The Ahmedabad Mfg. & Calico Printing Co. Ltd.

Vs

S. C. Mehta, Income-Tax Officer and Another

Civil Appeal No. 139 of 1962

(S. K. Das, J. L. Kapur, A. K. Sarar, M. Hidayatullah, Raghuvar Dayal)

14.11.1962

JUDGMENT

S.K. DAS, J. –

This appeal on a certificate of fitness granted by the High Court of Bombay raises a question of interpretation of sub-s. (10) of s. 35 of the Indian Income-tax Act, 1922. This sub-section is one of a group of sub-sections substituted or inserted in the said section by s. 19 of the Finance Act, 1956 (Act 18 of 1956). By s. 28 of the said Finance Act, sub-s (10) of s. 35 of the Income-tax Act, 1922, came into force on April 1, 1956. The short question before us is, whether on its true construction, sub-s. (10) of s. 35 applies in a case where a company declares dividends by availing itself wholly or partly of the amount on which a rebate of income-tax was earlier allowed to it under clause (i) of the proviso to Paragraph B of Part I of the relevant Schedules to the Finance Acts, when such dividends were declared prior to the coming into force of the sub-section, that is prior to April 1, 1956.

The facts which have given rise to the appeal are these. The Ahmedabad Manufacturing and Calico Printing Co., Ltd., is the appellant before us. The appellant company was incorporated under the Indian Companies Act, 1866, and has its office at Ahmedabad. It carries on the business of manufacturing and selling cotton piece goods and chemicals. For the assessment year 1952-53, the corresponding account year being the calendar year 1951, the appellant was assessed to income-tax and super-tax on a total income of Rs. 1,02,79,808/- and was allowed a rebate of one anna per rupee on the undistributed profits of Rs. 36,62,776/- under the first proviso to Paragraph B of Part I of the first Schedule to the Finance Act, 1952. The amount of rebate allowed was Rs. 2,28,924/-. For the assessment year 1953-54, the corresponding account year being the calendar year 1952, the appellant showed a book profit of Rs. 45,67,966/-, but was assessed to a loss of Rs. 5,98,353/- on April 17, 1954. For the said calendar year 1952, the appellant declared a dividend of Rs. 19,32,000/- on April 20, 1954. This dividend came out of the undistributed profits of the calendar year 1951 on which the appellant had been allowed a rebate.

On March 18, 1958, the Income-tax Officer, Special Circle, Ahmedabad, respondent No. 1 before us, issued a notice to the appellant calling upon the latter to show cause why action under sub-s. (10) of s. 35 should not be taken against the appellant by withdrawing the rebate allowed on the sum of Rs. 19,32,000/-. The appellant raised some objections, one of which was that sub-s. (10) of s. 35 did not apply to his case. The Income-tax Officer, however, held that sub-s. (10) of s. 35 applied and accordingly directed that the rebate allowed on the sum of Rs. 19,32,000/- should be withdrawn, by recomputing the tax payable by the appellant. He ordered the issue of a demand notice for a sum of Rs. 1,20,750/- Which was the rebate allowed on Rs. 19,32,000/-. The Income-tax Officer passed this

order on March 27, 1958.

Being aggrieved by that order, the appellant moved the High Court of Bombay by a writ petition filed on June 26, 1958. The main ground taken by the appellant was that sub-s. (10) of s. 35 did not apply to a case where dividend was declared, as in this case, before the coming into force of sub-s. (10) of s. 35. The High Court rejected this contention and dismissed the writ petition. The appellant then obtained certificate of fitness and has preferred the present appeal in pursuance of that certificate.

We may now read some of the provisions of s. 35 in so far as they are relevant for our purpose -

> "S. 35(1) The Commissioner or Appellate Assistance Commissioner may, at any time within four years from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision under s. 33A and the Income-tax Officer may, at any time within four years from the date of any assessment order or refund order passed by him on his own motion rectify any mistake apparent from the record of the appeal, revision, assessment or refund as the case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee :
>
> #xx xx xx(2) xx xx(3) xx xx(4) xx xx##
>
> (5) Where in respect of any completed assessment of a partner in a firm it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the income of the firm under section 31, section 33, section 33A, section 33B, section 66 or section 66A that the share of the partner in the profit or loss of the firm has not been included in the assessment of the partner, or if included, is not correct, the inclusion of the share in the assessment or the correction thereof, as the case may be, shall be deemed to be a rectification of a mistake apparent from the record within the meaning of this section, and the provisions of sub-section (1) shall apply thereto accordingly, the period of four years referred to in that sub-section being computed from the date of the final order passed in the case of the firm.
>
> (6) Where the excess profits tax or the business profits tax payable by an assessee has been modified in appeal, revision or any other proceeding, or where any excess profits tax or business profits tax has been assessed after the completion of the corresponding assessment for income-tax (whether before or after the commencement of the Indian Income-tax (Amendment) Act, 1953), and in consequence thereof it is necessary to re-compute the total income of the assess chargeable to income-tax, such re-computation shall be deemed to be a rectification of a mistake apparent from the record within the meaning of this section and the provision of sub-section (1) shall apply accordingly, the period of four years referred to in that sub-section being computed from the date of the order making or modifying the assessment of such excess profits tax or business profits tax.
>
> #(7) xx xx(8) xx xx(9) xx xx##
>
> (10) Where, in any of the assessment for the years beginning on the 1st day of April of the years 1948 to 1955 inclusive, a rebate of income-tax was allowed to a company on a part of its total income under clause (i) of the proviso to Paragraph B

> of Part I of the relevant Schedules to the Finance Acts specifying the rates of tax for the relevant year, and subsequently the amount on which the rebate of income-tax was allowed as aforesaid is availed of by the company, wholly or partly, for declaring dividends in any year, the amount or that part of the amount availed of as aforesaid, as the case may be, shall, by reason of the rebate of income-tax allowed to the company and to the extent to which it has not actually been subjected to an additional income-tax in accordance with the provisions of clause (ii) of the proviso to Paragraph B of Part I of the Schedule to the Finance Acts above referred to, be deemed to have been made the subject of incorrect relief under this Act, and the Income-tax Officer shall recompute the tax payable by the company by reducing the rebate originally allowed, as if the computation is a rectification of a mistake apparent from the record within the meaning of this section and the provisions of sub-section (1) shall apply accordingly, the period of four years specified therein being reckoned from the end of the financial year in which the amount on which the rebate of income-tax was allowed as aforesaid was availed of by the company wholly or partly for declaring dividends."

