Before Hemant Gupta & Rajesh Bindal, JJ.

P. R. SHARMA AND OTHERS,—*Petitioners*

versus

UNION OF INDIA AND OTHERS,—*Respondents*

C.W.P. No. 16446 of 2007

22nd August, 2008

Constitution of India, 1950—Arts. 226—Income Tax Act, 1961— S.17(2)(ii), Explanation 1—Amendment in provisions of S. 17(2)(ii) inserting Explanation I giving deemed meaning to word 'concession' with retrospective effect—Challenge thereto— Provisions of Explanation I neither discriminatory nor violative of Article 14— Amendment falls within legislative competence of the Parliament— Such amendment does not declare a judicial decision to be invalid— Petition dismissed.

Held, that the provisions of the amending Act, inserting Explanation-I to Section 17(2)(ii) giving deemed meaning to the word "concession" with retrospective effect falls within the legislative competence of the Parliament. Such amendment does not declare a judicial decision to be invalid but meets out the deficiency pointed out by the Hon'ble Supreme Court. For the reasons recorded by the Hon'ble Supreme Court in *Arun Kumar and others vs. Union of India and others, (2006) 286 ITR 89 (SC)* holding that the provisions of Rule 3 are not discriminatory or violative of Article 14 of the Constitution, we also do not find any merit in the argument that the provisions of Explanation I are discriminatory and thus, violative of Article 14 of the Constitution of India.

(Paras 13&15)

S.K. Mukhi, Advocate, *for the petitioner.*

Yogesh Putney, Advocate, *for the respondents.*

HEMANT GUPTA, J.

(1) The challenge in the present writ petition, filed on behalf of the employees of the Food Corporation of India, is to the retrospective effect given to Explanation-1 added to Section 17(2)(ii) of the Income Tax Act, 1961 (for short 'the Act') inserted by Section 11 of Finance Act, 2007 with effect from 1st April, 2002.

(2) Section 17(2)(ii) of the Act, before its amendment was to the following effect :—

"17. For the purposes of Sections 15 and 16 and of this Section,

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(2) perquisite includes,

(i) the value of rent-free accommodation provided to the assessee by his employer.

(ii) the value of any concession in the matter of rent respecting any accommodation provided to the assessee by his employer."

(3) The said provisions became subject matter of challenge before different High Courts, but attained finality with the judgment of the Hon'ble Supreme Court reported as **Arun Kumar and others** *versus* **Union of India and others, (1).** Rule 3 of the Income Tax Rules, 1962, was amended in the year 2001. The method of valuation of perquisite on the basis of the population of the city was substituted. The argument raised before the Hon'ble Supreme Court in the said case was that liability to pay tax will arise only if a concession shown in the matter of rent in respect of accommodation, is a perquisite under the Act and that the authority must come to the conclusion that Section 17(2)(ii) is attracted. Considering the said argument, the Hon'ble Supreme Court found that Section 17(2)(ii) of the Act, would apply only if there is a concession in respect of accommodation. The definition of perquisite is inclusive in nature and takes within its sweep several matters enumerated in clauses (i) to (vii) Section 17(2)(ii) declares that the value of any "concession" in the matter of rent respecting any accommodation provided to the employee by his employer would be

(1) (2006) 286 ITR 89 (SC)

a "perquisite". Nevertheless it must be a "concession" in the matter of rent respecting any accommodation provided by the employer to his employee. After finding so, the Court proceeded to hold as under :—

> "The word "concession" has neither been defined in the Act nor in the rules. According to the Concise Oxford Engligh Dictionary, "concession" is "a thing that is conceded"; "a gesture made in recognition of a demand or prevailing standard", "a reduction in price for a certain category of person". It is a "grant; ordinarily applied to a grant of specific privileges by Government, a special privilege granted by a Government, Corporation or other authority" *(P.R. Aiyer, Advanced Law Lexican, 2005; Vol. I; page 944).* It is "an act of yielding or conceding as to a demand or argument; something conceded; usually employing a demand; claim or request", "a thing yielded", "a grant" *[Indian Alumunium Co. Ltd. versus Thane Municipal Corporation* [1992] Supp 1 SCC 480] "Concession" is a form of "privilege" *[V. Pechimuthu versus Gowammal* [2001] 7 SCC 617].
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> It is, therefore clear that before section 17 (2)(ii) can be invoked or pressed into service and before calculation of concession as per rule 3 is made, the authority exercising power must come to a positive conclusion that it is a concession. "Concession", in our judgment is, thus a foundational, functional or jurisdictional fact."
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> In our opinion, the submission of Mr. Salve is well founded and deserves to be accepted that "concession" under sub-clause (ii) of clause (2) of section 17 of the Act is a "jurisdictional fact". It is only when there is a "concession" in the matter of rent respecting any accommodation provided by an employer to his employee that the mode, method or manner as to how such concession can be computed arises. In other words, concession is a "jurisdictional fact"; the

