L. Dwarka Dass vs Income-Tax Officer, Special Circle "A" ... on 21 November, 1955

Equivalent citations: [1956]29ITR60(ALL)

JUDGMENT

CHATURVEDI, J. - This is a petition under article 226 of the Constitution.

The petitioner was a partner of the firm R. B. Lachhman Das Mohan Lal & Sons. The firm had declared its principal place of business as Lahore, though it appears that its main business was of manufacture and sale of sugar and its bye-products in the district of Lucknow, U.P. The petitioner and other partners of the firm deposited certain amounts as advance tax under section 18A of the Income-tax Act in Lahore before March 31, 1947, for the assessment years 1946-47 and 1947-48. As a result of partition of the country, two Dominions were formed with effect from August 15, 1947. It is not known whether assessments were made at Lahore for the assessment years 1946-47 and 1947-48, but it is not denied that assessment with respect to some income for these years were made at Lucknow. After this, an assessment was made for the year 1948-49 and the amount assessed was Rs. 2,16,994-7-0 on all the partners of the firm. It appears from a letter of the Income-tax Officer, Lucknow, dated February 5, 1952 (marked as annexure I to the affidavit, filed along with the petition) that the petitioner had claimed an adjustment of the excess advance payments said to have been made by him in Lahore under section 18A of the Income-tax Act, in the assessment made for the year 1948-49. In this letter the Income-tax Officer in effect says that the matter regarding the adjustment of surplus money for the year 1946-47 and 1947-48 had been referred to the higher authorities and on getting instructions, credit for these amounts was to be allowed. If the higher authorities did not allow credit, a demand for the balance would then be sent to the petitioner. This letter was followed by another letter of the Income-tax Officer, dated June 24, 1952, in which it was stated that the liability for adjustment of advance payment of tax under section 18A rested with the Dominion which was in possession of the assessment record. This record had not been transferred from Lahore to Lucknow and it was, therefore, not possible to allow the adjustment of the excess amount paid under section 18A in Lahore. The petitioner was asked to pay the entire demand for which challan were enclosed. The petitioner sent a representation tot he Secretary, Central Board of Revenue, Government of India, New Delhi, on the July 16, 1952, claiming adjustment of the excess amount paid in Lahore. Another representation appears to have been sent to the Income-tax Officer tot he same effect in November, 1954, as appears from the reply sent by that Officer on the November 26, 1954 (annexure 4). In this letter the Income-tax Officer says :

> "This is to inform you that the decision of the Government in respect of adjusting the payments made under section 18A in Pakistan has not yet been arrived at. It is therefore that neither recovery of the demands for the relevant assessment years has been pursued nor can the refunds be granted to you. You may please note that the excess payments made by you for the assessment years 1946-47 and 1947-48 cannot be accounted for against the demands outstanding for the assessment year 1948-49."

It was said that the demand for 1948-49 could not be kept pending and the petitioner was requested to deposit the entire amount assessed for the year forthwith, failing which provisions of section 46 of the Income-tax Act were to be invoked. The petitioner was further required to deposit the amount assessed for the year 1949-50. This was followed by another letter demanding payment, which is dated February 5, 1955. The present petition was filed on the February 21, 1955, and the main prayers contained in the petition are that a writ in the nature of certiorari be issued quashing the orders of the Income-tax Officer, Kanpur, dated November 26, 1954, and February 5, 1955, and that a writ in the nature of mandamus be issued commanding the respondent to set off, from assessments of the years 1948-49 and 1949-50, the amounts paid in excess under section 18A for the years 1946-47 and 1947-48 in Lahore.

Two counter-affidavits have been filed on behalf of the respondent. In the affidavit filed on the October 31, 1955, it is stated that the assessment file of the petitioners firm has not been received from Pakistan after August 15, 1947. In the second counter-affidavit this fact is sought to be proved by copies of two letters said to have been sent by Mullik Raj one of the partners of the petitioner on June 7, 1948, and February 27, 1950. A further defence has been taken to the effect that under section 9 of the Indian Independence Act, the Governor-General issued certain Orders, including Orders known as the Indian Independence (Partition Council) Order, 1947, and the Arbitral Tribunal Order, 1947. Reference is also made to the report of the Expert Committee and to the acceptance of this report by the partition Committee. The result of these, according to the respondent, is that the Dominion of Indian was not liable for the adjustment of advance payment of income-tax in respect of payment made in the territory, which now form part of Pakistan.