Speaking generally, s. 35 deals with rectification of mistakes in circumstances detailed in the various sub-sections thereof and provides for orders consequent on such rectification. Sub-section (1) empowers the Income-tax authorities to rectify mistakes apparent from the record in respect of certain orders passed by them. It provides that the Income-tax Officer concerned may at any time within four years from the date of any assessment order passed by him on his own motion rectify any mistake apparent from the record of the assessment. The power of rectification may be exercised subject to two conditions : (1) that there is a mistake apparent from the record of the assessment, and (2) that the order of rectification is made within four years from the date of the assessment sough to be rectified. Sub-section (5) deals with inclusion or correction of the income of a partner in a firm consequent upon assessment or re-assessment of the firm of which he was a partner. Sub-section (6) deals with recomputation of total income of an assessee in consequence of modifications made in the excess profits tax or the business profits tax payable by an assessee subsequent to an assessment made under the Income-tax Act. These two sub-sections were considered by this court in two decisions to which we shall presently refer. They have been relied on by the appellant and have some bearing on the interpretation of sub-s. (10). Sub-sections (2), (3), (4), (7), (8) and (9) are relevant for our purpose and need not be referred to.

Now, we come to sub-s. (10). It deals with a case where a rebate was allowed to a company on a part of its income (viz., undistributed profits) by virtue of the concessions given by the Finance Acts of 1948 to 1955. This is clear from the first part of the sub-section. The seconds part states the condition in which, or rather the crucial event on the happening of which, the rebate granted to a company is deemed to have been given by a mistake apparent from the record, this condition or crucial event is the declaration of dividends by the company out of the amount in whole or part, on which rebate was earlier granted to it. The third and operative part states that on the happening of the crucial event, the amount on which rebate was granted and which has been subsequently utilised for declaring dividends shall be deemed to have been made the subject of incorrect relief under the Act and the Income-tax Officer shall re-compute the tax payable by the company by reducing the rebate originally allowed as if the recomputation is a rectification of a mistake apparent from the record within the meaning of the section. The fourth and last part introduces a period of limitation of four years, the four years being reckoned not from the date of the order passed as in sub-s. (1), but from the end of the financial year in which the amount on which rebate if income-tax was allowed was availed of by the company wholly or partly for declaring dividends. This, in brief,

appears to be the scheme of sub-s. (10) of s. 35.

Now, the argument on behalf of the appellant is this. Link sub-s. (5) of s. 35, sub-s. (10) affects a vested right, namely, the right to a rebate of income-tax on a part of the total income of the company under clause (1) of the proviso to Paragraph B of Part 1 of the relevant Schedules to the Finance Acts of 1948 to 1955, and the further right to declare dividends out of the undistributed profits of the previous year. Under the well settled rules of statutory construction, on statute which impairs an existing right or obligation except as regards a matter of procedure, shall have retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. Put differently, a statute is not to be construed to have a greater retrospective operation than its language renders necessary;..... and it is submitted that "the general rule is that all statutes other than those which are merely declaratory, or which relate only to matters of procedure or of evidence are prima facie prospective; and retrospective effect is not to be given to them unless by express words or necessary implication, it appears that this was the intention of the legislature" and "it is a corollary of this general presumption against retrospection that, even when a statute is intended to be to some extent retrospective, it is not to be construed as having a retrospective effect than its language renders necessary". (Halsbury's Laws of England, Vol. 36. Third edition, p. 423 and p. 426). The argument on behalf of the appellant is that by s. 28 of the Finance Act. 1956, sub-s. (10) has undoubtedly retrospective effect from April 1, 1956; but the language of the sub-section does not expressly, nor by necessary implication, show that it has any grater retrospective effect. It is pointed out that, on the contrary, where the legislature wanted a particular sub-section to have greater retrospective effect, it had said so, e.g. in sub-s. (6). It is also pointed out that sub-s. (5) of s. 35 was inserted by the Indian Income-tax (Amendment) Act, 1953, and by s. 1(2) of the said Act it came into force on April 1, 1952. Where the legislature wanted to give greater retrospective effect to particular processions., it said so in ss. 3(2), 7(2) and 30(2) of the said Act. That being the position, the argument on behalf of the appellant is that we should not give any greater retrospective effect to sub-s. (10) of s. 35 than what has been done by s. 28 of the Finance Act, 1956. Learned Counsel for the appellant has strongly relied on the decision of his Court in Income-tax Officer v. S.K. Habibullah ([1962] Supp. 2 S.C.R. 716.) wherein with regard to sub-s. (5) of s. 35 it was held that the sub-section was not declaratory of the pre-existing law nor a matter relating to procedure but effected vested rights and must be deemed to have come into force only from April 1, 1952; therefore, the Income-tax Officer had no jurisdiction under the said sub-section to rectify the assessment of a partner consequent on the assessment of the firm in cases where the firm's assessment was completed before April 1, 1952. The argument of the learned counsel for the appellant is that the same principle must apply in the present case and sub-s. (10) of s. 35 does not apply to a case where dividend was declared by the company before the date of the coming into force of the sub-section, namely, April 1, 1956.