method of fixation of amount is a "fact in issue" or "adjudicatory fact". If the assessee contends that there is no "concession", the authority has to decide the said question and record a finding as to whether there is a "concession" and the case is covered by Section 17(2)(ii) of the Act. Only thereafter may the authority proceed to calculate the liability of the assessee under the rules. In our considered opinion, therefore, inspite of the legal position that rule 3 is *intra vires,* valid and is not inconsistent with the provisions of the parent Act under Section 17(2)(ii) of the Act, it is still open to the assessee to contend that there is no "concession" in the matter of accommodation provided by the employer to the employee and hence the case did not fall within the mischief of Section 17(2)(ii) of the Act."

(4) The Hon'ble Supreme Court further found that Section 17(2)(ii) does not contain any deeming clause that once it is established that an employee is paying rent less than 10% of his salary in cities having population of 4 lacs and 7.5 per cent, in other cities, it should be deemed to be a "concession" within the meaning of the Act. The Hon'ble Supreme Court concluded that Rule 3 would apply only to those cases where a "concession" has been shown by the employer in favour of an employee in the matter of rent respecting any accommodation. The argument that Rule 3 is discriminatory creating distinction between the employees of the Central Government and the State Government and other employees i.e. employees of companies; corporations and other undertakings, did not find favour with the Hon'ble Supreme Court. The Court found the aforesaid classification to be a reasonable classification based on Intelligible Differentia. The same was found to have reasonable rational nexus with the object sought to be achieved and, thus, it was found that such provision cannot be held *ultra vires* to Article 14 of the Constitution of India.

(5) By virtue of Section 11 of the Finance Act, 2007, an explanation has been added giving deemed meaning to the word "concession". Such explanation has been incorporated with effect from

1st April, 2002 i.e. to cover the period in respect of amended Rule 3 of the Rules. Section 11(b) of the Finance Act, 2007 reads as under :—

"11. In Section 17 of the Income Tax,

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(b) in clause (2),

(A) After sub-clause (ii),

(i) the following Explanations shall be inserted and shall be deemed to have been inserted with effect from 1st day of April, 2002, namely :—

Explanation 1. For the purposes of this sub-clause, concession in the matter of rent shall be deemed to have been provided if,

(a) in a case where an unfurnished accommodation is provided by any employer other than the Central Government or any State Government, and

(i) the accommodation is owned by the employer, the value of the accommodation determined at the rate of ten per cent of salary in cities having population exceeding four lakhs as per 1991 census and seven and one-half per cent of salary in other cities, in respect of the period during which the said accommodation was occupied by the assessee during the previous year, exceeds the rent recoverable from, or payable by, the assessee;

(ii) the accommodation is taken on lease or rent by the employer, the value of the accommodation being the actual amount of lease rental paid or payable by the employer or ten per cent of salary, whichever is lower, in respect of the period during which the said accommodation as occupied by

the assessee during the previous year, exceeds the rent recoverable from, or payable by, the assessee;

(b) In a case where a furnished accommodation is provided by the Central Government or any State Government, the licence fee determined by the Central Government or any State Government in respect of the accommodation in accordance with the rules framed by such Government as increased by the value of furniture and fixtures in respect of the period during which the said accommodation was occupied by the assessee during the previous year, exceeds the aggregate of the rent recoverable from, or payable by the assessee and any charges paid or payable for the furniture and fixtures by the assessee ;

(c) In a case where a furnished accommodation is provided by an employer other than Central Government or any State Government, and

(ii) the accommodation is owned by the employer, the value of the accommodation determined under sub-clause (i) of clause (a) as increased by the value of the furniture and fixtures in respect of the period during which the said accommodation was occupied by the assessee duing the previous year, exceeds the rent recoverable from, or payable by, the assessee;

(iii) the accommodation is taken on lease or rent by the employer, the value of the accommodation determined under sub-clause (ii) of clause (a) as increased by the value of the furniture and fixtures in respect of the period during which the said accommodation was occupied by the assessee during the previous year, exceeds the rent recoverable from, or payable by, the assessee;

(d) in a case where the accommodation is provided by the employer in a hotel (except where the assessee is provided such accommodation for a period not exceeding in aggregate fifteen days on his transfer from one place to another), the value of the accommodation determined at the rate of twenty-four per cent of salary paid or payable for the previous year or the actual charges paid or payable to such hotel, whichever is lower, for the period during which such accommodation is provided, exceeds the rent recoverable from, or payable by the assessee."

