

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WRIT PETITION (CIVIL) NO. 7127 OF 2008**

% **Reserved on: 22nd March, 2011**
Date of Decision: 3rd June, 2011

INDGLONAL INVESTMENT&FINANCE LTD.&ANR. ...Petitioners

Through Mr. Salil Aggarwal, Advocate.

VERSUS

INCOME TAX OFFICER WARD NO.11(4) N.DELHI & ORS.

....Respondents

Through Mr. N.P. Sahni, Advocate

AND

+ **WRIT PETITION (CIVIL) NO. 15639 OF 2006**

% **Reserved on : 18th April, 2011.**
Date of Decision : 3rd June, 2011.

M/S TAKSAL THEATERS PRIVATE LIMITED Petitioner

Through, Mr. Y.K. Kapur, Advocate.

VERSUS

ASSISTANT COMMISSIONER OF INCOME TAX & ANOTHER

...Respondents

Through Ms. Rashmi Chopra, Advocate.

CORAM:

HON'BLE MR. JUSTICE DIPAK MISRA, THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes.
3. Whether the judgment should be reported in the Digest ? Yes.

SANJIV KHANNA, J.:

These two writ petitions were heard on different dates, but as the issue and subject matter are similar, they are being disposed of by this common decision. Factual aspects have been discussed below and the result would show one writ petition is being allowed and the other is being dismissed by applying the legal principles and ratio to the factual matrix.

2. Income-Tax Act, 1961 (1961 Act) and Wealth Tax Act, 1957 (1957 Act) are direct taxes. Under the 1961 Act, taxes are collected by deduction of tax at source (TDS, for short), payment of self-assessment tax or advance tax. Under the 1957 Act, self-assessment tax is paid by the assessee. Taxes are also paid on demand raised.

3. An assessee may be entitled to refund of the tax paid on the basis of return of income filed, refund claimed, pursuant to an assessment order, appellate order or some other order. The two enactments, as noticed below, incorporate statutory provisions for refund of taxes paid in excess of the amount ascertained/determined or due and payable. The question raised in these writ petitions is whether and when an assessee is entitled to refund when tax or part thereof has been paid by inadvertence or if the tax is 'wrongly' paid, recovered or

retained. Often in such cases reliance is placed on Article 265 of the Constitution and it is urged that taxes ‘wrongly’ levied and collected should be refunded. Doctrine/principles of unjust enrichment, equity, justice and good conscience are concomitantly invoked.

4. Article 265 reads as under:

“265. Taxes not to be imposed save by authority of law.—No tax shall be levied or collected except by authority of law.”

5. Expressions “levy” and “collection” are used in Article 265 in a comprehensive sense and are intended to include the entire process of collection, commencing from charging or taxing a person to taking away money. What the Article enjoins is that every stage in this entire process must be authorized by law. (See *District Mining Officer versus Tata Iron and Steel Company*, (2001) 7 SCC 358). The term “levy” is of a wider import than the term “assessment” and includes both imposition of tax as well as assessment. (See *CCE versus National Tobacco Company of India Limited*, (1972) 2 SCC 560).

6. Article 265 and a claim for refund for violation of the principles underlying the said Article or under the general principles of equity, justice and good conscience as well as the statutory provisions in tax

enactments was settled by the Constitutional Bench decision of 9 Judges in *Mafatlal Industries versus Union of India*, (1997) 5 SCC 536. The said decision interprets Article 265 of the Constitution and lays down legal principles, which we feel are equally applicable to the arguments raised. The Supreme Court in the said case has held that Article 265 mandates that no tax can be levied or collected except by authority of law, which means that tax collected contrary to law has to be refunded; but the question is -- when a tax is considered to have been levied and collected without authority of law. The Supreme Court visualized several hypothetical situations and answered questions but for the purpose of this case we are required to examine two distinct situations/categories. The first situation is where the tax is collected or voluntarily paid to the authority under a valid enactment but by misconstruing or by wrong interpretation of the provisions of the enactment or by erroneous determination of relevant facts. The second category of cases is where the enactment by which tax is levied is an unconstitutional enactment or its provisions transgress the constitutional limitations. In such cases, refund becomes due because enactment/statute imposing the tax or the provision is unconstitutional. This second category of cases will normally be cases; (1) where legislative competence of the legislature is challenged and questioned

on the basis of entries in the Seventh Schedule of the Constitution, (2) where law is prohibited by any particular provision of the Constitution, e.g., Articles 276(2), 286 etc. and (3) the wrong or relevant portion thereof is invalid under Article 13 for repugnancy to those freedoms, which are guaranteed by Part-III of the Constitution. (see ***Chhotabhai Jethabhai Patel and Company versus Union of India***, (1962) Supp. 2 SCR 1).

7. In the present Writ petitions, we are not concerned with the second category of cases. The two enactments and their provisions have not been challenged on the ground that they are unconstitutional. We are concerned with the first category of cases where an assessee claims refund on the ground that the levy is wrong or contrary to the provisions of the enactment, i.e., under an enactment itself tax should not have been levied or has been wrongly imposed/collected/paid. The first category of cases will also include cases where an assessee claims that he is entitled to refund on the ground that the tax was mistakenly paid under misapprehension or error in understanding the statutory provisions and in fact tax was not payable or exigible. (Mistake of law in understanding/interpreting the statute, will not include cases where the enactment itself or the provision of the enactment is declared to be unconstitutional for violation of any constitutional limitation).

Regarding the said category of cases, the Supreme Court in the case of *Mafatlal Industries* (supra) examined the provisions of Article 265 of the Constitution and Central Excise and Salt Act, 1944. The wide scope and width of the issues examined by the Supreme Court can be understood if we read paragraph 31, of the said decision;