The second part of the argument of the learned counsel for the appellant is that there is no real difference in language between the two sub-sections, sub-s. (5) and sub-s. (10) of s. 35. In both cases a rectification or correction is made by reason of a subsequent event; in sub-s. (5) the subsequent event is the assessment of the firm which discloses the inaccuracy in the earlier assessment of a partner; in sub-s. (10) the subsequent event is the declaration of dividend out of the amount on which a rebate was earlier granted. It is pointed out that in their true scope and effect, the two sub-sections stand on the same footing. Sub-section (10) further makes it clear that by a legal fiction that which was correct at the time when it was made is rendered incorrect after the coming into force of the sub-section. The sub-section states clearly

> "shall, by reason of the rebate of Income-tax allowed to the company..... ....

> ..... be deemed to have been made the subject of incorrect relief under this Act, and the Income-tax Officer shall re-compute the tax payable by the company by reducing the rebate originally allowed,..... ...."

This language, it is argued, is clearly prospective and does not justify the carrying of the legal fiction to a period earlier than April 1, 1956.

As against these arguments, learned counsel for the respondent has contended that the language of sub-s. (10) is different from that of sub-s. (5) and the principle laid down by this court in S.K. Habibullah's ([1962] Supp. 2 S.C.R. 716.) cannot be applied to the present case. Alternatively, he has argued that the decision is incorrect and should be reconsidered by us. The argument of learned counsel for the respondent is that that sub-s. (10) by necessary implication has a greater retrospective effect that what is laid down by s. 28 of the Finance Act, 1956. He points out that the first part of the sub-section talks of the assessments made for any of the years beginning on April 1, 1948, to April 1, 1955, when a rebate of income-tax was allowed; then the second part refers to the subsequent declaration of dividend by the company in any year. Learned counsel for the respondent has emphasised the expression "in any year" and has submitted that this shows that the intention was to take in a declaration of dividend made even earlier than April 1, 1956. According to him, the only effect of s. 28 of the Finance Act, 1956, is that the income-tax Officer can take action only after April 1, 1956, but the language of the sub-section does not justify the conclusion that the legal fiction created by it must be restricted to the declaration of dividends on or after April 1, 1956.

We have carefully considered these arguments. The language of sub-s. (10) of s. 35 is perhaps not as clear as one might wish it to be. There is no doubt, however, that the sub-section affects vested rights and should not be given a grater retrospective operation than its language renders necessary. Even through the sub-section is to a certain extent retrospective, and s. 28 of the Finance Act, 1956, in express terms makes it retrospective from April 1, 1956, it is clear to us that there is nothing in the language of the sub-section which would justify the inference that the legislature intended to carry the legal fiction created by the sub-section to a period eariler than the date on which the sub-section came into force. The maxim applicable in such cases is that even in construing a section which is to a certain extent retrospective, the line is reached at which the words of the section cease to be plain. We are further of the opinion that when the first of the sub-section refer to the assessments for the years 1948 to 1955, it merely refers to the period during which the rebate provisions were in force. It is not disputed before us that the rebate provisions came into force from the Finance Act of 1948 and ended with the Finance Act of 1955. The first part therefore is merely a reference to the period during which the rebate provisions were in force. It is indeed true that in the second part of the sub-section the expression used is "declaring dividends in any year" and this has to be read in conjunction with the word "subsequently " which can only mean subsequent to the allowance of the rebate. But in the very same part, it is further stated that the declaration of dividend in any year shall, by reason of the rebate be deemed to have made the amount on which the rebate was granted, the subject of incorrect relief etc. This language which creates the legal fiction is clearly prospective and shows that what was correct at the time when the rebate was granted is rendered incorrect on the happening of the crucial event after the coming into force of the sub-section, and by the express terms of s. 28 of the Finance Act, 1956, the sub-section comes into force on April 1, 1956. We are unable, therefore, to agree with the learned counsel for the respondent that the language of sub-s. (10) by necessary implication taken the legal fiction back to a period earlier than April 1, 1956. In coming to this conclusion, we have kept in mind the principle that a statute does not necessarily become retrospective because a part of the requisites for its action is drawn from a time antecedant to its passing.

Furthermore we see no reason why the principle laid down in S.K. Habibullah's case ([1962] Supp. 2 S.C.R. 716.) will not apply in the present case nor are we satisfied that that decision with regard to sub-s. (5) of s. 35 was incorrect. We may point out, however, that in Second Additional Income-tax Officer v. Atmala Nagaraj ([1962] 46 I.T.R. 609.) this court went a step further and held that sub-s. (5) of s. 35 was not applicable to cases where the assessment of the partner was completed before April 1, 1952, even though the assessment of the firm was completed after April 1, 1962. Learned counsel for the appellant frankly conceded before us that he did not wish to go as far as that and contend that even in a case where a declaration of dividend was made after April 1, 1956, sub-s. (10) would not apply; because that would make sub-s. (10) unworkable. The decision in Second Additional Income-tax Officer v. Atmala Nagaraj ([1962] 46 I.T.R. 609.) may perhaps require reconsideration as to which we need not express any final opinion now; but so far as this case is concerned we see no reason why the principle in S.K. Habibullah's case ([1962] Supp. 2 S.C.R. 716.) will not apply. The principle is simply this. A statute which is not declaratory of a pre-existing law nor a matter relating to procedure but affects vested rights cannot be given a greater retrospective effect than its language renders necessary, and even in construing a section which is to a certain extent retrospective, the line is reached at which the words of the section cease to be plain. These are well settled principles and there is no reason to doubt their accuracy.

For the reasons given above, we would allow the appeal, set aside the order and judgment of the High Court and quash the order of the Income-tax Officer dated March 27, 1958, and the notice of demand dated March 28, 1958. The appellant will be entitled to its costs throughout.