(6) Learned counsel for the petitioners has vehemently argued that inserting the aforesaid explanation, the judgment of the Hon'ble Supreme Court in **Arun Kumar's case,** is sought to be set at naught and therefore, the amendment is illegal. It is also contended that such amendment creates liability of tax with retrospective effect and thus, affects the rights of the petitioner adversely and, therefore, cannot be given effect to. In support of his contention, the learned counsel for the petitioners has relied upon **Lohia Machines Ltd. and others** *versus* **Union of India and others, (2) Kardicoppal Estate** *versus* **State of Karnataka and another, (3) D. Cawasji and Co.** *versus* **State of Mysore and others, (4) State of Punjab** *versus* **Nestle India Ltd. and another, (5) K. Veeraswami** *versus* **Union of India, (6) Voltas India Ltd.** *versus* **Union of India, (7) AIR and Radha Krishna Punchithaya** *versus* **H. Sanjeeva Rao, (8).**

(7) We have heard learned counsel for the parties at length, but do not find any merit in the present petition.

(8) The Hon'ble Supreme Court in Arun Kumar's case (supra), has categorically noticed that the word "concession" has not been

(2) (1985) 152 ITR 308 (SC)
(3) (2004) 266 ITR 20 (Karn.)
(4) (1984) 150 ITR 648 (SC)
(5) (2004) 269 ITR 97 (SC)
(6) (1991) 3 SCC 655
(7) AIR 1995 S.C. 1881
(8) AIR 1963 Ker. 348

defined under the Act. Since an omission was found in the statute by the Hon'ble Supreme Court, the said omission was rectified by inserting explanation in question with retrospective effect. It is well settled that the legislative power either to introduce enactment for the first time or to amend the enacted law with retrospective effect, is not only subject to competence, but also subject to several judicially recognised limitations. The first is that amendment must provide or clearly imply retrospective operation. Keeping in view the specific language or Section 11 of the amending Act, the first test in respect of retrospective effect of the explanation is satisfied. Another test is that where the legislative is intending to overcome a judicial decision, the power cannot be used to subvert the decision without removing the basis of the decision. The Hon'ble Supreme Court in Arun Kumar's case (supra), has categorically and clearly found that the word "concession" has not been defined and it does not contain any deeming clause. The said deficiency has been met by an insertion of Explanation-I. The insertion of explanation is not to subvert the decision of the Court, but to meet out the deficiency pointed out by the Court. Therefore, it cannot be said that the amendment is to subvert the judicial decision.

(9) In **Goodricke Group Ltd.** *versus* **State of West Bengal and others, (9)** it was held by the Hon'ble Supreme Court that once the defect pointed out is rectified and remedied in the impugned enactment, it can certainly be given retrospective effect to cover the period covered by the earlier enactment which is not only a well known but a frequently adopted measure by all the legislatures. It was held to the following effect :—

> "Lastly, the learned counsel for the petitioners questioned the validity of the retrospective effect given to the impugned enactment. We fail to see any substance in this submission. If the Act is good, it is good both prospectively and retrospectively. Retrospective effect is given for the period covered by the anterior provisions which were struck down in **Buxa Dooars Tea Co. Ltd.** *versus* ***State of W.B.,*** (1989) 3 SCC 211. One we hold that the defect pointed out in Buxa Dooars is rectified and remedied in the impugned enactment,

(9) 1995 Supl. (1) S.C.C. 707

it can certainly be given retorspective effect to cover the period covered by the earlier enactment which is only a well known but a frequently adopted measure by all the legislatures.

(10) **In American Remedies Pvt. and another** *versus* **Government of Andhra Pradesh and another, (10)** an argument was raised that since assessee has not collected the amount of sales tax from the consumers, therefore, the retrospective effect given to a statute raising liability to pay the differential amount of tax, is not tenable. It was held by the Hon'ble Supreme Court that merely because the assessee has not collected the tax from the consumers is not a ground to escape the liability of tax, in respect of retrospective effect to a statute.

(11) In **National Agricultural Cooperative Marketing Fcderation of India Ltd. and another** *versus* **Union of India and others, (11)** the Hon'ble Supreme Court has examined the scope of legislative powers in giving retrospective effect to the statutes. It was held to the following effect :—

"15. The legislative power either to introduce enactments for the first time or to amend the enacted law with retrospective effect, is not only subject to the question of competence but is also subject to several judicial recognised limitations with some of which we are at present concerned. The first is the requirement that the words used must expressly provide or clearly imply retrospective operation. The second is that the retrospectively must be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional. The third is apposite where the legislation is introduced to overcome a judicial decision. Here the power cannot be used to subvert the decision without removing the statutory basis of the decision.

