CIVIL MISCELLANEOUS

Before S. K. Kapur, J.

DARSHAN SINGH CHAWLA,—*Petitioner*

versus

INCOME-TAX OFFICER, NEW DELHI AND OTHERS,—*Respondents*

Civil Writ No. 65-D of 1966

August 12, 1966

Income Tax Act (XLIII of 1961)—S. 297(2)(d)—Whether retrospective—Proceedings under S. 34, Income Tax Act (XI of 1922) barred by time—Whether can be revived under S. 148 of Income Tax Act (XLIII of 1961)—Interpretation of Statutes—Rules as to retrospectivity of a provision in a statute stated.

Held, that secction 297(2)(d) of the Income Tax Act, 1961, is not retrospective to such an extent as would inject life into a matter which had died before the Act came into force and consequently if the proceedings under section 34 of the Indian Income Tax Act, 1922, had become barred by time before the Act of 1961 came into force, they do not stand revived by the latter Act. The 1961 Act merely seeks to save actions which were alive from the effect of repeal of the 1922 Act. It is a firmly established principle of Income-tax Law that once a final assessment is arrived at and the assessment is complete, it cannot be reopened except in the circumstances detailed in section 34 of the 1922 Act and section 148 read with section 297 of the 1961 Act and those prescribed by the provisions relating to rectification of errors.

Held, that retrospetive legislation is looked upon with disfavour, as a general rule, and properly so because of its tendency to be unjust and oppressive. Indeed, there is a presumption that the Legislature intended its enactments to be effective only *in futuro.* Consequently, in the absence of any express provisions or necessary intendment that the Legislature intended the statute to operate retrospectively, it must be given prospective effect. Even where an intention properly appears that the statute was intended to operate retrospectively, such operation must be confined as closely as possible. This close application is adhered to with greater strictness in case of statutes the retrospective interpretation of which will either destroy or impair vested interests. A similar test is applied to fiscal legislation and in fact there is a stronger presumption against their retrospection. It is also a corollary of general presumption against retrospection that, even where the statute is clearly intended to be to some extent retrospective, it is not to be construed as having a greater retrospective effect than its language

renders necessary. Another principle which has to be borne in mind is that a saving clause can only reserve things which were *in esse* at the time of its enactment. The Legislature may in certain cases depart from the above general rule in enacting a saving clause but all the same that departure is to be inferred only in the presence of a very strong indication to that effect.

Held, that if the language of the statute is found to be clear and explicit, it must receive full effect whatever may be the consequences. Other factors become relevant in the ascertainment of the intention of the Legislature when the language is not very plain and explicit as in such cases the office of all the judges is always to make such construction as shall suppress the mischief and advance justice. Where a statute is susceptible to two or more interpretations, that interpretation should surely be accepted by the Courts as constituting the one intended by the law-makers, which operates most equitably, justly and reasonably as determined by our existing standards of proper conduct and by our conceptions of what is right and what is wrong, of what is just and what is unjust.

Petition under Articles 226 and 227 of the Constitution of India, praying that this Hon'ble Court may be pleased to issue:—

(a) *A writ, order or direction in the nature of* certiorari *and/or* mandamus *quashing the notice, dated 25th March, 1965 (Annexure 'D' to the petition).*

(b) *A writ, order or direction in the nature of* mandamus *and for otherwise directing the respondents to cancel and/or withdraw the said notice, dated 25th March, 1965, Annexure 'D' to the petition.*

(c) *A writ, order or direction in the nature of* mandamus *and for prohibition and/or otherwise directing the respondents not to take any action or proceed against the petitioner in any manner or to make any assessment or to take any proceedings under or in pursuance of the said Notice, dated 25th March, 1965, Annexure 'D' to the petition.*

(d) *Any other writ, order or direction as this Hon'ble Court may deem fit and proper on the facts and circumstances of this case.*