A rejoinder affidavit has been filed on behalf of the petition saying that he was not aware of any assessment having been made as to his income in Lahore for the assessment years 1946-47 and 1947-48 nor was any application made to Pakistan Officers by the petitioner for refund of the amounts he had paid under section 18A for the above years.

The question, that arises for consideration id this petition, is whether the petition is entitled to have the amounts set off in India from the amount assessed for the year 1948-49, the amount that he paid in Lahore for the assessment years 1946-47 and 1947-48. The learned counsel for the petition has urged two grounds in support of his contention that the set-off should be allowed in India. The first ground is that the petitioner has made advance payments under section 18A of the Income-tax Act, and this section read with section 48 provides for a refund of excess amount paid, and as they payment was made under the section, the petitioner is entitled to a refund. The contention is that this Act was in force in Lahore at the time that the payment were made and it is still in force in India, and, the petitioner having made the payments under section 18A, he is entitled to have a refund of the excess amounts paid by him; and that the petitioner being entitled to the refund, he is also entitled to ask the Income-tax Officer to adjust the amount in the tax assessed for the subsequent years.

The other argument is that under article 9 of the Indian Independence (Rights, Property and Liabilities) Order, 1947, issued under section 9 of the Indian Independence Act, the liability for the repayment of this amount was imposed on the Dominion Government of India. The Dominion

Government being liable to refund the amount, article 294 of the Constitution makes the Union Government now subject to the same liability. The learned counsel for the respondent controverts both the above contentions by saying that the amounts having been paid in Lahore, which is now a part of Pakistan, the Union Government cannot be made liable for the refund of the amounts, because the sums were paid before the Partition, and the Indian Income-tax Act would not govern such a case. Concerning the second ground, he says that a liability like this does not come within the words used in article 9 of the Indian Independence (Rights, Property and Liabilities) Order, 1947, because the payment cannot be said to be a "loan", nor a "guarantee" nor a "financial obligation" within the meaning of the words as used in that article. He has further contended that the Government of the Indian Dominion was liable for the adjustment of the amounts, paid prior to Partition in the territories which now fall in Pakistan, concerning only those cases whose files have been transferred from Pakistan to India. For this assertion, the learned counsel relied on paragraph No. 9(f) of the Report of Export Committee No. III(i), dated August 1, 1947, published at page 10 of Partition Proceedings, Vol. III, a publication of 1948 by the Manager, Government of India Press, New Delhi. This clause deal with refund or adjustment of advance payments of income-tax, and it says that the liability will be on the Government to whom the assessment file is transferred. But the Muslim members made their acceptance of the agreement conditional on the corresponding deposits being transferred to Pakistan. The argument of the learned counsel is that the file of this case not having been transferred by Pakistan authorities, the Dominion of India was not liable for the refund of the excess payments made under section 18A of the Income-tax Act. The learned counsel further contended that the petitioner has not filed the assessment order passed in Pakistan with respect to the assessment years 1946-47 and 1947-48, and it was not known what excess payments had actually been made by the petitioner in those years. The learned counsel further urged that the claim, if it is treated to be a claim for refund, is barred by time. I may also mention the preliminary objection taken to the maintainability of the petition, which is to the effect that the order refusing the refund is appealable and, the petitioner having failed to file an appeal, this petition should not be entertained.

Coming to the first contention of the learned counsel for the petitioner that the petitioner having made an excess payment under section 18A of the Act, he is entitled to a refund under section 48 and to a consequent set-off from the assessments for the subsequent years under section 49E, he argues that the Act has made no exception in the liability of the Government to make a refund concerning those payments which were made in the territories which now constitute the Dominion of Pakistan. I think there is force in this contention. The excess payments were made in Lahore, which was previously the principal place of the petitioners business and, under section 64 of the Income-tax Act, the petitioner was assessable by the Income-tax Officer of Lahore. At Lahore the petitioner made payments under section 18A and he was compelled to do so because of the provisions of the Act, otherwise he would have lain himself open to a liability for payment of penalty. The amounts must have been credited immediately to the account of the Government of India. In view of the conditions that prevailed in Lahore immediately before and after August 15, 1947, the petitioners business must have suffered a set back and he has admittedly now made Lucknow as his principal place of business. The payment was made under section 18A(1) of the Act at the time when it was applicable to the area where the payment was made and the petitioner having made payments under section 18A to the Government of India, the provisions of section 48

are attracted to the facts of the case. The petitioner satisfied the Income-tax Officer at Lucknow that the amount that he paid under section 18A exceeded the amount with which he was chargeable under the Income-tax Act for the years 1946-47 and 1947-48, and the Income-tax Officer referred the matter to higher authorities.