“31. There is as yet a third and an equally important category. It is this: a manufacturer (let us call him “X”) pays duty either without protest or after registering his protest. It may also be a case where he disputes the levy and fights it out up to first appellate or second appellate/revisional level and gives up the fight, being unsuccessful therein. It may also be a case where he approaches the High Court too, remains unsuccessful and gives up the fight. He pays the duty demanded or it is recovered from him, as the case may be. In other words, so far as “X” is concerned, the levy of duty becomes final and his claim that the duty is not leviable is finally rejected. But it so happens that sometime later — may be one year, five years, ten years, twenty years or even fifty years — the Supreme Court holds, in the case of some other manufacturer that the levy of that kind is not exigible in law. (We must reiterate — we are not speaking of a case where a provision of the Act whereunder the duty is struck down as unconstitutional. We are speaking of a case involving interpretation of the provisions of the Act, Rules and Notifications.) The question is whether “X” can claim refund of the duty paid by him on the ground that he has discovered the mistake of law when the Supreme Court has declared the law in the case of another manufacturer *and* whether he can say that he will be entitled to file a suit or a writ petition for refund of the

duty paid by him within three years of such discovery of mistake? Instances of this nature can be multiplied. It may not be a decision of the Supreme Court that leads “X” to discover his mistake; it may be a decision of the High Court. It may also be a case where “X” fights up to first appellate or second appellate stage, gives up the fight, pays the tax and then pleads that he has discovered the mistake of law when the High Court has declared the law. The fact is that such claims have been entertained both in writ petitions and suits until now, purporting to follow the law declared in *Kanhaiya Lal*, and are being allowed and decreed, sometimes even with interest. The Union of India says that this can never be. It says, a manufacturer must fight his own battle and only if he succeeds therein, can he claim refund. He cannot take advantage of success of another manufacturer and that no suit or writ is maintainable by him for refund on the ground of alleged discovery of mistake of law on the declaration of law by this Court or a High Court (or a Tribunal or any other authority under the Act) in the case of another person. The Union of India denies that such a person can plead payment of duty under a mistake of law within the meaning of Section 72 of the Contract Act. It also denies that such a writ petition or a suit can be filed within three years of such “discovery of mistake of law”.

8. The first situation/category mentioned above was answered as under;-

“78. There is, however, *one exception* to the above proposition, i.e., where a provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation of any of the constitutional limitations. This is a situation not

contemplated by the Act. The Act does not contemplate any of its provisions being declared unconstitutional and therefore it does not provide for its consequences. Rule 11/Section 11-B are premised upon the supposition that the provisions of the Act are good and valid. But where any provision under which duty is levied is found to be unconstitutional, Article 265 steps in. In other words, the person who had paid the tax is entitled to claim refund and such a claim cannot be governed by the provisions in Rule 11/Section 11-B. The very collection and/or retention of tax without the authority of law entitles the person, from whom it is collected, to claim its refund. A corresponding obligation upon the State to refund it can also be said to flow from it. This can be called the *right to refund arising under and by virtue of the constitutional provisions, viz., Article 265*. But, it does not follow from this that refund follows automatically. Article 265 cannot be read in isolation. It must be read in the light of the concepts of economic and social justice envisaged in the Preamble and the guiding principles of State Policy adumbrated in Articles 38 and 39 — an aspect dealt with at some length at a later stage. The very concept of economic justice means and demands that unless the claimant (for refund) establishes that he has not passed on the burden of the duty/tax to others, he has no just claim for refund. It would be a parody of economic justice to refund the duty to a claimant who has already collected the said amount from his buyers. The refund should really be made to the persons who have actually borne its burden — that would be economic justice. Conferring an unwarranted and unmerited monetary benefit upon an individual is the very antithesis of the concept of economic justice and the principles underlying Articles 38 and 39. Now, the right to refund arising as a result of declaration of unconstitutionality of a provision of

the enactment can also be looked at as a *statutory right of restitution*. It can be said in such a case that the tax paid has been paid under a mistake of law which mistake of law was discovered by the manufacturer/assessee on the declaration of invalidity of the provision by the court. Section 72 of the Contract Act may be attracted to such a case and a claim for refund of tax on this score can be maintained with reference to Section 72. This too, however, does not mean that the taxes paid under an unconstitutional provision of law are automatically refundable under Section 72. Section 72 contains a rule of equity and once it is a rule of equity, it necessarily follows that equitable considerations are relevant in applying the said rule — an aspect which we shall deal with a little later. Thus, whether the right to refund of taxes paid under an unconstitutional provision of law is treated as a constitutional right flowing from Article 265 or as a statutory right/equitable right affirmed by Section 72 of the Contract Act, the result is the same — there is no automatic or unconditional right to refund.

79. We may now consider a situation where a manufacturer pays a duty unquestioningly — or he questions the levy but fails before the original authority and keeps quiet. It may also be a case where he files an appeal, the appeal goes against him and he keeps quiet. It may also be a case where he files a second appeal/revision, fails and then keeps quiet.* The orders in any of the situations have become final against him. Then what happens is that after a year, five years, ten years, twenty years or even much later, a decision is rendered by a High Court or the Supreme Court in the case of another person holding that duty was not payable or was payable at a lesser rate in such a case. (We must reiterate and emphasise that while dealing with this situation we are keeping out the situation

where the provision under which the duty is levied is declared unconstitutional by a court; that is a separate category and the discussion in this paragraph does not include that situation. In other words, we are dealing with a case where the duty was paid on account of misconstruction, misapplication or wrong interpretation of a provision of law, rule, notification or regulation, as the case may be.) Is it open to the manufacturer to say that the decision of a High Court or the Supreme Court, as the case may be, in the case of another person has made him aware of the mistake of law and, therefore, he is entitled to refund of the duty paid by him? Can he invoke Section 72 of the Contract Act in such a case and claim refund and whether in such a case, it can be held that reading Section 72 of the Contract Act along with Section 17(1)(c) of the Limitation Act, 1963, the period of limitation for making such a claim for refund, whether by way of a suit or by way of a writ petition, is three years from the date of discovery of such mistake of law? *Kanhaiya Lal* is understood as saying that such a course is permissible. Later decisions commencing from *Bhailal Bhai* have held that the period of limitation in such cases is three years from the date of discovery of the mistake of law. With the greatest respect to the learned Judges who said so, we find ourselves unable to agree with the said proposition. Acceptance of the said proposition would do violence to several well-accepted concepts of law. One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding. Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law. So

long as that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained. But what is happening now is that the duty which has been paid under a proceeding which has become final long ago — may be an year back, ten years back or even twenty or more years back — is sought to be recovered on the ground of alleged discovery of mistake of law on the basis of a decision of a High Court or the Supreme Court. It is necessary to point out in this behalf that for filing an appeal or for adopting a remedy provided by the Act, the limitation generally prescribed is about three months (little more or less does not matter). But according to the present practice, writs and suits are being filed after lapse of a long number of years and the rule of limitation applicable in that behalf is said to be three years from the date of discovery of mistake of law. The incongruity of the situation needs no emphasis. And all this because another manufacturer or assessee has obtained a decision favourable to him. What has indeed been happening all these years is that just because one or a few of the assessees succeed in having their interpretation or contention accepted by a High Court or the Supreme Court, all the manufacturers/assesseees all over the country are filing refund claims within three years of such decision, irrespective of the fact that they may have paid the duty, say thirty years back, under similar provisions — and their claims are being allowed by courts. All this is said to be flowing from Article 265 which basis, as we have explained hereinbefore, is totally unsustainable for the reason that the Central Excises Act and the Rules made thereunder including Section 11-B/Rule 11 too constitute “law” within the meaning of Article 265 and that in the face of the said provisions — which are exclusive in their nature — no claim for refund is maintainable except under and in accordance therewith. The second basic