(e) *Costs of the petition be also awarded to the petitioner.*

B. N. Kirpal, Advocate, for the Petitioner.

H. Hardy, Senior Advocate with Dalip K. Kapur, Advocate, for the Respondents.

ORDER

KAPUR, J.—The dispute relates to the assessment year 1948-49. During the year 1947, the petitioner was a registered shareholder of 46350 shares of the face value of Rs. 10, each in Messrs Punjab Distilling Industries Limited, Khasa. By a special resolution of the shareholders of the above-named company passed on 6th September, 1947, it was resolved to reduce the issued and subscribed capital from rupees fifty lakhs to rupees twenty-five lakhs. This resolution was, in due course, confirmed by this Court under the provisions of the Companies Act, 1913. Rupees twenty-five lakhs available to the company as a result of reduction of the share capital were distributed among the shareholders in proportion to their shareholdings and the petitioner received Rs. 2,31,750. For the assessment year in question the petitioner filed his income-tax before the Income-tax Officer, Ludhiana, but admittedly did not include therein the aforesaid sum of Rs. 2,31,750 and, according to the petitioner, he did not do so as he was under the impression that the said sum was not taxable being merely a return of capital. The Income-tax Officer, Ludhiana, assessed the petitioner but did not include the aforesaid amount in his total income. On March 25, 1965, the petitioner received from the Income-tax Officer, New Delhi (respondent No. 1), a notice under section 148 of the Income-tax Act, 1961, requiring him to file a revised return of his income for the assessment year 1948-49. The said notice was issued on the ground that in the opinion of the Income-tax Officer certain amount chargeable to tax for the assessment year 1948-49, had escaped assessment within the meaning of section 147 of the Income-tax Act, 1961. The petitioner filed the return and he claims that he did so under protest. It is not disputed before me that the Revenue is, in pursuance of the said notice under section 148, seeking to include the dividend income of the petitioner on account of the return of the share capital. The Revenue computes the escaped income at Rs. 72,136|11|- like this: They say that the total amount received by the petitioner on account of return of capital was Rs. 2,31,750. Under Section 2(6A) (d) of the Income-tax Act, 1922, any amount distributed by a company to its shareholders on the reduction of its capital constitutes dividend to the extent to which the company possesses accumulated profits. At the time of the distribution of rupees twenty-five lakhs among its shareholders, the company possessed accumulated profits to the extent of Rs. 5,34,920 and, therefore, 21.4 per cent of the amount received by each shareholder would be dividend income under section 2(6A) (d) of

the Income-tax Act, 1922. 21.4 per cent of Rs. 2,31,750 that is Rs. 49,594|8|-, when grossed up under section 16(2) of the Act come to Rs. 72,136|11|-. The petitioner, on the other hand, disputes even the calculation by the Revenue on two grounds—

(1) The amount of Rs. 49,594|8|- cannot be grossed up under the provisions of section 16(2), and

(2) the accumulated profits of the company were not Rs. 5,34,920, but much less because—

(a) the balance in the profit and loss account amounting to Rs. 3,19,920|12|2 are the current profits of the year and not accumulated profits, and

(b) as decided in *Punjab Distilling Industries Ltd.* v. *Commissioner of Income-tax, Punjab* (1), the accumulated profits of the company with respect to the year in question were, in any case, Rs. 3,61,405 and when calculated on that basis the deemed dividend would work to Rs. 48,730.

I have mentioned these calculations because one of the contentions raised on behalf of the petitioner is that even if it were permissible to take proceedings under the Income-tax Act, 1961, the period of limitation would be eight years, the escaped amount being less than Rs. 50,000.

The petitioner has challenged the legality of notice, dated 25th March, 1965, issued under section 148 of the Income-tax Act, 1961, on various grounds. His first submission is that even according to the Revenue the amount that escaped assessment was Rs. 72,136|11|- and therefore, the period of limitation for issuing notice was eight years under section 34 of the Income-tax Act, 1922, which expired on 31st March, 1957, and consequently no notice could be issued under section 148 of the Income-tax Act, 1961. In other words, the contention is that the Act of 1961 does not extend limitation for the issue of a notice for escaped assessment for any year in respect of which the time had

(1) (1963) 48 I.T.R. 288.