The petitioners case clearly comes under the wording of that section and he is thus entitled to a refund of the excess payments made for the years 1946-47 and 1947-48. According to section 49E, if a refund is found to be due to any person, the Income-tax Officer, in lieu of payment of the amount, may set off the amount to be refunded or any part of that amount, against the tax remaining payable by the person to whom the refund is due. The Income-tax Officer thus has the power either to refund the amount or to set it off against the income-tax due for the subsequent years and the petitioner requested him to adopt this latter course of setting off the excess paid under section 18A. There cannot be much doubt that, if the Income-tax Officer had decided to make the refund, he would have preferred to follow the course of setting off the excess from the amount due for the subsequent years under section 49E of the Act. But he refused to do so as, according to him, th e payment having been made in Lahore, the petitioner was not entitl ed to claim a refund of that amount from the assessments made in Lucknow.

The learned counsel for the respondent argued that the discretion f or setting off the amount rests with the Income-tax Officer and the petitioner cannot compel him to do so. According to him, the pe titioner could have prayed in his petition that he should be allowed to have the refund of the amount, but that is not the prayer and the prayer is that the amount should be set off from the amount due on account of income-tax for the subsequent years. This relief the petitioner is not entitled to claim, because the op tion rests with the Income-tax Officer and not with the petitioner. The wording of this section favours the respondents contention, because the word used is "may" and not "shall", but I do not think it is necessary to take such a technical view of the pleadings and, in a case where the relief is one of set-off, it is possible, in appropriate cases, to direct the refund of the amount if the respondent objects to the set-off being granted. The respondent would obviously prefer to set off the amount rather than refund, if it is held that the petitioner is entitled to a refund of the amount. The relief claimed is more favourable to the respondent than the one which might have been claimed against him, and I think this lesser relief can be granted on the pleadings as they stand.

Apart from this, there is a well known principle of law that if a power has been conferred by a statute on a public officer, which is beneficial to the citizen, then that power is to be construed as a duty imposed upon the public officer. In the case of Alcock Ashdown & Co. Ltd. v. The Chief Revenue Authority, Bombay, their Lo rdships have laid down the rule in the following words :-

> "But when a capacity or power is given to a public authority, there may be circumstances which couple with the power a duty to exercise it."

This was a case under the Income-tax Act and section 51 of that Act authorised the Chief Revenue Authority to draw up a statement of the case and refer it to the High Court. Their Lordships held that, in the circumstances of the case, a power like this includes a duty to exercise the power.

A similar question came up for consideration before their Lordships of the Supreme Court in the case of The Chief Controlling Revenue Authority v. The Maharashtra Sugar Mills Co. Ltd. This was a case under the Stamp Act and under section 57 of that Act the Chief Controlling Revenue Authority has been given power to refer a case to the High Court for its opinion. This power the Supreme Court held was coupled with the duty cast upon the officer, as a public officer, to do the right thing. In the case before their Lordships important and intricate questions of law arose with respect to the construction of a document and their Lordships held that, under the circumstances, it was the duty of the Revenue Authority, as a public servant, to make the reference. In case the Authority omitted to perform that duty, it was within the power of the Court to direct the Authority to discharge it and make a reference to the High Court.

The principle laid down in the cases covers the present case and it is the duty of the Income-tax Officer to allow a set-off to the assessee, if he claims it and it is proved that he is entitled to a refund. It was argued on behalf of the respondent that the power contained in section 49E is for the behalf of the Department and not for the benefit of the assessee, and the assessee, therefore, cannot compel the Department to exercise the power. I think that it is to the convenience and benefit of both the parties that, where a refund is due, a set-off may be claimed and allowed, because it would avoid the necessity of first taking the money from the Department and then again paying it back to the Department.