concept of law which is violated by permitting the above situation is the sanctity of the provisions of the Central Excises and Salt Act itself. The Act provides for levy, assessment, recovery, refund, appeals and all incidental/ancillary matters. Rule 11 and Section 11-B, in particular, provide for refund of taxes which have been collected contrary to law, i.e., on account of a misinterpretation or misconstruction of a provision of law, rule, notification or regulation. The Act provides for both the situations represented by Sections 11-A and 11-B. As held by a seven-Judge Bench in *Kamala Mills*, following the principles enunciated in *Firm & Illuri Subbayya Chetty*, the words “any assessment made under this Act” are wide enough to cover all assessments made by the appropriate authorities under the Act whether the assessments are correct or not and that the words “an assessment made” cannot mean an assessment properly and correctly made.

It was also pointed out in the said decision that the provisions of the Bombay Sales Tax Act clearly indicate that all questions pertaining to the liability of the dealer to pay assessment in respect of their transactions are expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction. Whether or not a return is correct and whether a transaction is exigible to tax or not are all matters to be determined by the authorities under the Act. The argument that the finding of the authority that a particular transaction is taxable under the Act is a finding on a collateral fact and, therefore, resort to civil court is open, was expressly rejected and it was affirmed that the whole activity of assessment beginning with the filing of the return and ending with the order of assessment falls within the jurisdiction of the authorities under the Act and no part of it can be said to constitute a collateral activity not specifically or

expressly included in the jurisdiction of the authorities under the Act. It was clarified that even if the authority under the Act holds erroneously, while exercising its jurisdiction and powers under the Act that a transaction is taxable, it cannot be said that the decision of the authority is without jurisdiction. We respectfully agree with the above propositions and hold that the said principles apply with equal force in the case of both the Central Excises and Salt Act and the Customs Act. Once this is so, it is ununderstandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for reopening the concluded proceedings on the aforesaid basis. We must reiterate that the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said article. In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11-B. An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos. It is, however, suggested that this result follows only in tax matters because of Article 265. The explanation offered is untenable, as demonstrated hereinbefore. As a matter of fact, the situation today is chaotic because of the principles supposedly emerging from *Kanhaiya Lal* and other decisions following it. Every decision of this Court and of the High Courts on a question of law in favour of the assessee is giving rise to a wave of refund claims all over the country in respect of matters which have become final and are closed long number

of years ago. We are not shown that such a thing is happening anywhere else in the world. Article 265 surely could not have been meant to provide for this. We are, therefore, of the clear and considered opinion that *the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11-B and under no other provision and in no other forum.* An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assessee. (See the pertinent observations of Hidayatullah, C.J. in *Tilokchand Motichand* extracted in para 46.) The decisions of this Court saying to the contrary must be held to have been decided wrongly and are accordingly overruled herewith."

9. Like the Central Excise and Salt Act, 1944, the two enactments, i.e., the 1961 Act and the 1957 Act are self-contained codes exhaustive of matters dealt with therein. They are also exhaustive to obligations and remedies available to a tax payer under the two enactments. Applying the ratio expounded in *Mafatlal Industries* (supra), it is clear that in cases covered by the first category, claim for refund must be made by the assessee in accordance with the provisions of the enactment. Refund will be due and paid to the assessee as per the

provisions of the enactment itself. The two Acts provide for levy, assessment, recovery, refund, appeals and all incidental/ancillary matters. For an assessee to claim refund, he must satisfy the statutory requirements and Article 265 of the Constitution is not violated if an assessee does not claim refund as per the provisions of the Act or when the “wrong” assessment or any other “wrong” order becomes final and has the effect of denying refund. An assessee cannot file a writ petition and state that Article 265 of the Constitution is violated because he is not being refunded tax which is not refundable under the enactment. In such cases, tax has been collected in accordance with law, i.e., under the enactment itself and no amount is refundable unless a refund can be claimed in terms of the statute/enactment. Of course, if the ‘wrong’ order itself is challenged in a writ petition and the challenge is accepted then refund can be a consequence. Invoking the writ jurisdiction to question an order or assessment is a separate aspect. Existence of an adequate legal remedy which has not been availed of is an important and relevant consideration before resort to extraordinary jurisdiction is accepted.

10. Any other interpretation would lead to incongruous results with the Revenue being put and saddled with liabilities even after the assessments become final and are not subjected to any challenge in

appeal or revision. It will result in chaotic situation and will be contrary to public interest, making a decision or adjudication inchoate and uncertain. It may be noticed here that there are fetters and restrictions on the power of the tax authorities both by limitation as well as conditions regarded as jurisdictional pre-conditions that have to be satisfied before any case is reopened under Section 147/148 of the 1961 Act or under Section 17 of the 1957 Act. Further, Revenue cannot defend a writ petition or a refund claim and state that the assessee had wrongly claimed benefit or has been wrongly granted benefit of a deduction/claim, even when the order/assessment has attained finality.

11. Provisions of assessment are independent of provisions of refund, but the provisions relating to refund may be dependent on the assessment. (See *Commissioner of Income Tax, West Bengal vs. Central India Industries Ltd.* (1971) 82 ITR 555). An assessment order or an order quantifying the income/net wealth can be rectified or modified in the proceedings as contemplated by the enactment. The assessment order or the order quantifying the income or taxable wealth cannot be challenged on merits while the authorities examine the question of refund. The authorities cannot go behind the assessment

order or the order quantifying net wealth/income. Section 242 of the 1961 Act is apposite and is reproduced below:-

“242. Correctness of assessment not to be questioned.--In a claim under this Chapter, it shall not be open to the assessee to question the correctness of any assessment or other matter decided which has become final and conclusive or ask for a review of the same, and the assessee shall not be entitled to any relief on such claim except refund of tax wrongly paid or paid in excess.

12. Another principle is that the refund provisions should be interpreted in a reasonable and practical manner and when warranted liberally in favour of the assessee. If there is substantial compliance of the provisions for refund, it may not be denied because it is not made strictly in the form or the prescribed manner. The forms prescribed may be merely intended to facilitate payment of refund. The tax authorities have to act judiciously when they exercise their power under an enactment. The power given to the tax authorities under the enactments are mandated with the duty to exercise them when the statutory provisions so warrant. It is imperative upon them to exercise their authority in an appropriate manner. In case the Assessing Officer or tax authority comes to know that an assessee is entitled to deduction, relief or refund on the facts of the case and the assessee has omitted to make the claim, he should draw the attention of the assessee. The tax

authorities should act as facilitators and not occlude and obstruct. The role of tax authorities has been aptly described in *CIT versus Rajesh Jhaveri Stock Brokers Pvt. Ltd.* (2008) 14 SCC 208 as :-

“19..... The function of the assessing officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers.”

