee as an outgoing and regard the subsequent refund as a capital receipt. In my opinion, the sum in question is a revenue gain and not a capital receipt."

28. The Calcutta High Court in *IKRAHNANDI COAL CO. Vs. COMMISSIONER OF Income Tax, CALCUTTA.*, , also upheld the Revenue's contention that the amount received as refund of sales tax paid earlier was assessable as the income of the assessee in the year in which the refund was obtained by the assessee. The sales tax which was collected by the assessee earlier from its customers was part of the sale consideration and hence would go to as part of the sale price, even though such collections were shown separately by the assessee in its accounts. The assessee contended that those refunded amounts were likely to be demanded by the customers; on this, the court held at page 497 :

"The potentiality of the money being refunded or the potentiality of the money being claimed by a buyer from the assessee could not destroy or alter the sale

price in the present case or the real transaction between the parties that it was a case of sale and purchase of merchandise in the course of trade."

29. The decision of the Madhya Pradesh High Court in Commissioner of Income Tax Vs. Deora Pu Canbeon Mfg. Co. Pvt. Ltd., was the result of its peculiar facts. The refunded sales tax obtained by the assessee was held as belonging to the Madhya Pradesh Electricity Board and the assessee had no right to retain the refunded amount; therefore, section 41(1) was not attract to the refunded amount.

30. Mr. Sarangan cited Commissioner of Income Tax Vs. Sugauli Sugar Works P. Ltd., a decision of the Calcutta High Court to point out that there is a difference, in law, between a cessation of a liability and the right of the creditor to enforce the liability before getting time-barred; in the latter case, there is no cessation of liability and, therefore, amounts deducted earlier towards debts (shown as such in the accounts) could not be taxed u/s 41, when the assessee transferred them to his accounts on the debts getting time-barred. We do not think it is necessary of us to go into the said aspect in the view have taken as to the scope of section 41(1); we are not concerned here with the cessation or remission of any liability at all.

31. In view of our answer to the first question in the affirmative and against the assessee, it is not necessary to answer the second question.

32. Reference answered accordingly.