I may also dispose of here the contention of the learned counsel for the respondent that the claim for a refund under section 48 is barred by time. Section 50 of the Act imposes a limitation of four years for claiming a refund and this period of four years is to start from the last day of the financial year commencing next after the expiry of the previous year in which the income arose. The period of four years is for making a claim for the refund and, in the instant case, it appears from a letter of the respondent dated February 5, 1952, that a claim for setting off the amount of excess payments made under section 18A had been made previously by the petitioner with respect to the payments for the years 1946-47 and 1947-48 (vide annexure 1). The Income-tax Officer told the petitioner by this letter that he had referred the matter regarding this adjustment to the higher authorities and he would act according to the instructions received from them. Even with respect to payments made for the year 1946-47, the time of four years commenced on the last day of the next financial year, which would be March 31, 1948. The letter of the Income-tax Officer, dated February 5, 1952, shows that the claim had been made before that date and was thus within the period allowed by section 50 of the Act.

The other point urged by the learned counsel for the petitioner is that it was the Government of the Dominion of India, which had been made liable for the payment of such amount under the Indian Independence (Rights, Property and Liabilities) Order, 1947. This order was issued by G.G.O. No. 18, dated August 14, 1947, under section 9 of the Indian Independence Act of 1947. Article 9, clause (a), of this Order is the relevant clause and read as a whole runs as follows :

> "All liabilities in respect of such loans, guarantees and other financial obligations of the Governor-General-in-Council or of a Province as are outstanding immediately before the appointed day shall as from that day -

> (a) in the case of liabilities of the Governor-General-in-Council, be liabilities of the Dominion of India."

Other clauses (b), (c) and (d) are not relevant. The argument of the learned counsel for the petitioner is that a liability to make a refund for excess payments of the income-tax is a liability which is in the nature of a "loan" and is covered by the expression "financial obligations". The learned counsel for the respondent argued that it is not covered by that expression, which is meant to cover only cases of obligations to the States by the Dominion.

The meaning of this expression came up for consideration before the Supreme Court in the case of The State of West Bengal v. Sheikh Sirajuddin Batley. The question in that case was whether the liability to pay rent under a lease came within the expression "financial obligations", as used in article 9 of the Order, mentioned above. Their Lordships held that, if the expression was taken in its ordinary meaning, it would cover all monetary obligations of every nature, but this construction renders the provisions of article 8 nugatory, which specifies the nature of contracts for which the liability will be of the Dominion of India. The case was taken to be covered by article 8 and it was held to be outside the purview of the expression "financial obligations", used in article 9. Their Lordships held that the expression should be construed ejusdem generis and, so construed, it only refers to obligations which are obligations in the nature of "loans" and "guarantees" incurred or undertaken by the Government. Reference was then made to three other cases, two of which were decided by the High Court at Calcutta and one by the High Court at Punjab. Their Lordships then observed (at page 383) :

> "In that context financial obligations would mean obligations arising out of arrangement or agreements relating to State finance such as distribution of revenue, the obligation to grant financial assistance by the Union to any State or the obligation of a State to make contributions and the like. It is, however, not necessary or desirable to attempt an exhaustive definition of the expression financial obligations. The Court will have to consider in each ca se whether a particular obligation which may be the subject-matter of discussion falls within the expression financial obligations within the meaning of article 9. Whatever liabilities may or may not come within that expression we are clearly of opinion in agreement with the High Court that the liability to pay rent under a lease certainly does not come within that expression."

The decision thus only is that the liability to pay rent under a lease does not come within the expression. Some obligations have been mentioned like agreements relating to State finance and the grant of financial assistance by the Union to any State, but their Lordships did not think it desirable to give any exhaustive definition and were of the opinion that each case had to be considered on its own merits.

In the case of an excess payment made under section 18A of the Income-tax Act, the position is that under sub-section (5) the Central Government is required to pay interest at 2 per cent. from the date of the payment to the date of the provisional or regular assessment under section 23, as the case

may be. Similarly where an underpayment has been made by an assessee, the assessee is required to pay interest at 6 per cent. under sub-section (6). The payment was not to be made as a result of any assessment of the income-tax for the year in which the payment is made, and the payment is an advance payment which is to be allowed credit for in the regular assessment, and interest is payable by the assessee or the Government according to the deposit being inadequate or adequate. Under the circumstances, it was argued that this payment is in the nature of a "loan" and interpreting the expression "financial obligations" ejusdem generis it would include a payment of this kind. The payment really is an advance payment of income-tax with an obligation to pay interest on the amount paid in advance. It is really not a loan but a payment to be made for the liability expected to be incurred on account of income-tax, in future. But I think the nature of this payment is that of a loan wh ich is to be adjusted in the regular assessment and interest is to be paid by the assessee or the Government, as the case may be. The payment also concerns the revenue of the Central Government and I think that it is included in the expression "financial obligations", as used in article 9 of the Order. The liability for the payment of this advance amount devolved after the Partition on the Dominion of India.