13. In *Commissioner of Income Tax Vs. Shelly Products and Anr.*, (2003) 261 ITR 367, the Supreme Court while upholding the right of the tax authorities to retain taxes due and payable even when the assessment proceeding is annulled, on the question of refund when tax is not payable clarified the position as under:

“We cannot lose sight of the fact that the failure or inability of the Revenue to frame a fresh assessment should not place the assessee in a more disadvantageous position than in what he would have been if a fresh assessment was made. In a case where an assessee chooses to deposit by way of abundant caution advance tax or self-assessment tax which is in excess of his liability on the basis of the return furnished or there is any arithmetical error or inaccuracy, it is open to him to claim refund of the excess tax paid in the course of the assessment proceeding. He can certainly make such a claim also before the concerned authority calculating the refund. Similarly, if he has by mistake or inadvertence or on account of ignorance, included in his income any amount which is exempted from payment of income-tax, or is not income within the contemplation of law, he may likewise bring this to the notice of the assessing authority, which if satisfied, may grant

him relief and refund the tax paid in excess, if any. Such matters can be brought to the notice of the concerned authority in a case when refund is due and payable, and the authority concerned, on being satisfied, shall grant appropriate relief.”

Facts of the W.P.(C) No. 7127 Of 2008

14. The petitioner No. 1, Indglonal Investment & Finance Limited, by this writ petition has prayed for quashing of the order dated 23rd August, 2007 passed by the respondent No. 1, Income Tax Officer, Ward No. 11(4), New Delhi and for direction that the respondent should refund Rs.5,73,038/- along with interest. It is stated that this amount was deducted as TDS during the period relevant to the assessment year 1994-95 and is refundable.

15. By the impugned order dated 23rd August, 2007, the claim for refund has been rejected on the ground that in the return of income for the assessment year 1994-95 filed on 29th November, 1994, the assessee/petitioner had declared total loss of Rs.4,56,994/- and no amount was shown as deducted towards TDS and no claim for refund was made. It is stated that the return was processed under Section 143(1)(a) of the 1961 Act on 28th February, 1995 and it was concluded that no tax was paid and due. The respondent has relied upon Section 139(5) of the 1961 Act and stated that in case there was an omission or

error in the return itself, the petitioner should have filed revised a return within the time stipulated. No revised return was filed.

16. Section 237, 239(1) & (2)(c) and 240 of the 1961 Act read as under:-

“Section 237- Refunds

If any person satisfies the [Assessing] Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess.”

Section 239- Forms of claim for refund and limitation.

“(1) Every claim for refund under this Chapter shall be made in the prescribed form and verified in the prescribed manner.

[(2) No such claim shall be allowed, unless it is made within the period specified hereunder, namely:-

(a) ...

(b) ...

(c) Where the claim is in respect of income which is assessable for any other assessment year, [one] year from the last day of such assessment year;]”

Section 240- Refund on appeal, etc.

“Where, as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the Assessing Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf.

Provided that where, by the order aforesaid,--

(a) an assessment is set aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment ;

(b) the assessment is annulled, the refund shall become due only of the amount, if any of the tax paid in excess of the tax chargeable on the total income returned by the assessee.”

17. As per Section 237 of the 1961 Act, an assessee is entitled to refund if the tax paid by him or treated to have been paid by him or on his behalf for the assessment year, exceeds the amount chargeable under the 1961 Act for a particular assessment year. Claim for refund as per Section 239(1) and 239 (2)(c), has to be made in the prescribed form and verified in the proper manner within one year from the last date of the relevant assessment year. Rule 41 of the Income Tax Rules, 1962 (Rules, for short) is also relevant. As per the aforesaid Rule, claim for refund is to be accompanied by a return in the prescribed form and in case a person makes a claim for refund that consists of dividend from any other income on which tax has been deducted at source, the claim is required to be accompanied by certificate of TDS.

The said provisions for refund have been liberally interpreted in favour of the assessee and hyper-technical grounds which hinder the right of the assessee to get refund have not been encouraged. When there has been substantial compliance of Sections 237 and 239 of the 1961 Act but there is a procedural lapse, for non-compliance, the refund should not be denied.

18. Section 240 of the 1961 Act provides that where, as a result of any order passed in appeal or other proceedings under the Act, refund of any amount becomes due to any assessee, the assessing officer shall refund the amount to the assessee without his having made any claim in that behalf. Interpreting the expression "other proceedings" in Section 240 of the 1961 Act it has been held in *Atmaram J. Haithsala Vs. Smt. S. Sarup, ITO* (1994) 209 ITR 456 as under;-

"The phrase "other proceedings" used under section 240 is of wide amplitude and would cover any order passed in proceedings other than an appeal under the Income-tax Act. Therefore, the phrase "orders passed in other proceedings under the Income-tax Act" would include orders passed under section 154 (rectification proceedings), orders passed by the High Court or the Supreme Court under section 260 (in reference) and orders passed by the Commissioner of Income-tax in revision applications under section 263 or 264 or on an application under section 273A of the Act. In this view of the matter, in our view, there is no reason to restrict the meaning of the phrase "other proceedings" under the Income tax Act used in section 240 to only some orders by which refund of excess tax or penalty is granted and

not to cover orders passed under section 273A of the Act. Sub-section (1A) of section 244 also, inter alia, provides that where the whole or any part of the refund referred to in sub-section (1) is due to the assessee in pursuance of any order of assessment or penalty and such amount or any part thereof having been found in other proceedings under this Act to be in excess of the amount which such assessee is liable to pay as penalty, then the Government is required to pay to such assessee simple interest as specified therein. In this view of the matter, there is no reason to hold that in case where penalty is waived or reduced under section 273A of the Act, the assessee is not entitled to have the said amount with interest as provided under section 244(1A) of the Act.

The Allahabad High Court in the case of Raj Kishore Prasad v. ITO [1991] 188 ITR 765, observed that the words "other proceedings under the Act" used under section 240, are wide enough to include proceedings or orders passed under section 263 of the Act giving rise to the claim of an assessee for refund. The court negatived the contention of the Revenue for restricting the meaning and scope of the phrase "other proceedings" only to references made under the Act."