already expired before the said Act came into force. It has not been disputed by the Revenue that time for the issue of notice under section 34 with respect to the income sought to be taxed in pursuance of the impugned notice expired on 31st March, 1957. The petitioner has mainly relied on a Division Bench decision of the Gujarat High Court in *Induprasad Devshankar Bhatt* v. *J. P. Jani, Income-tax Officer* (2). That decision is undoubtedly on all fours with the present case. There a notice under Section 148 was served on the assessee on 13th November, 1963, and the Gujarat High Court decided that where the right to reopen the assessment under section 34(1) of the 1922 Act was barred by time, the 1961 Act did not give a fresh right to the Income-tax Officer to reopen the assessment. Bhagwati, J. observed—

> "Now one thing is clear from the authorities to which we have referred above, that mere general words in a section are not enough to warrant any retrospective operation being given to the section as a matter of construction. As we have pointed out above, the words in section 34(1) (a) as amended by the Finance Act, 1956, which came up for consideration in *Debi Dutta Mody* v. *T. Bellan* (3) were general in scope. So also were the words in the amended proviso to section 34(3), which came up for consideration in *S. C. Prashar* v. *Vasantsen Dwarkadas* (4), general in character. And yet it was held in both these cases that they were not sufficient to indicate that the legislature intended to give a retrospective operation to the provisions in question. There must be some definite indication in the language of the provisions showing that the legislature intended that the provision should have a retrospective operation. We do not find any such indication in section 297(2) (d) (ii) either in its express words or by way of necessary intendment. On the contrary there is, in our opinion, the clearest legislative intend that section 297(2) (d) (ii) should not have a retrospective operation."

Apart from the decision of the Gujarat High Cour the learned counsel for the petitioner seeks to support his contention on the basis of the language of section 297(2)(d) as indicating that the same was

(2) (1965) 58 I.T.R. 559.

(3) A.I.R. 1959 Cal. 567.

(4) (1956) 29 I.T.R. 857.

not intended to operate retrospectively, and by reference to various authorities as to the scope of the saving clause. According to the learned counsel "saving clauses are used in a statute to preserve earlier statutes, which would otherwise be repealed by it, or rights which would otherwise be abrogated by it. A saving clause cannot be taken to give any right which did not exist already. It can only preserve things which were *in esse* at the time of its enactment, and therefore cannot affect transactions complete at the date of the repealing statute." (*Vide* Halsbury's Laws of England, Third Edition, Volume 36, at page 401, paragraph 605). He has also relied on *Debi Dutta Mody* v. *T. Bellan* (3), *S. C. Prashar* v. *Vasantsen Dwarkadas* (4), *Mathuradas Govinddas* v. *Income-tax Officer* (5) and *S. S. Gadgil, G. N. Gadgil* v. *Lal & Co.* (6). All these decisions have been considered by the Gujarat High Court and, therefore, it is not necessary to discuss them in detail. There has been no serious controversy about the rule of interpretation that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to affect, or alter or destroy any right already acquired or so as to revive any remedy already lost by efflux of time. I have no doubt in my mind that if the right of the Income-tax Officer to reopen the assessment had been barred under the 1922 Act, the subsequent enlargement of time will not revive that right except by express words or necessary intendment. Various authorities have been mentioned at the bar but there is none directly touching on the matter except the decision of the Gujarat High Court in *Induprasad Devshankar Bhatt's case*. The matter must ultimately turn on the interpretation of the various provisions of the Income-tax Act, 1961, and particularly of sections 148 to 150 and section 297 thereof. Of course, the authorities dealing with other statutes or other circumstances do lend assistance in finding out the treatment accorded to such statutes and circumstances or in understanding the general principles which are required to be observed in interpreting the provisions of law. The matter is certainly not free from difficulty. There are two considerations which, to some extent, go to support the Revenue.

(1) Section 297(2)(d) is in terms retrospective inasmuch as deals with assessment years before the 1961 Act came into force. It also seems to touch at least in some cases all the

(5) (1965) 56 I.T.R. 621.
(6) (1964) 53 I.T.R. 231 (S.C.).

assessment years after the year ending on the 31st day of March, 1940. That is so because even where there was no period of limitation for issue of notice under section 34 of 1922 Act, the period has been, by 1961 Act, curtailed to 16 years. Take a case where the escaped income amounted to rupees one lakh or more. Under section 34 of 1922 Act notice could be issued at any time and without any bar of limitation and yet under the 1961 Act section 297(2)(d) (ii) cuts down the period to 16 years even in such cases. Again under section 34 the aggregate of the escaped income of several years could be taken for determining whether the amount escaping assessment was rupees one lakh or more, but under section 297(2)(d)(ii) read with section 149 it is the escaped income of each assessment year that has to be taken into consideration. The section being, therefore, retrospective, the question to be determined is only the extent of retrospectivity.