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(10) (1999) 2 SCC 117
(11) (2003) 5 SCC 23

20. As has been held in **Ujagar Prints** *versus* **Union of India,** *(1989)3 SCC 488* :—

"A competent legislature can always validate a law which has been declared by courts to be invalid, provided the infirmities and vitiating infractors noticed in the declaratory judgment are removed or cured. Such a validating law can also be made retrospective. If in the light of such validating and curative exercise made by the legislature-granting legislative competence the earlier judgment becomes irrelevant and unenforceable, that cannot be called an unrenforceable legislative overruling of the judicial decision. All that the legislature does is to usher in a valid law with retrospective effect in the light of which earlier judgment becomes irrelevant."

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22. Once the circumstances are altered by legislation, it may neutralise the effect of the earlier decision of the Court which becomes ineffective after the change of the law."

(12) In **S.S. Bola and others** *versus* **B.D. Sardana and others, (12)** it was held that what is really prohibited is that the legislature cannot in exercise of its plenary power under Articles 245 and 246 of the Constitution merely declare a decision of a court of law to be invalid or to be inoperative in which case it would be held to be an exercise of judicial power. It was further held that undoubtedly under the scheme of the Constitution, the legislature does not possess the same.

(13) Keeping in mind the aforesaid principles, the act of the legislature having given deemed meaning to the word "concession", cannot be said to be invalid. Thus, we are of the opinion that the provisions of the amending Act, inserting Explanation-I to Section 17(2) (ii) giving deemed meaning to the word "concession" with retrospective effect falls within the legislative competence of the Parliament. Such

(1) (1997) 8 SCC 522

amendment does not declare a judicial decision to be invalid, but meets out the deficiency pointed out by the Hon'ble Supreme Court.

(14) The argument that the amendment is discriminatory or has caused onerous financial burden on the petitioner, is again not sustainable in law. The argument in respect of discrimination raised on the basis of Rule 3 has been dealt with by the Hon'ble Supreme Court in **Arun Kumar's** case *(supra)*. In fact the basis of determination of concession contained in Rule 3 has been made part of the substantive provision by inserting Explanation-I. The said explanation deals separately with the cases of assessee, where unfurnished accommodation is provided by any employer other than the Central Government or the State Governments and in respect of furnished accommodation provided by the Central Government or the State Governments. Similarly, where the furnished accommodation is provided by the employer other than the Central Government, the process of determining concession has been explained.

(15) For the reasons recorded by the Hon'ble Supreme Court in **Arun Kumar's** case *(supra)* holding that the provisions of Rule 3 are not discriminatory or violative of Article 14 of the Constitution, we also do not find any merit in the argument raised by the learned counsel for the petitioner that the provisions of Explanation-I are discriminatory and thus, violative of Article 14 of the Constitution of India.

(16) The argument that the petitioner has to meet out the financial burden with the retrospective effect on account of the amendment, is again not tenable. In fact, a circular was issued by the Food Corporation of India on 31st December, 2001 to maintain status *quo* on valuation of perquisite for computing income tax charges under the salary head for residential accommodation consequent to the amendment of Rule 3 with effect from 25th September, 2001. It appears that Rule 3 was amended to deal with the mode of computation of valuation of perquisite. The said Rule came to be interpreted before the Hon'ble Supreme Court and it was held that in the absence of any deemed meaning of word

"concession", Rule (3) cannot be applied. Therefore, the question of applicability of Rule 3 was pending before the High Courts, which came to be concluded by the judgment of the Hon'ble Supreme Court in **Arun Kumar's** case *(supra)*. The issued raised was subject to interpretation by the Courts. Therefore, it cannot be said that the petitioners cannot be visited with the consequences of the amendment from the retrospective date.

(17) Thus, we do not find any merit in the present petition. Hence, the present writ petition is dismissed.

R.N.R.

Before M.M. Kumar & Jitendra Chauhan, JJ.

ANIL SAGAR,—***Petitioner***

versus

STATE OF HARYANA AND OTHERS,—***Respondents***

C.W.P. No. 13811 of 2007

19th August, 2008

Constitution of India, 1950—Art. 226—Haryana Public Works Department (Buildings and Roads Branch) Research Laboratory (Group B) Service Rules, 1996—R1.7—Promotion of respondent No. 4 to post of Assistant Director (Lab.)—Respondent not possessing essential qualifications as required under R1.7—Requirement of fulfilling qualification is mandatory and not merely directory—Under Rule 17 relaxation could be granted in case of 'necessity' or 'expediency'— Petitioner possessing adequate qualification and experience—Neither any 'necessity' in existence nor it would be expedient to relax qualification because educational qualification is required to be possessed by candidate as a condition of eligibility for promotion to higher post—Petition allowed.

Held, that the language of Rule 7 starts with the expression that no person shall be appointed unless he is in possession of qualification and experience. It shows that the requirement of fulfilling the qualification