(See also *S.R.Koshti versus Commissioner of Income Tax*

(2005) 276 ITR 165 mentioned below)

19. In view of the statutory provisions the issue raised is whether the petitioner assessee had made a claim for refund or the refund is payable under the 1961 Act.

20. Photocopy of the acknowledgment issued by the Department at the time of filing of return is available on our file. Acknowledgment

shows that there was a specific column i.e. column No. 5, in which the assessee was required to show total tax deducted and collected at source. Against the said column, the figure written is NIL. A perusal of the acknowledgment of return also shows that no specific claim for refund was mentioned. The column has been left blank. In the column relating to number of documents attached regarding pre-paid taxes etc., no detail has been given.

21. The original file of the department was called and has been produced before us. We have examined the original file. The Income Tax form for the said year consisted of 10 pages. The original return available on record consists of the first 4 pages and pages 9 and 10. Pages 5 to 8 are not available on the record. It is obvious that these have been removed. However, at page 3 of the return, income of Rs.20,83,125/- has been declared as dividend from Asian Consolidated Industries Limited. Page No. 10 of the return available on record, shows that the assessee had filed statement of assessable income, statutory audit report, Profit & Loss Account, Balance-sheet, annexures to the Balance-sheet, tax audit report and depreciation. The statement of assessable income and the audited Balance Sheet is available on record. The statement of assessable income available on record shows that TDS on dividend as per Form No. 16A enclosed amounting to

Rs.5,73,038/- is refundable. Original TDS certificate issued by the Asian Consolidated Industries Limited dated 14th July, 1993 is available on record at page no. 21. The said TDS certificate relates to equity dividend for the year 1991-92. The gross dividend declared in the accounts is Rs.20,83,125/-. The amount of Rs.2,81,479/- has been paid as interest and an amount of Rs.5,73,038/- has been deducted towards TDS and accordingly net payment of Rs.17,91,566/- has been made. It is noticed from the audited accounts that this amount of Rs.2,81,479/- towards interest has been shown as interest received.

22. The returned income as declared was accepted. The question arises whether or not the assessee had asked for refund or the assessed income entitles the petitioner to refund of TDS of Rs.5,73,034/-.

23. The contention of the Revenue is that only the return form and the not the annexures attached are relevant to decide whether the assessee is entitled to refund or not. Thus, if the assessee has not claimed refund in the return form itself, then the assessee is not entitled to refund. The aforesaid submission cannot be accepted in the present case. We are concerned with assessment year 1994-95 and the relevant provisions of the 1961 Act applicable in the said year. An assessee was required and mandated by Section 139(9) of the 1961 Act to file specified annexures and documents with the return of income. Unless

the specified documents were furnished, the return of income was regarded as defective. Section 139(9) of the 1961 Act during the relevant period reads as under:-

“Section 139. Return of income

(9) Where the Assessing Officer considers that the return of income furnished by the assessee is defective, he may intimate the defect to the assessee and give him an opportunity to rectify the defect within a period of fifteen days from the date of such intimation or within such further period which, on an application made in this behalf, the Assessing Officer may, in his discretion, allow ; and if the defect is not rectified within the said period of fifteen days or, as the case may be, the further period so allowed, then, notwithstanding anything contained in any other provision of this Act, the return shall be treated as an invalid return and the provisions of this Act shall apply as if the assessee had failed to furnish the return:

Provided that where the assessee rectifies the defect after the expiry of the said period of fifteen days or the further period allowed, but before the assessment is made, the Assessing Officer may condone the delay and treat the return as a valid return.

Explanation.--For the purposes of this subsection, a return of income shall be regarded as defective unless all the following conditions are fulfilled, namely:--

(a) the annexures, statements and columns in the return of income relating to computation of income chargeable under each head of income, computation of gross total

income and total income have been duly filled in ;

(b) the return is accompanied by a statement showing the computation of the tax payable on the basis of the return ;

(bb) the return is accompanied by the report of the audit obtained under section 44AB ;

(c) the return is accompanied by proof of--

(i) the tax, if any, claimed to have been deducted at source and the advance tax and tax on self-assessment, if any, claimed to have been paid ;

(ii) the amount of compulsory deposit, if any, claimed to have been made under the Compulsory Deposit Scheme (Income-tax Payers) Act, 1974 (38 of 1974) ;

(d) where regular books of account are maintained by the assessee, the return is accompanied by copies of--

(i) manufacturing account, trading account, profit and loss account or, as the case may be, income and expenditure account or any other similar account and balance-sheet ;

(ii) in the case of a proprietary business or profession, the personal account of the proprietor ; in the case of a firm, association of persons or body of individuals, personal accounts of the partners or members ; and in the case of a partner or member of a firm, association of persons or body of individuals, also his personal account in the firm, association of persons or body of individuals ;

(e) where the accounts of the assessee have been audited, the return is accompanied by copies of the audited profit and loss account and balance-sheet and the auditor's report and, where an audit of cost accounts of the assessee has been conducted, under section 233B of the Companies Act, 1956 (1 of 1956), also the report under that section ;

(f) where regular books of account are not maintained by the assessee, the return is accompanied by a statement indicating the amounts of turnover or, as the case may be, gross receipts, gross profits, expenses and net profit of the business or profession and the basis on which such amounts have been computed, and also disclosing the amounts of total sundry debtors, sundry creditors, stock-in-trade and cash balance as at the end of the previous year.”

24. The explanation clause (b) specifically stipulated that the return must be accompanied by a computation of tax payable on the basis of return. Clause (c) further stipulated that the return must be accompanied by proof of TDS, advanced tax and self assessment tax. A return of income could be treated as defective unless these documents were enclosed. The assessing officer was required to intimate the defect and give an opportunity to the assessee to rectify the same. The contention of the Revenue, thus, cannot be accepted that the annexures do not form a part and parcel of the return. The documents were a part of the return. As a matter of abundant caution,

we clarify that the statutory provision with regard to return have undergone a change as now in some cases documents along with return are not required to be filed. However, we are not concerned with the present statutory provisions. Once we examine and consider the documents attached to the return, it is apparent that the petitioner had made a claim for refund of Rs. 5,73,034/-.

25. The income tax return as filed consists of 10 pages. Pages 5 to 8 which are the relevant pages pertaining to refund are missing. There is no explanation by the Revenue/respondent why and how they are missing. Although these are pages missing from the income tax return filed by the petitioner, statement of total income, computation of tax payable on the total income and attachment of the original TDS certificate with the original return, have not been denied or disputed by the respondent. This supports the stand of the petitioner. The statement of assessable income on record clearly shows that TDS on dividend amounting to Rs. 5,73,038/- is refundable. The return for the relevant assessment year had been filed by the petitioner well within the time and the contention of the respondent that the petitioner should have filed a revised return in order to claim refund is not satisfactory or correct, in light of the attachments that had been annexed to the return.