SARKAR, J. –

In its assessment to income-tax for the year 1952-53, the appellant, a company, had been granted under the provisions of the Finance Act, 1952, a rebate on a portion of its profits of the previous year, that is, 1951 which it had not distributed as dividends to its shareholders. In the next assessment year 1953-54, the appellant used a part of the aforesaid undistributed profits for declaring dividends. As the law then stood, nothing could be done by the revenue authorities to withdraw the rebate earlier granted on the ground of the profits being utilised in declaring dividends in a latter year. From April 1, 1956, however, there was a change in the law as sub-s. (10) of s. 35 of the Income-tax Act, 1922, was brought into force then. By an order made on March 27, 1958, under that sub-section, the terms of which I will set out presently, the aforesaid rebate was withdrawn and the appellant was called upon to refund it. The appellant then applied to the High Court at Bombay for a writ to quash the order of March 27, 1958, on the ground that sub-s. (10) was not applicable to the facts of this case for reasons which I will later state. That application was dismissed. This apple is against this decision of the High Court at Bombay Dismissing the Application.

Now sub-s. (10) of s. 35 of the Income-tax Act was enacted by the Finance Act of 1956 and it was given effect from April 1, 1956. That sub-section, in so far as it is necessary to state for the purpose of this case, provides that where in any of the assessment years 1948-49 to 1955-56, a rebate of income-tax was allowed to a company under the Finance Act Prevailing in that year on a part of its total income "and subsequently the amount on which the rebate of income-tax was allowed as aforesaid is availed of by the company, wholly or partly, for declaring dividends in any year..... the Income-tax Officer shall re-compute the tax payable by the company by reducing the rebate originally allowed." The sub-section in substance permits a rebate duly allowed in any year before it, came into force to be withdrawn if "subsequently" the amount on which the rebate was allowed "is availed of" "for declaring dividends in any year."

The appellant contends that the sub-section does not apply unless the amount on which the rebate was granted is availed of for declaring dividends after the sub-section had come into force, that is after April 1, 1956, and therefore it does not apply to the present case. It is said that if it were not so, the sub-section would be given a retrospective operation and the rule is that it is to be presumed that a statute dealing with substantive rights is not to have such operation. The case of Income-tax Officer, Madras v. S.K. Habibullah ([1962] Supp. 2 S.C.R. 716.) was cited in support of this contention.

I will assume that if the sub-section were applied to a case like the present, it would affect a vested right. The rule no doubt is that a statute is presumed not to do so. But this rule does not apply if the language of the statute indicates an intention to give it a retrospective operation. It seems to me that sub-s. (10) uses language which indicates sufficiently cearly that it was intended to be applied where the amount on which rebate had been obtained was availed of for declaring dividends before the sub-section came into force, that is to say, to have a retrospective operation. It says, "subsequently the amount on which the rebate of income-tax was allowed as aforesaid is availed of..... for declaring dividends in any year". There is no doubt that the words "subsequently" and "in any year" mean in any year subsequently to the year in which the rebate was granted. They would, therefore, clearly include a year before the sub-section came into force. But it is said that these words should in view of the rule be read as not including a year before the sub-section came into force as they also include years subsequent to the coming into force of the sub-section and are therefore ambiguous.

I am unable to accept this contention. I find no ambiguity. If the intention was that the sub-section would apply only when the amount was availed of for declaration of dividends after it was enacted then the words "subsequently" and "in any year" were wholly unnecessary. Without these words the sub-section would have read, "and the amount is availed of for declaring dividends." There would then be no doubt that it was intended to operate only prospectively. But the legislature used some more words. It must have done so with some purpose. What that purpose was if it was not to give the sub-section retrospective operation, I failed to see. I am unable to read the words "subsequently" and "in any year" as otiose and as indicating no different intention. Therefore, it seems to me that the language of the sub-section plainly requires it to have a retrospective operation. The sub-section is properly applicable to this case.

There is another consideration leading me to the view that the presumption against retrospective operation does not arise here. It was said in Pardo v. Bingham ((1869) L.R. 4 Ch. 735.) that it was not an invariable rule that a statute could not have a retrospective operation unless so expressed in its very terms, and that it was necessary to took to the general scope and purview of the statute and at the remedy sought to be applied and consider what was the former state of the law and what it was that the legislature contemplated. It is quit plain that in providing for the grant of rebate on undistributed profits by the Finance Acts of 1948 to 1955 the legislature wanted to encourage the employment of the profit made in a business in the business itself. The object presumably was to expand the industries of the country. This involved a long term employment of the profits in the business. It could not have been the intention of the legislature to grant rebate when a company only kept the profits for a short time with itself and having earned the rebate distributed the profits without the industry having had any real benefit of them. I think I should state here that the provisions for the grant of rebate did not require that dividend was not to be declared at all. The object was to encourage reasonable division of the profit between the shareholders and the industry. Allowance of rebate was provided for on that part of the profits which was left for employment in the industry after reasonable dividends had been distributed to the shareholders. The rebate was

allowed on a graded scale depending on the amount of profits which was not distributed as dividends.

Now the system of granting rebates started in 1948-49. It was stopped in 1955-56. The sub-section was brought into force on April 1, 1956, that is, seven years after the system had first been started. The sub-section provided for withdrawal of the rebate when the amount on which it had been granted was availed of in declaring dividends. It is fairly clear from this that the legislature did not approve of these amounts being utilised in declaration of dividends. It is also not too much to suppose that there had been many previous cases of such utilisation of profits for if it had not happened earlier, there is no reason to think that the legislature anticipated the evil happening in future and passed the law to stop it. In view of the large number of years that had passed between the time when the allowance of rebate commenced and the time when sub-section was brought into force, it can be imagined that a very number of cases of distribution of profits on which rebate had been allowed, had already taken place. I find it difficult to think that many cases remained after April 1, 1956, where a company which intended to utilise the amounts on which rebate had been granted in the declaration of dividends, had not already done so.