(2) Section 297(2)(d) generally provides for issue of notice for any assessment year after the year ending on the 31st day of March, 1940.

It, however, appears that the above factors are overlaid by considerations in favour of the contention put forth on behalf of the petitioner The provisions under considerations are not, in my opinion, merely procedural, but also deal with the substantive rights of assessees. After the expiry of the period of limitation the Revenue loses all rights to make assessment. It is a firmly established principle of Income-tax Law, that once a final assessment is arrived at and the assessment is complete, it cannot be reopened except in the circumstances detailed in section 34 of the 1922 Act and section 148 read with section 297 of the 1961 Act and those prescribed by the provisions relating to rectification of errors. It is equally well accepted that retrospective legislation is looked upon with disfavour, as a general rule, and properly so because of its tendency to be unjust and oppressive. Indeed, there is a presumption that the Legislature intended its enactments to be effective only *in futuro*. Consequently, in the absence of any express provisions or necessary intendment that the Legislature intended the statute to operate retrospectively, it must be given prospective effect. Even wherean intention properly appears that the statute was intended to operate retrospectively, such operation must be confined as closely as possible. This close application

is adhered to with greater strictness in case of statutes the retrospective interpretation of which will either destroy or impair vested interests. A similar test is applied to fiscal legislation and in fact there is a stronger presumption against their retrospection. It is also a corollary of general presumption against retrospection that, even where the statute is clearly intended to be to some extent retrospective, it is not to be construed as having a greater retrospective effect than its language renders necessary. Another principle which has to be borne in mind is that a saving clause can only preserve things which were *in esse* at the time of its enactment. The Legislature may in certain cases depart from the above general rule in enacting a saving clause, but all the same that departure is to be inferred only in the presence of a very strong indication to that effect. On behalf of the Revenue the cases dealing with the amendment of section 34 of the 1922 Act have been sought to be distinguished on the ground that section 297(2)(d) is expressly intended to operate on assessment years before the 1961 Act came into force. It is in the light of the above discussion that one has to see the extent of retrospection of section 297(2)(d). Having carefully considered the matter, I am of the opinion that section 297(2)(d) does not have the effect of saving actions which had already become barred by time when the 1961 Act came into force. The object of enacting section 297 obviously is to permit the Revenue Authorities to take proceedings with respect to the escaped income after the passing of the new Act. In doing so the Legislature appears to have given to section 297(2)(d) a very limited restrospective operation. It seems to merely save some actions which were alive from suffering a demise as a result of repeal of 1922 Act. In other words section 297(2)(d) is a saving provision in a qualified sense. Qualified because, even where action was alive, it in some cases reduces the period of limitation and in some cases enlarges it. If that is held to be the object of enactment of section 297(2)(d) I fail to see how I can give effect to the argument of the Revenue that the said provision intended to create new rights. One example will illustrate the chaotic result that would ensue if the argument of the Revenue were to be accepted. Take a case where a notice under section 34 had been issued, before the new Act came into force, but after the expiry of 8 years of the relevant assessment year on the ground that in the opinion of the Revenue the escaped income was likely to amount to rupees one lakh or more. Such a notice would be valid notice when issued, as section 34 in terms authorises such a notice to be issued without any bar of limitation in case the amount is "likely" to be more than rupees one lakh. Under section 297(2)(d)(i) the proceedings

in pursuance of that notice will have to be continued and disposed of as if the 1961 Act had not been passed. When the Revenue Officer goes into the merits of the case after the anactment of the 1961 Act he finds that the income escaped was not rupees one lakh or more, but only Rs. 90,000. He will have to, by virtue of section 297(2)(d)(i), cancel that notice on the ground of bar of limitation. It would in the circumstances be impossible to issue another notice under the 1961 Act. Yet if no such notice had been issued, before the new Act came into force, to an assessee similarly placed and circumstanced, action could be taken within 16 years. This would be rather an anomalous situation. If, on the other hand, the construction that I am seeking to place on the provisions of section 297(2)(d) is given effect to, it would avoid such discriminatory treatment and anomalies. The view of the Revenue may bring the statute in clash with Article 14 of the Constitution. More so, because the applicability of 1922 Act does not depend on the time of detection of escapement, but on the time of issue of notice.