26. The documents placed on record show that the petitioner had written to the Deputy Commissioner of Income Tax, New Delhi on 20th October, 1999 stating that it had filed its return of income on 29th November, 1994 for the assessment year 1994-95 declaring a loss of Rs. 4,56,994/-. In the said letter the petitioner had prayed for refund of Rs. 5,73,038/- in respect of TDS and had filed copy of Income Tax return, TDS certificate and a computation of income along with the said letter. Thereafter, the petitioner wrote several letters from 2004 onwards to the respondent and also to the Commissioner of Income Tax, Help Line requesting for the refund and interest in view of provisions of Sections 237 and 239 of the 1961 Act. On 23rd April, 2007, the Revenue had sent a letter to the petitioner asking them to furnish evidence in relation to its initial claim for refund. No question of limitation or delay was raised by the respondent.

27. Plea of the respondent relying upon the doctrine of delay and laches has to be rejected. Apart from the facts noticed above, once it is held that the petitioner had applied for and is entitled to refund, then the delay in making the refund is attributable to the respondent. The respondent rejected the claim for refund only vide order dated 23rd August, 2007 and the petitioner filed the present writ petition in 2008. The petition has remained pending for last 3 years.

28. In *Ram Chand v. Union of India*, (1994) 1 SCC 44, the Supreme Court has observed that if the statutory authority has not performed its duty within a reasonable time, it cannot justify the same by taking the plea that the person who has been deprived of his right has not approached the appropriate forum for relief. It was held:

“16. On behalf of the respondents, it was pointed out that the petitioners have approached this Court only after making of the awards, or when awards were to be made, having waited for more than fourteen years, without invoking the jurisdiction of the High Court under Article 226 or of this Court under Article 32. It is true that this Court has taken note of delay on the part of the petitioners concerned in invoking the jurisdiction of the High Court or of this Court for quashing the land acquisition proceedings on the ground that the proceedings for acquisition of the lands in question have remained pending for more than a decade, in the cases of *Aflatoon v. Lt. Governor of Delhi* and *Ramjas Foundation v. Union of India*. According to us, the question of delay in invoking the writ jurisdiction of the High Court under Article 226 or of this Court under Article 32, has to be considered along with the inaction on the part of the authorities, who had to perform their statutory duties. Can the statutory authority take a plea that although it has not performed its duty within a reasonable time, but it is of no consequence because the person, who has been wronged or deprived of his right, has also not invoked the jurisdiction of the High Court or of this Court for a suitable writ or direction to grant the relief considered appropriate in the circumstances? The authorities are enjoined by the statute concerned to perform their duties within a reasonable time, and as such they are answerable to the Court why such

duties have not been performed by them, which has caused injury to claimants. By not questioning, the validity of the acquisition proceedings for a long time since the declarations were made under Section 6, the relief of quashing the acquisition proceedings has become inappropriate, because in the meantime, the lands notified have been developed and put to public use. The lands are being utilised to provide shelter to thousands and to implement the scheme of a planned city, which is a must in the present set-up. The outweighing public interest has to be given due weight. That is why this Court has been resisting attempts on the part of the landholders, seeking quashing of the acquisition proceedings on ground of delay in completion of such proceedings. But, can the respondents be not directed to compensate the petitioners, who were small cultivators holding lands within the ceiling limit in and around Delhi, for the injury caused to them, not by the provisions of the Act, but because of the non-exercise of the power by the authorities under the Act within a reasonable time?"

29. In the present case the respondent has deprived the petitioner of its money which was refundable as per statute. The question of delay invoking writ jurisdiction has to be considered with a duty cast by the statute on the authority. When a statutory authority does not pass any order and fails to comply with the statutory mandate within reasonable time, they cannot take the defence of laches and delay. Delay in such cases furnishes cause of action and right to the petitioner to approach courts. Of course if the respondent had rejected the refund claim

but the petitioner had kept quiet and thereafter approached the court after considerable delay, different consequence would flow. It was the respondent's statutory duty to act within a reasonable time. State is a virtuous litigant and should meet honest claims (See *Dilbagh Rai Jarry Vs. Union of India* (1974) 3 SCC 554 and *Madras Port Trust Vs. Hymanshu International* (1979) 4 SCC 176). The aforesaid view finds resonance in the *State of U.P. and Ors. Vs. Manohar*, (2005) 2 SCC 126, in the following words:

“5. As a matter of fact, the appellants were unable to produce even a scrap of evidence indicating that the land of the respondent had been taken over or acquired in any manner known to law or that he had ever been paid any compensation in respect of such acquisition. That the land was thereafter constructed upon, is not denied.

6. Having heard the learned counsel for the appellants, we are satisfied that the case projected before the court by the appellants is utterly untenable and not worthy of emanating from any State which professes the least regard to being a welfare State. When we pointed out to the learned counsel that, at this stage at least, the State should be gracious enough to accept its mistake and promptly pay the compensation to the respondent, the State has taken an intractable attitude and persisted in opposing what appears to be a just and reasonable claim of the respondent.

7. Ours is a constitutional democracy and the rights available to the citizens are declared by the Constitution. Although Article 19(1)(f)

was deleted by the Forty-fourth Amendment to the Constitution, Article 300-A has been placed in the Constitution, which reads as follows: “300-A. *Persons not to be deprived of property save by authority of law.*—No person shall be deprived of his property save by authority of law.”

8. This is a case where we find utter lack of legal authority for deprivation of the respondent’s property by the appellants who are State authorities. In our view, this case was an eminently fit one for exercising the writ jurisdiction of the High Court under Article 226 of the Constitution. In our view, the High Court was somewhat liberal in not imposing exemplary costs on the appellants. We would have perhaps followed suit, but for the intransigence displayed before us.”

30. In view of aforesaid the writ petition is to be allowed.

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31. Taksal Theaters Private Limited has filed this petition for refund of wealth tax deposited by them for the assessment year 1999-2000. Claim for refund for the assessment year 2000-01 has been granted and to this extent the prayer in the writ petition is infructuous. Another prayer made in the writ petition is that it should be declared that the properties of the petitioner at Varansi being a theater and commercial complex during the relevant assessment year were exempt from payment of wealth tax.