There is no dispute that by sub-s. (10) the legislature intended to penalise a case where subsequent to its enactment, the amount on which rebate had been granted was utilised in declaration of dividends. Now is there any reason to think that the legislature did not want to impose the penalty also on those who had earlier utilised the amount in declaration of dividends ? There was no special merit in these latter cases. And I also think that they formed the majority of the cases. The grant of rebate having been stooped after March 31, 1956, there was no occasion to provide for cases of such grant thereafter. All these circumstances lead me to the view that the intention of the legislature was to penalise the cases of utilisation of amounts on which rebate had been granted in payment of dividends which had happened before the sub-section came into force. The remedy which the sub-section provided would largely fail in any other view. The general scope and purview of the sub-section and a consideration of the evil which it was intended to remedy lead me to the opinion that the intention of the legislature clearily was that the sub-section should apply to the facts that we have in this case.

As to S.K. Habibullah's case ([1962] Supp. 2 S.C.R. 716.) I do not think that much assistance can be had from it. It applied the rule of presumption against a statute having a retrospective operation - as to which rule, of course, there is no dispute - to sub-s. (5) of s. 35. Now cases on the construction of one statute are rarely of value in construing another statute, for each case turns on the language with which it is concerned and statutes are not often expressed in the same language. The language used in sub-ss. (5) and (10) seems to me to be wholly different. There is nothing in S.K. Habibullah's case ([1962] Supp. 2 S.C.R. 716.) to indicate that in the opinion of the learned Judges deciding it there were any words which would indicate that sub-s. (5) was to have a retrospective operation. In my view, sub-s. (10) contains such words. Furthermore, I do not find that the other considerations to which I have referred, arose for discussion in that case. In my view, the two cases are entirely different.

I, therefore, think that sub-s. (10) of s. 35 properly applies to this case. In my view, the appeal should be dismissed with costs.

HIDAYATULLAH, J. –

This is an appeal by an assessee with certificate under Art. 133(i)(c) of the Constitution from the

judgment and order of the High Court of Bombay dismissing the assessee company's petition under Art. 226 of the Constitution which challenged an order under s. 35(10) of the Income-tax Act rectifying the earlier assessment and sought a writ or writs to prohibit the Income-tax Authorities from giving effect to that order.

The assessee (The Ahmedabad Manufacturing & Calico Printing Co. Ltd.) is a public limited company carrying on business of manufacture of cotton piece-goods and chemicals. The year of account of the assessee company is the calendar year. In the assessment year 1952-53, corresponding to the calendar year 1951, the appellants were assessed on January 31, 1953, on a total income of Rs. 1,02,79,808. The assessee company was allowed a rebate of one anna per rupee amounting to Rs. 2,28,924 on the undistributed profits of Rs. 26,62,776 under the first proviso to Paragraph B of Part I of the first Schedule to the Finance Act, 1952. For the assessment year 1953-54 (account year calendar year 1952) the books of the assessee company showed a profit of Rs. 45,67,966. That profit became a loss of Rs. 5,98,353 after deductions like depreciation etc. were allowed. Inspite of there being a loss, the assessee company declared on April 20, 1953, a dividend of Rs. 19,32,000 for the year of account 1952.

The Income-tax Officer, by an order dated March 18, 1958, called upon the assessee company to show cause why action under s. 35(10) of the Income-tax Act should not be taken to recall a proportionate part of the rebate because in his opinion the entire dividend of Rs. 19,32,000 came out of the undistributed profits of the calendar year 1951 on which the appellant had received a rebate. The assessee company objected saying that the 10th sub-section of s. 35 was introduced as from April 1, 1956, and could not operate on an assessment which had become final before April 1, 1956, from which date sub-s. (10) was retrospectively applied. This objection was not accepted and the Income-tax Officer held that dividend paid in the year 1952 came out of the undistributed profits of 1951 and a tax proportionate to the sum of Rs. 19,32,000 amounting to Rs. 1,20,750 was leviable. The assessee company filed a petition under Art. 226 of the Constitution. That application was heard along with another filed by the New Shorrock Spg. & Mfg. Co. Ltd. in which the leading judgment was delivered by the High Court. Following the decision in the New Shorrock Spg. Company's case ([1959] 37 I.T.R. 41.), the High Court dismissed the assessee company's petition with costs. The High Court, however, certified the case as fit for appeal and hence the present appeal.

Section 35 deals with rectification of mistakes. Prior to 1939, rectification of any mistake apparent from the record could be made within one year of the order of assessment but by the Indian Income-tax (Amendment) Act, 1939 (7 of 1939), the period of four years was substituted for one year in the first sub-section. The sub-section omitting the provisos read at all material times as follows :-

> "The Commissioner or Appellate Assistant Commissioner may, at any time within four years from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision under section 33A and the Income-tax Officer may, at any time within four years from the date of any assessment order or refund order passed by him on his own motion rectify any mistake apparent from the record of the appeal, revision, assessment or refund as the case may be, and shall within the like period rectify and such mistake which has been brought to his notice by an assessee :"

It must be noticed that the time limit started from the date of the order of assessment which was to be rectified.

In 1953, by s. 19 of the Indian Income-tax (Amendment) Act, 1952 (25 of 1953), sub-s. (5) (among others) was added as from April 1, 1952. That sub-section reads as follows :-

> "(5) Where in respect of any completed assessment of a partner in a firm it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the income of the firm under section 31, section 33, section 33A, section 33B, section 66 or section 66A that the share of the partner in the profit or loss of the firm has not been included in the assessment of the partner, or, if included, is not correct, the inclusion of the share in the assessment or the correction thereof, as the case may be, shall be deemed to be a rectification of a mistake apparent from the record within the meaning of this section, and the provisions of sub-section (1) shall apply thereto accordingly, the period of four years referred to in that sub-section being computed from the date of the final order passed in the case of the firm."