Yet another matter has, to some extent, entered my mind in construing this provision and I think in fairness I must mention it. The Act of 1961 was passed quite some time before it came into force on the 1st day of April, 1962, and, as a matter of fact, its provisions came to the knowledge of the persons concerned with its administration even earlier. If after such knowledge an Income-tax Officer were to detect escapement of income, he would have to proceed under the 1922 Act. Where the escaped income is less than rupees one lakh and 8 years have expired, he will not be in a position to take proceedings under section 34 because of the prescription of limitation. In such a case he will have to pass an order that the matter be dropped as the period of limitation has expired. Yet another Income-tax Officer may sit quiet over the matter in spite of having detected the escapement and wait till the enactment of the new Act and then take proceedings thereunder. It may be argued that in the former case also there will be no bar against proceedings under section 148. That may be so, but is that justice? I think the answer must be no. I do not suggest that such like consequences can affect the meaning of the plain language because if the language of the statute is found to be clear and explicit, it must receive full effect whatever may be the consequences. But these factors do become relevant in the ascertainment of the intention of the Legislature when the language is not very plain and explicit as in such cases the office of all the judges is always to make such construction as shall suppress the mischief and advance justice. Where a statute is susceptible to two or more interpretations, that

interpretation should surely be accepted by the Courts as constituting the one intended by the law-makers, which operates most equitably, justly and reasonably as determined by our existing standards of proper conduct and by our conceptions of what is right and what is wrong, of what is just and what is unjust. The learned counsel for the petitioner has pressed on me to apply the same principle to this case as was applied by the Calcutta High Court in *Debi Dutta Mody's case* and by the Bombay High Court in *S.C. Prashar's case*. I may point out that *S. C. Prashar's case* went up in appeal to the Supreme Court in *S.C. Prashar and another* v. *Vasantsen Dwarkadas and others* (7), and on this point out of five of their Lordships two expressed agreement with the view of the Bombay High Court, while two did not. Sarkar, J., however, did not deal with this point. The learned counsel for the petitioner also says that the observations of Sarkar, J. go to support his view. I, however, do not think that that is so since his Lordship rested his judgment on section 4 of the Income-tax (Amendment) Act, 1959. Be that as it may, the fact remains that those decisions only provide guiding principles for the interpretation of the section now before me. Having carefully considered the authorities and the arguments raised at the bar, I am of the opinion that section 297 (2)(d) of the 1961 Act is not restrospective to such an extent as would inject life into a matter which had died before the Act came into force and consequently if the proceedings under section 34 had become barred by time before the Act of 1961 came into force, they do not stand revived by the latter Act. The 1961 Act, as I have said earlier, merely seeks to save actions which were alive from the effect of repeal of the 1922 Act. In this view it must be held that notice under section 148 is without jurisdiction. Since that point is enough to dispose of the petition, it is not necessary for me to deal with the various other contentions raised on behalf of the petitioner, namely—

(a) Section 297(2)(d) is violative of Article 14 of the Constitution;

(b) the amount which is alleged to have escaped is less than Rs. 50,000 since no grossing up can be done under section 16(2);

(c) the accumulated profits were less than what are alleged by the Revenue; and

(7) (1963) 48 I.T.R. 1.

(d) Section 148 can apply only to such income as escaped assessment after 1961 and in enacting section 297 the Legislature has misfired.

In the circumstances it must be held that the notice is barred by time and must be quashed. The petition, therefore, succeeds and is allowed, but there will be no order as to costs.

B.R.T.

1984 ILR—Government Press Chandigarh