32. The admitted factual position is that the petitioner had filed the wealth tax return and had deposited Rs.1,49,536/- on self assessment basis, as the wealth tax for the assessment year 1999-2000. In the wealth tax return, the petitioner had declared taxable wealth on the basis of which the self assessment tax was paid. The petitioner in taxable wealth, has included the asset, the cinema hall-cum-commercial complex. In the writ petition, the petitioner has not mentioned the date when the return for the assessment year 1999-2000 was filed. The respondents also have not stated in their counter affidavit the date on which the wealth tax return for the assessment year 1999-2000 was filed. The only document available on record is the challan for deposit of self assessment wealth tax, which is dated 15th November, 1999. It appears that the return was, therefore, filed in November, 1999.

33. It is the accepted case of the parties that the return filed by the petitioner was accepted and the return was not subjected to scrutiny. In these circumstances, the acknowledgment of return is to be regarded as the assessment under Section 16(1) of the 1957 Act.

34. This is clear if we examine Section 16 of the 1957 Act, which for the sake of convenience is reproduced below:-

“16. Assessment.--(1) *Where a return has been made under section 14 or section 15 or in response to a notice under clause (i) of sub-section (4),--

(i) if any tax or interest is found due on the basis of such return, after adjustment of any amount paid by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under section 30 and all the provisions of this Act shall apply accordingly ; and

(ii) if any refund is due on the basis of such return, it shall be granted to the assessee and an intimation to this effect shall be sent to the assessee :

Provided that except as otherwise provided in this sub-section, the acknowledgement of the return shall be deemed to be intimation under this sub-section where either no sum is payable by the assessee or no refund is due to him :

Provided further that no intimation under this sub-section shall be sent after the expiry of two years from the end of the assessment year in which the net wealth was first assessable.

(1A) and (1B) omitted by FA 1999 wef 1-6-1999.

(2) Where a return has been made under section 14 or section 15, or in response to a notice under clause (i) of sub-section (4) of this section, the Assessing Officer shall, if he considers it necessary or expedient to ensure that the assessee has not understated the net wealth or has not under paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend at the office of the Assessing

Officer or to produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return:

Provided that no notice under this sub-section shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished:

(3) On the day specified in the notice issued under sub-section (2) or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by order in writing, assess the net wealth of the assessee and determine the sum payable by him on the basis of such assessment.

(4) For the purposes of making an assessment under this Act, the Assessing Officer may serve, on any person who has made a return under section 14 or section 15 or in whose case the time allowed under sub-section (1) of section 14 for furnishing the return has expired, a notice requiring him, on a date to be specified therein,--

(i) Where such person has not made a return within the time allowed under sub-section (1) of section 14 to furnish a return of his net wealth or the net wealth of any other person in respect of which he is assessable under this Act on the valuation date, in the prescribed form and verified in the prescribed manner, setting forth the particulars of such net wealth and such other particulars as may be prescribed, or

(ii) to produce or cause to be produced such accounts, records or other documents as the Assessing Officer may require.

(5) If any person,--

(a) fails to make the return required under sub-section (1) of section 14 and has not made a return or revised return under section 15, or

(b) fails to comply with all the terms of a notice issued under sub-section (2) or sub-section (4),

the Assessing Officer, after taking into account, all relevant material which he has gathered, shall, after giving such person an opportunity of being heard, estimate the net wealth to the best of his judgment and determine the sum payable by the person on the basis of such assessment:

Provided that such opportunity shall be given by the Assessing Officer by serving a notice calling upon the person to show cause, on a date and time to be specified in the notice, why the assessment should not be completed to the best of his judgment:

Provided further that it shall not be necessary to give such opportunity in a case where a notice under sub-section (4) has been issued prior to the making of the assessment under this sub-section.

(6) Where a regular assessment under sub-section (3) or sub-section (5) is made,--

(a) any tax or interest paid by the assessee under sub-section (1) shall be deemed to have been paid towards such regular assessment ;

(b) if no refund is due on regular assessment or the amount refunded under sub-section (1) exceeds the amount refundable on regular assessment, the whole or the excess amount so refunded shall be deemed to be tax payable by the assessee and the provisions of this Act shall apply accordingly.”

35. Section 16(1) of the 1957 Act stipulated that where a return of wealth was filed, the Assessing Officer would on the basis of such return examine whether after adjustment of the amount paid by way of tax or interest any further amount was payable or refundable and accordingly send an intimation to the assessee. This action was without prejudice to provisions of sub-section 2 to Section 16. The aforesaid sub-section related to cases which were taken up for scrutiny. The proviso to Section 16(2) stipulated that no notice for scrutiny would be served on the assessee after expiry of 12 months from the end of the month in which the return was furnished. With regard to intimation under Section 16(1) also, the second proviso stipulated that no intimation under Section 16(1) shall be sent two years after the end of the assessment year in which the net wealth was assessable. The first proviso stipulated that the acknowledgment of the return shall be deemed to be intimation under this sub-section where no sum was payable by the assessee or no refund was due to him. It, therefore, follows that if no intimation was received after expiry of two years from the end of the assessment year, then acknowledgment of the return issued by the Revenue was to be treated as the intimation that no sum was payable by the assessee and no refund was due to him.

36. The sum effect of Section 16(1) and (2) is that in case no notice under sub-section 2 to Section 16 was issued and no intimation for refund or payment of tax was issued within two years, the acknowledgment issued at the time of filing of the return by the Revenue is treated as the intimation. Consequently net wealth as declared is the assessed taxable wealth. Above discussion elucidates that the return of wealth tax filed by the petitioner-assessee in November, 1999 was accepted and has become an order of intimation under Section 16(1) of the 1957 Act. The said intimation has become final and binding and cannot be reopened under Section 16(2) as the period for issue of notice under the said Section has expired. The result is that the return filed by the petitioner-assessee declaring the net wealth has attained finality.

37. It may be noted here that the petitioner had the right to file a revision under Section 25 of the 1957 Act. However, the period for filing of the revision has expired and the petitioner did not take steps to invoke the said power.

38. The provision for refund of wealth tax is found in Chapter VII A of the Act. The said Chapter consists of only one section, Section 34A and the relevant sub-sections are 1 and 2, which read as under:-

“34A. Refunds.--(1) Where, as a result of any order passed in appeal or other proceeding (including a rectification proceeding) under this Act, refund of any amount becomes due to the assessee, the Assessing Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf.

Provided that where, by the order aforesaid,--

(a) an assessment is set aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment ;

(b) the assessment is annulled, the refund shall become due only of the amount, if any, of the tax paid in excess of the tax chargeable on the net wealth returned by the assessee.