It must be noticed that under this amendment time limit started from the date of the final order passed in the case of the firm though the rectification is to be made in the assessment of the partners of the firm.

By s. 19 of the Finance Act, 1956, sub-s. (10) (among others) was added as from April 1, 1956. That sub-section reads as follows :-

> "(10) Where in any of the assessments for the years beginning on the 1st day of April of the years 1948 to 1955 inclusive, a rebate of income-tax was allowed to a company on a part of its total income under clause (i) of the proviso to Paragraph B of Part I of the relevant Schedules to the Finance Acts specifying the rates of tax for the relevant year, and subsequently the amount on which the rebate of income-tax was allowed as aforesaid is availed of by the company, wholly or partly, for declaring dividends in any year, the amount or that part of the amount availed of as aforesaid, as the case may be, shall, by reason of the rebate of income-tax allowed to the company and to the extent to which it has not actually been subjected to an additional income-tax in accordance with the provisions of clause (ii) of the proviso to Paragraph B of Part I of the Schedules to the Finance Acts above referred to, be deemed to have been made the subject of incorrect relief under this Act, and the Income-tax Officer shall recompute the tax payable by the company by reducing the rebate originally allowed, as if the recomputation is a rectification of a mistake apparent from the record within the meaning of this section and the provisions of sub-section (1) shall apply accordingly, the period of four years specified therein being reckoned from the end of the financial year in which the amount on which rebate of income-tax was allowed as aforesaid was availed of by the company wholly or partly for declaring dividends."

It will be noticed that the time limit under this sub-section was to commence from the end of the financial year in which the dividends were declared from profits on which the rebate was earned earlier.

The question in this case is whether sub-s. (10) can apply to an assessment which had been made before sub-s. (10) came into force. The contention of the assessee company is that sub-s. (10) was given retrospectivity only up to April 1, 1956, and the words of that sub-section should be interpreted in such a way as to give the sub-section no greater retrospectivity. According to the

assessee company, the assessment for the year 1953-54 had become final on April 17, 1954, that is to say, before the 1st day of April, 1956, from which date sub-s. (10) was made to operate. The provisions of s. 35(10), according to the assessee company, could only be utilised if dividends were declared after April 1, 1956, but not if the declaration took place earlier. Reliance was placed upon the decision of this Court in Income-tax Officer v. Habibullah ([1962] Supp. 2 S.C.R. 716.), and reference was also made to another decision following Habibullah's case ([1962] 46 I.T.R. 609.), Second Additional Income-tax Officer v. Atmala Nagaraj ([1962] 46 I.T.R. 609.).

Our learned brother Das, J., following Habibullah's case ([1962] Supp. 2 S.C.R. 716.) has held that the contention of the assessee company is well-founded and has expressed the opinion that Atmala Nagaraj's case ([1962] 46 I.T.R. 609.) may need re-consideration. He has, therefore, ordered the reversal of the judgment and order of the High Court. In our judgment, and we say it with profound respect, this appeal must be dismissed. We are also of the opinion that both the above cases (which are of the same Divisional Bench) may have to be re-considered hereafter. Atmala Nagaraj's case ([1962] 46 I.T.R. 609.) followed Habibullah's case ([1962] Supp. 2 S.C.R. 716.). The difference in the facts of the two cases was only in one respect and that was not sufficient to take Atmala Nagaraj's case ([1962] 46 I.T.R. 609.) out of the ratio of the earlier decision. We shall deal with these two cases later.

The Income-tax Act imposes a charge of tax for a year at a time and that year is the year of assessment. The charge is in respect of a previous year which is commonly known as the year of account. The rate at which the tax is to be charged is enacted by an annual Finance Act for each assessment year. The assessment year is the Financial Year. From the nature of things an amendment of the Income-tax Act, made in the middle of the assessment year, if made to operate from the beginning of the assessment year, operates on incomes which had been earned before. Since an amendment cannot be allowed to operate from the mid-term, each such amendment is made to comprise a whole assessment year whether it be the assessment year then running or an earlier or a later assessment year. Amendments are thus give retrospective operation from the first day of April in the same, or a preceding, or prospective operation for a future assessment year. Ordinarily, the law, as it stands on the Ist of April in any assessment year, applies to assessments in that year but the law may expressly or by necessary implication give itself a greater retrospective operation.

The date on which the amendment comes into force is the date of the commencement of the amendment. It is read as amended from that date. Under ordinary circumstances, an Act does not have retrospective operation on substantial rights which have become fixed before the date of the commencement of the Act. But this rule is not unalterable. The legislature may affect substantial rights by enacting laws which are expressly retrospective or by using language which has that necessary result. And this language may give an enactment more retrospectivity than what the commencement clause gives to any of its provisions. When this happens the provisions thus made retrospective, expressly or by necessary intendment, operate from a date earlier than the date of commencement and affect rights which, but for such operation, would have continued undisturbed.

It must be remembered that if the Income-tax Act prescribes a period during which the tax due in any particular assessment year may be assessed, then on the expiry of that period the Department cannot made an assessment. Where no period is prescribed the assessment can be completed at any time but once completed it is final. Once a final assessment has been made, it can only be reopened to rectify a mistake apparent from the record (s. 35) or to re-assess where there has been an escapement of assessment of income for one reason or another (s. 34). Both these sections which enable reopening of back assessments provide their own periods of time for action but all these

periods of time, whether for the first assessment or for rectification, or for re-assessment, merely create a bar when that time passes against the machinery set-up by the Income-tax Act for the assessment and levy of the tax. They do not create an exemption in favour of the assessee or grant an absolution on the expiry of the period. The liability is not enforceable but the tax may again become exigible if the bar is removed and the tax-payer is brought within the jurisdiction of the said machinery by reason of a new power. This is, of course, subject to the condition that the law must say that such is the jurisdiction, either expressly or by clear implication. If the language of the law has that clear meaning, it must be given that effect and where the language expressly so declares or clearly implies it, the retrospective operation is not controlled by the commencement clause.