The next question is whether it devolved after that on the Union of India. Reference in this connection may be made to article 294(b) of the Constitution, which says that all rights, liabilities and obligations of the Government of the Dominion of India, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India subject to any adjustment made by reason of the creation, before the commencement of this Constitution, of the Dominion of Pakistan. The liabilities thus of the Government of the Dominion of India have been transferred by this article to the Government of the Union of India subject to any adjustments made by reason of the creation of the Dominion of Pakistan. If no such adjustments have been made, the liability is of the Government of the Union of India and I have come to the conclusion, as I shall discuss presently, that no adjustment has been made in this matter by reaso n of the creation of the Dominion of Pakistan. In this view of the matter, the petitioner is entitled to a refund of the advance payme nt made by him on this ground as well.

The learned counsel for the respondent argued that adjustment had been made as a result of which the Government of India was not made liable for the discharge of this obligation. He referred in th is connection to the Indian Independence (Income-tax Proceedings) Order, 1947, issued under G.G.O. No. 12, dated August 12, 1947. Article 3 of this Order provides :

> "Where before the appointed day the jurisdiction of a tax officer under the relevant Tax Act has been altered in connection with the setting up of the Dominions of India and Pakistan, or where after the appointed day the case of an assessee is transferred from one Dominion to the other by agreement between the Central Boards of Re venue of the Dominions, and by reason of such alteration of jurisdiction or transfer the case of an assessee falls to be dealt with on or after the appointed day by the tax authorities of India, or as the case may be of Pakistan, all proceedings relating to the case pending before any tax authority of Pakistan, or as the case may be of India, shall be transferred to the corresponding tax authority of India, or as the case may be of Pakistan, and shall be disposed of by the last mentioned tax authority in

accordance with law."

The first part of this article refers to a case where the jurisdiction of a Tax Officer has been altered in connection with the setting up of the two Dominions, and this is obviously not the case here, nor has the learned counsel for the respondent relied upon this part of the article. He has urged that the case of the petitioner was not transferred from the Dominion of Pakistan to the Dominion of India and there was no agreement with respect to it. The two counter-affidavits filed by the respondent also aver that no such transfer has taken place. The argument is that the case not having been transferred, the Dominion of India is not liable for any sum found due to the petitioner, even if he had made any excess payment in Lahore. I do not think the inference drawn by the learned counsel for the respondent is correct. A reading of the article shows that in the two cases provided for in it, all proceedings relating to the case are to be transferred to the Income-tax Authority to whom the case has been transferred. It only confers jurisdiction on a Tax Authority of a different place to deal with the case, if there has been an alteration of jurisdiction of the Tax Authority, as a result of setting up of two Dominions, or if the file of the case has been transferred by an agreement by one Dominion to another. The article does not concern itself with the liabilities for the refund of excess payments. Further, the article is merely an enabling one and it nowhere says what is to happen to those cases in which the files have not been transferred or the jurisdiction has not been altered. The instant case is said to be one where the petitioners file has not been transferred and this article nowhere says what is to happen in such cases. The Income-tax department have taken th e view that the file having not been transferred to them from Lahore, they are not liable to make any refund of the excess payment. I do not think that this article takes away the liability to make a refund, as provided in section 48 of the Income-tax Act or article 9 of the Indian Independence (Rights, Property and Liabilities) Order of 1947.