(2) Where refund of any amount becomes due to the assessee as a result of and order under this Act or under the provisions of sub-section (1) of section 16 after a return has been made under section 14 or section 15 or in response to a notice under clause (i) of sub-section (4) of section 16 and the Assessing Officer is of the opinion, having regard to the fact that,--

(i) a notice has been issued, or is likely to be issued, under sub-section (2) of section 16 in respect of the said return ; or

(ii) the order is the subject-matter of an appeal or further proceeding ; or

(iii) any other proceeding under this Act is pending,

that the grant of the refund is likely to adversely affect the revenue, the Assessing Officer

may, with the previous approval of the Chief Commissioner or Commissioner, withhold the refund till such time as the Chief Commissioner or Commissioner may determine.”

39. Under sub-section 1, the Assessing Officer was required to make refund of tax paid by the assessee without any claim or application on behalf of the assessee if the same becomes due as a result of an order passed in an appeal or any other proceedings. Sub-section 2 makes it clear that a refund may become due even when an order was passed or intimation was made under sub-section 1 to Section 16 of the 1957 Act. As discussed above the acknowledgment of the return constitutes intimation but as per the said intimation, no amount is refundable. The order of intimation under Section 16(1) has attained finality and has not been challenged or questioned in a revision. Return of wealth has also not been revised. In terms of Section 34A of the 1957 Act, the tax paid by the petitioner is not to be refunded and the tax deposited is payable towards the wealth declared which has become the wealth assessed.

40. Faced with the aforesaid situation, learned counsel for the petitioner submitted that the intimation under Section 16(1) of the 1957 Act is a nullity as the assets declared by the petitioner and included in the net wealth are excluded and are not assessable to wealth tax. The

aforesaid contention has no merit. The Assessing Officer has jurisdiction to pass an order of assessment or accept a return. An acknowledgment of the return may constitute intimation. An order or intimation may be incorrect and contrary to the provisions of the Act. Something which is exempt and not assessable to tax may have been included and treated as a part of net the wealth, but this will not make the order or the intimation void ab initio or nullity in law. The order itself may be susceptible to challenge but the said order or intimation cannot be ignored and regarded as a waste paper. So long as it exists, it operates and the consequences flow. Any other interpretation will lead to unacceptable consequences. There will be cases or writ petitions by the assessee, or even by the Revenue if a 'wrong' order is passed by the tribunal, based on the premise that the order or intimation on record being contrary to the provisions of the Act are null and void and, therefore, either tax should be refunded or tax should be paid. This is not acceptable. The Act itself is a complete code that deals with the question of payment of tax and refund of tax. It is not as if the petitioner was without remedy. The petitioner had remedy to either file a revised return or file a revision. The petitioner did not avail of the said remedies and the limitation period has now expired. The petitioner

cannot get over the period of limitation by this method. Whether or not an asset was eligible to wealth tax is determined under the 1957 Act.

41. Reliance placed by the petitioner on *Sandvik Asia Limited versus Commission of Income Tax-I, Pune and Others*, (2006) 280 ITR 643 (SC) is misconceived. In the said case, the assessee had claimed interest on the amount refundable. The amounts refundable represented interest which was paid by the assessee to the department under the 1961 Act. It was noticed that there was delay from 12 years to 17 years in payment of the refund, i.e., interest paid by the assessee to the department. It was held that as per the relevant provisions and in the facts, interest was payable on the amount refundable even when the amount paid by the assessee was towards the interest element. In the present case, the intimation under Section 16(1) of the 1957 Act has attained finality. No amount is refundable as per the said intimation.

42. Decision of the Delhi High Court in *Vijay Kumar Bhati versus Commissioner of Income Tax and Another*, (1994) 205 ITR 110 (Delhi) deals with Section 241 of the 1961 Act and the power of the Assessing Officer to set off of refunds under section 241 of the 1961 Act. In the said case, refunds were due but the Assessing Officer without intimation had passed an order under Section 241 of the 1961

Act which was held to be bad. Accordingly, directions were issued by the High Court.

43. In another judgment of the Delhi High Court in ***Glaxo Smith Kline Asia Private Limited versus Commissioner of Income Tax and Others***, 2007 (94) DRJ 681, Section 245 of the 1961 Act was invoked and in that context observations were made with regard to power to set off a refund against an outstanding demand. It was held that the restrictions on power under Section 241, were equally applicable to Section 245 and the section should not be mechanically invoked. Observations in the said decision are of no relevance.

44. In ***R. Seshammal versus Income Tax Officer and Another***, (1999) 237 ITR 185 (Mad), the assessee had paid advance tax amounting to Rs.43,808/- but had not filed any return of income or applied for refund in time under Section 237 of the 1961 Act. However, Notice under Section 148 of the 1961 Act was issued and the assessee had filed return of income but the proceedings were closed. Thus the assessee had claimed refund. The assessee had filed a petition under Section 119(2) of the 1961 Act, which was rejected. In the said decision, relevant provisions of the 1961, Act, have not been considered and interpreted. It will not be appropriate to apply the said decision to the case of the petitioner in the present writ petition as in

the present case, return was filed and the wealth declared has been accepted. The acknowledgment/return constitutes intimation, which has become final.

45. Decision of a Division Bench of Gujarat High Court in ***S.R. Koshti vs. Commissioner of Income-tax***, (2005) 276 ITR 165 (Guj.), is distinguishable. In the said case, return was filed and was processed. Subsequently, the assessee revised his return to claim deduction under Section 10(10C) but the same was beyond limitation. The Assessing Officer had passed a rectification order under Section 154 of 1961 Act, and had allowed the said deduction. But this order was reversed by the Commissioner exercising power under Section 263 of the 1961 Act. The assessee filed a revision petition under Section 264 of the 1961 Act which was dismissed. The High Court in the writ proceedings referred the two orders under Section 263 and 264 of the 1961 Act. It was held that the Commissioner had the power to revise the assessment order under Section 264, even if the revised return was not filed, once the assessee was able to show that he was over assessed.

46. Decision of Calcutta High Court in ***Mayank Poddar (HUF) vs. Wealth Tax Officer***, (2003) 262 ITR 633 (Cal.), is on an appeal filed under the provisions of the 1957 Act. The same is not the position here.

Conclusion

47. Accordingly, writ of mandamus is issued directing the respondent to process the claim on merits for refund to the petitioner- Indglonal Investment Finance Ltd. Rs 5,73,034/- along with the interest as per the 1961 Act within eight weeks from the date of copy of this order is received. W.P.(C) No 15639 of 2006 filed by M/s Taksal Theaters Private Limited is however, dismissed. In the facts of the cases there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(DIPAK MISRA)
CHIEF JUSTICE

JUNE 3rd, 2011
KKB/VKR