The amendment, with which we are concerned, was made by the Finance Act, 1956 (18 of 1956). By s. 2, it dealt with the year beginning on the 1st day of April, 1956, and fixed the rates of taxes for the assessment year commencing on that date. It also amended the Income-tax Act by ss. 3 to 35. Section 28 then prescribed the dates of commencement of these sections. It reads :-

> "28. Commencements of amendments to Act 11 of 1922. - The amendments made in the Income-tax Act by section 4 and clause (b) of section 15 shall be deemed to have come into force on the 1st day of April 1955, and the amendments made by section 3 to 27 inclusive shall come into force on the 1st day of April, 1956."
>
> Sub-section (10) was introduced into s. 35 of the Income-tax Act by s. 19 of this Act. If there was nothing more in the language of the sub-section to give it operation from an earlier date it would have operated only from 1st April, 1956, but the language of the sub-section gives it additional retrospectivity and says so in such clear and unambiguous language as to leave no doubt. There is no room for the application of Lord Justice Bowen's dictum in Reid v. Reid ((1886) 31 Ch. D. 409.) that even in construing a section which is to a certain extent retrospective, the maxim that statutes are prospective only, ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain.

The topic of s. 35 is rectification of mistakes apparent from the record. Sub-section (10) introduced a new basis for rectification is s. 35 which already prescribed a period of four years from the order of assessment and the new sub-section enabled rectification to be made in new circumstances and within a new time limit. Those circumstances when analysed, furnish the key to the retrospectivity of the section. We shall begin by quoting only the material portion of that sub-section, which has been quoted in full earlier :-

> "Where, in any of the assessments for the years beginning on the 1st day of April of the years 1948 to 1955 inclusive, a rebate of income-tax was allowed..... and subsequently the amount on which the rebate of income-tax was allowed..... is availed of.... for declaring dividends in any year..... the amount.... shall..... be deemed to have been made the subject of incorrect relief.... and the Income-tax Officer shall recompute the tax..... as if the recomputation is a rectification of a mistake apparent from the record within the meaning of this section and the provisions of sub-section (1) shall apply accordingly, the period of four years.... being reckoned from the end of the financial year in which the amount on which rebate of income-tax was allowed..... was availed of..... for declaring dividends."

The purport of this new sub-section was the recall of rebate which had been allowed in any of the

assessments for the years 1-4-1948 to 31-3-1956 under certain circumstances. At the year start, the sub-section takes one to assessment years to which s. 28 which prescribed the commencement as 1-4-1956 did not take one to. We do not accept the argument of the learned counsel for the assessee company that the mention of the years is merely a repetition of a historical fact for ready reference. The words "in any of the assessments for the years etc." show in respect of which assessments rectification would be possible. The years are mentioned individually by using the word "any". The law speaking in 1956 was thus speaking of all the assessment years individually going back to 1st April, 1948. The language was clearly one of retrospectivity and the suggestion that there is no intent behind these words and that they merely refer to a historical fact is not acceptable to us. This conclusion is further fortified by the words :-

> "and subsequently the amount..... is availed of.... for declaring dividends in any year....."

Having mentioned the years individually in the opening part, an event is mentioned which is subsequent, namely, declaration of dividend from an amount on which rebate was allowed. "Subsequently" here obviously means subsequent to "any of the assessments for the years beginning on the 1st day of April of the years 1948 of 1955 inclusive", not necessarily subsequent to the Amending Act. The declaration of the dividends must be after the grant of the rebate. That is the only condition and it does not import the date of commencement of the sub-section in any way. Then comes the operative part and it is this. If in the earlier assessment in any of the years mentioned a rebate was allowed and subsequently in any year there was a declaration of dividend utilising the amount on which the rebate was given, the amount so utilised should be deemed to be the subject of incorrect relief. This fiction comes into force from 1-4-1956 but it is not stated that the circumstances in which it comes into being should also be after 1-4-1956. The sub-section no doubt is to be used from 1-4-1956 but it is to be used retrospectively to recall rebate on amounts which the law deems to have been the subject of an incorrect relief in the past. The recalling of the rebate is after the enactment of sub-s. (10) but the conditions for the exercise of the power may be before or after the commencement of the sub-section. The only curb on the exercise of the power is that the Income-tax Officer may go back a period of four years reckoned from the end of the financial year in which the declaration of dividend was made to the date when the action is taken.

In the present case, this is so. The assessee company declared dividends in the calendar year 1952. The assessment year was 1-4-1953 to 31-3-1954. The letter written on March 18, 1958, asking the assessee company to show cause was within the four years reckoned from the end of the financial year (31-3-1954) in which the amount on which rebate of Income-tax was availed of for declaring dividends. It complied with the letter of the sub-section. Since the power commenced on 1-4-1956, the utmost reach of the Income-tax Officer would be the end of the assessment year 1952. Any declaration of dividend after 1st day of April, 1952, out of accumulated profits of any of the years in which rebate was earned would be within time for the recall of the rebate. But a declaration prior to 1-4-1952 would be beyond the power of the Income-tax Officer to recall. This meaning is the only meaning which the plain words of the section can bear. Any other meaning might make sub-s. (10) unworkable because no company, with the knowledge that rebate would be recalled, would like to declare dividends after April 1, 1956, out of amounts on which rebate was earned. If the other meaning was attributed, sub-s. (10) might well be a dead letter. The sub-section was obviously the result of noting how rebates were earned and later were being utilized to fill the pockets of the share-holders. The amendment met this situation and did it in very clear terms.