Reliance was next placed by the learned counsel for the respondent on the report of an agreement arrived at by (Central Revenues) Expert Committee No. III(i), printed at page 3 of Partition Proceedings, Vol. III, Published by the Manager of Publications, New Delhi. In paragraph No. 9 of the report of this Committee, the relevant term of reference has been quoted and it includes the matter of income-tax. Clause (f) of this paragraph, shorn of unnecessary detail, is as follows :-

> "(f) The liability for refund or adjustment of.....advance paym ents of income-tax.....will be on the Government to whom the assessment file is transferred from August 15, 1947, (in the opinion of non-Muslim members), on April 1, 1948 (in the opinion of the Musl im members). Each Government should also take over the liability to refund a fraction of the excess profits tax under section 10 of the Finance Act 1942, in respect of the same assessees. (The Muslim members agree to the above arrangements provided the corresponding deposits are also transferred to Pakistan. They suggest that this may be brought to the notice of the Assets and Liabilities Committee. The non-Muslim members are of the view that this will be done automatically with the division of assets and liabilities)".

At page 20 of the publication it is said that the Partition Council agreed to the recommendations in paragraph No. 9 of the report of the Expert Committee, No. III(i), (Central Revenues). The

argument of the learned counsel is that this Partition Council was set up und er the Indian Independence (Partition Councils) Order, 1947, issued under G.G.O. No. 8, dated August 12, 1947. Article 3 of this Order provides for the setting up of the Partition Council for India and Pakistan, as also certain other Councils. Article 4 deals with the constitution of this Council, and article 7 enumerates its duties. One of the duties of the Council is to consider all questions relating to such of the matters as are mentioned in article 4 of the Arbitral Tribunal Order, 1947, and to attempt to reach an agreed decision on all such questions. In the event of the failure to reach an agreed decision, the Partition Council is to make a reference to the Arbitral Tribunal set up by another Order, issued under the Independence Act. The matters which the Arbitral Tribunal is to consider are mentioned in article 4(1), and the first matter i s the division between the Dominions of India and Pakistan, of the assets and liabilities of the Governor-General-in-Council. It is also said here that the Tribunal shall have power to make awards in respect of references made to it by any of the bodies mentioned later. Under clause (2) of article 4, the Partition Council is one of the bodies referred to in clause (1). Clause (3) provides that when the appropriate body, mentioned in clause (2), was unable to re ach an agreed decision in regard to the matters mentioned in clause (1), that body was to make a reference to the Tribunal. Article 5, clause (2), says that when a question has been referred to a Tribunal if the two members of the Tribunal are agreed as to the decision to be given, such decision shall be the decision of the Tribunal and if the two members are not agreed the Chairman shall decide the question and his decision will be the decision of the Tribunal. The decision of the Arbitral Tribunal is to be binding on all concerned.

It is nobodys case that the matter was ever referred to the Arbitral Tribunal and the argument only is that the Partition Council accepted the decision of the Expert Committee and, therefore, it must be held that the decision was of the Partition Council. There are a number of difficulties in accepting this argument. The first difficulty is that a reading of paragraph 9(f) of the Expert Committees Report shows that the Muslim members of that Committee agreed to the arrangement provided the corresponding deposits were also transferred to Pakistan. There is no evidence, nor even any suggestion, that the corresponding deposits were transferred to Pakistan. The agreement of the Muslim members being conditional on this deposit, and the condition not having been fulfilled, it cannot be s aid that the agreement ever came into effect. The very basis of the arguments, therefore, disappears. The second difficulty is that the Expert Committees Report had no binding effect and it was not given under any of the Orders issued under section 9 of the Indian Independence Act. The Report was made on the August 1, 1947, and the orders issued under section 9 of the Indian Independence Act came into force with effect from August 15, 1947. It may be said that it was open to the Partition Council, subsequently constituted under the Partition Councils Order, to accept a report previously made; but it appears from the Partition Councils decision, (printed at page 20), in paragraph No. 3, that decision was itself given before the Partition. According to paragraph No. 3, income-tax due for the period upto and including August 14, 1947, was to be "divided between the two Dominion Governments on the same basis as assets of the present Government of India." The use of the words "present Government of India" shows that the decision of the Partition Council was made at a time before the Partition of India into the two Dominions had come into force. This Partition Council may be different from the one constituted under the Indian Independence Order, mentioned above, and if that is so, the decision of the Partition Council would have no binding force. Assuming, however, it was the decision of the Partition Council of India and Pakistan, constituted

under the relevant Order of the Governor-General, it does not appear that the decision of the Partition Council itself had any binding force on the two Dominions unless the two Dominions entered into an agreement on the point. An example of a binding agreement arrived at between the two Dominions is to be found in the Agreement for Avoidance of Double Taxation in India and Pakistan, issued under Notification No. 28, dated December 10, 1947, (printed in Income-tax Act by Kanga and Palkhivala, Second Edition, Div. 2, page 146). As a result of this agreement, section 49AA was added in the Income-tax Act providing for entering into of such an agreement for the avoidance of double taxation.

The instant case is not a case of double taxation and the agreement has only been mentioned as an instance of a binding agreement arrived at between the two Dominions. No such agreement appears to have been arrived at for the liability to refund income-tax under section 48 of the Income-tax Act. It is doubtful that, even if a binding agreement had been arrived at between the two Dominions, it would have had a binding effect on the citizen as regards his rights and liabilities against his own Government, in the absence of any legislation on the point. But no such agreement having been arrived at, the question need not be considered.

I may now come to the preliminary objection raised by the learned counsel for the respondent that the petitioner should have filed an appeal against the order of the Income-tax Officer refusing to grant a set-off under section 49E of the Income-tax Act. Section 30 is the appeal section and it does not provide for the filing of any appeal against an order passed under section 49E of the Act. But I have held that, in fact, the petitioner was asking for a refund and, in this view of the matter, an appeal would lie against an order passed under section 48, granting or refusing to grant a refund. But an appeal lies against an order of only the Income-tax Officer passed under section 48 and it is difficult to say that, in the instant case, any such order was passed by the Income-tax Officer himself. It appears from his letter, dated February 5, 1952, (annexure 1) that in the first instance he had granted the set-off and demanded payment of the balance only, and this matter he referred to the higher authorities. Subsequently, in his letter dated June 24, 1952, (annexure 2), the Income-tax Officer says that the liability for adjustment of advance payment of tax under section 18A rests with the Dominion which was in possession of the assessment record for the relevant year. As the record of the petitioners case had not been transferred to India, the adjustment was refused. It is obvious that this was not an order passed by the Income-tax Officer on his own initiative, but was an order issued after receiving the instructions of the higher authorities. The petitioner then made a representation to the Central Board or Revenue, Government of India, on the July 16, 1952, because that is the authority which is likely to have considered the matter. Another representation, a copy of which has not been filed, appears to have been sent in November, 1954, and the letter of the Income-tax Officer dated November 26, 1954, after making a reference to that representation, says that the Government had not so far decided the matter. The Government, since then, must have decided the matter. In these circumstance, it would have been futile for the petitioner to have filed any appeal against the order of the Income-tax Officer dated June 24, 1952. That order can hardly be said to be an order of the Income-tax Officer and, in any case, the Assistant Commissioner of Income-tax, to whom an appeal lay, was not likely to have taken a different view. The petitioner referred the matter to the Government and had been waiting for its decision, and it was when the recovery of the tax was threatened on the February 5, 1955, that he moved the present petition. The

remedy of an appeal, under the circumstances cannot be said to be an adequate or efficacious remedy.

The learned counsel for the respondent argued in the end that it was not clear how much excess payment had been made by the petitioner in Pakistan, as no assessment orders of Pakistan authorities for the relevant period had been filed, and it appeared from the petitioners letter attached to the affidavit that some proceedings were pending in Pakistan.

Mr. G. S. Pathak, learned counsel for the petitioner, said that no regular assessments had been made in Pakistan for the relevant years. I do not propose to consider this question, because the Income-tax authorities never took up the position, previous to the hearing of this petition, that no excess payments had been made by the petitioner in Pakistan under section 18A of the Income-tax Act. On the other hand, they always proceeded on the assumption that such payments had been made, but they thought that they were not liable to make any refund. Still I do not consider it safe to decide myself what excess payments had actually been made and I propose to leave it to the Income-tax authorities to decide that matter and to grant a set-off of the amount they find to have been paid in excess, under section 18A of the Act.

For the reasons given above, this petition is allowed and a writ of mandamus shall issue to the respondent commanding the respondent to determine what excess payments had been made by the petitioner under section 18A of the Income-tax Act in Lahore in respect of the years 1946-47 and 1947-48, and to allow a set-off of those amounts in the assessments of the subsequent years, 1948-49 and 1949-50.

The petitioner will be entitled to his costs of this petition.

Petitioner allowed.