It remains to consider the decisions of this Court in Habibullah's case ([1962] Supp. 2 S.C.R. 716.)

and Atmala Nagaraj's case ([1962] 46 I.T.R. 609.). In those two cases this Court was called upon to interpret sub-s. (5) quoted above which was introduced as from April 1, 1952, by the Indian Income-tax (Amendment) Act, 1953. In both the cases there was a final assessment of the incomes of partners in registered firms. Later the assessment of the registered firms took place and it was found that the share of income of the partners was larger than what had been assessed. Under s. 35(1), as it stood before sub-s. (5) was introduced, rectification could be made in respect of a mistake apparent from the record and the records of the firms could not be read with those of the partners to find an error in the latter. There was thus an impasse. It was ruled by the Privy Council in Commissioner of Income-tax v. Khemchand Ramdas ((1938) L.R. 65 I.A. 236, 248.), at p. 248 :

> "..... when once a final assessment is arrived at, it cannot, in their Lordships' opinion, be reopened except in circumstances detailed in section 34 and 35 of the Act..... and within the time limited by those acts."

Therefore, unless the original s. 35 allowed such rectification there was no help. Often the firm's final assessment dragged on for years and by the time that assessment was done the time limited by (sub-s. 1) had already run out. Parliament therefore stepped in with an amendment which was to commence on April 1, 1952. Two matters were provided by sub-s. (5). Firstly, the result of the assessment of the firm showing that the partners' income was not properly included in their own assessments, was to be deemed to disclose an error in the record of the partners' assessment and secondly, the period of four years instead of being computed from the order of assessment made against the partners as under sub-s. (1) was to be computed from the date of the final order passed in the case of the firm.

No doubt this power could be exercised from 1-4-1952 but the question that had to be considered was whether it could be exercised only to reopen the assessment of partners of a firm if, and only if, the order in the assessment of the firm was passed after the amendment came into force. In dealing with the matter in Habibullah's case ([1962] Supp. 2 S.C.R. 716.) this Court referred to the finality which attached to a final assessment as stated by the Privy Council. This Court then referred to the date of the commencement of sub-s. (5) which was fixed retrospectively as 1-4-1952 and held that the sub-section could not be used to reopen assessments which had become final before the commencement of the new sub-section, contrasting its language with that of sub-s. (6) which was simultaneously introduced. In Habibullah's case ([1962] Supp. 2 S.C.R. 716.) the dates were :-

> #Partners' assessment for 1946-47 on 22-2-1950- do - do - 1947-48 on - do - Registered firms' assessment for 46-47 on 31-10-1950- do - - do - 1947-48 on 30-6-1951Sub-s. (5) to s. 35 introduced from 1-4-1952Order under s. 35(5) on 27-3-1954##
>
> If sub-s. (5) could be used in this case it is plain that the four years period had not passed between 31-10-1950 (which was the earlier assessment) and 27-3-1954 when the rectification was made. No doubt the two assessments of the firm were also before 1-4-1952 but the sub-section has nowhere said that the power was only to be exercised if the assessment of the firm was after that date. Such a meaning is also difficult to imply. Under a fiction created after 1-4-1952 the assessment of the partners disclosed a mistake and if the fiction and the rest of the sub-section were to be given their full and logical effect the assessment of the partners could be reopened and rectified. But it was held otherwise by this Court. The main reason was that the partners' assessments had become final before 1-4-1952, that under the law, as it then

> stood, there was no error in their record, and sub-s. (5) having been enacted retrospectively from 1-4-1952 could not be given more retrospectivity. That the firms' assessment was also before 1-4-1952 was not given as a reason and in any event it was not very relevant. It neither added to nor detracted from the finality (such as it was on 22-2-1952) on the Partners' assessment. The law obviously mentioned the final order in the firm's assessment as the starting point in view of the length of time the firm's assessments take to reach their own finality. But there was nothing to show that this new terminus a quo must be after 1-4-1952 before sub-s. (5) could be used. The words of the sub-section were entirely indifferent to this aspect. In Atmala Nagaraj's case ([1962] 46 I.T.R. 609.) the assessment of the partners (22-1-1952) was also completed before 1-4-1952 and had become final subject, however, to section 34 and 35. No doubt, the assessment of the firm was completed after 1-4-1952 but this distinction made no difference to the finality such as had been gained on 22-1-1952.

We do not naturally express a final opinion on Sub-s. (5). We must leave that to a future case. We must, however, say that the two earlier cases may have to be reconsidered on some future occasion. When the occasion comes the questions to ask would be :-

> 1. Did finality attach in Habibullah's case ([1962] Supp. 2 S.C.R. 716.) to the partners' assessment under the law as it then stood from 22-2-1950 (partners' assessment) or from 31-10-1950 and 30-6-1951 (the firm's assessment) ?
>
> 2. Was there no finality in so far as the partner's assessment was concerned in Atmala Nagaraj's case ([1962] 46 I.T.R. 609.) between 22-1-1952 (partner's assessment) and 1-4-1952 (the commencement of sub-s. (5)) ?
>
> 3. Was the finality of the partner's assessment if any, controlled in the one case by the fact that the assessment of the firm was before 1-4-1952 and in the other by the fact that the assessment of the firm was after 1-4-1952 ?

We have detailed these questions because they high-light the only point of difference between the two cases. We express no opinion of these questions.

In view of what we have said on the interpretation of s. 35(10) we are of opinion that the judgment of the High Court was right. We would, therefore, dismiss this appeal with casts.

BY COURT : In accordance with the opinion of the majority, this appeal is dismissed with costs.

Appeal dismissed.

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