Commercial Tax Officer and Others

Vs

Biswanath Jhunjhunwalla and Another

Civil Appeal No. 716 of 1981

(S. P. Bharucha, K. S. Paripoornan JJ)

28.08.1996

JUDGMENT

BHARUCHA, J. -

1. The correctness of the judgment and order of a Division Bench of the High Court at Calcutta is under challenge in this appeal by the Commercial Tax authorities of the State of West Bengal.

2. The first respondent was the sole proprietary concern of the late Biswanath Jhunjhunwalla; the second respondent is his heir and legal representative. The first respondent carried on business, principally in gunny bags, and was a registered dealer under the Bengal Finance (Sales Tax) Act, 1941 (6 of 1941) (now called "the Act"). We are concerned in this appeal with the assessments of the first respondent for the Assessment Years Chaitra Sudi 2023 and 2024. These assessments were completed on 17-2-1969 and 26-3-1969. Under the law as it then stood, namely, Rule 80, sub-rule (5) of the Bengal Sales Tax Rules, 1941, the assessments could have been reopened only within a period of 4 years, for the relevant part of sub-rule (5) read thus :

> "80. (5) The Commissioner or any other authority to whom power in this behalf has been delegated by the Commissioner, shall not, of his own motion, revise any assessment made or order passed under the Act or the rules thereunder if -
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> (ii) the assessment has been made or the order has been passed more than four years previously."

3. The Bengal Sales Tax Ordinance, 1973, substituted sub-section (1) of Section 26 of the Act. As substituted, sub-section (1) of Section 26 read thus :

> "26. (1) The State Government may make rules, with prospective or retrospective effect, for carrying out the purposes of this Act."

The Ordinance was replaced by the Bengal Finance (Sales Tax) (Third Amendment) Act, 1974.

4. Pursuant to the amendment of Section 26(1) of the Act, a Government Notification was issued on 30-3-1974, amending, "with effect from 1st November, 1971", clause (ii) of sub-rule (5) of Rule 80. Subsequent to such amendment, the relevant part of sub-rule (5) read thus :

> "80. (5) The Commissioner or any other authority to whom power in this behalf has

been delegated by the Commissioner shall not, of his own motion, revise any assessment made or order passed under the Act or the rules thereunder if -

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(ii) the assessment has been made or the order has been passed more than six years previously."

5. On 7-11-1974, the Commercial Tax authorities issued to the first respondent notices reopening its completed assessments for the Assessment Years Chaitra Sudi 2023 and 2024 under the provisions of the amended sub-rule (5) of Rule 80. The then proprietor of the 1st respondent filed a writ petition in the Calcutta High Court challenging the legality of these notices. The validity of the amendment of Section 26(1) of the Act was called in question and was upheld. (This contention need not detain us because it is not pressed.) It was argued on behalf of the first respondent that the right to reopen the assessments dated 17-2-1969 and 26-3-1969, stood barrel under the unamended provisions of Rule 80(5)(ii) when the said Notification amending these provisions was issued and, therefore, the notices were bad in law. The contention was upheld. The High Court held that, by the amendment of the rule, assessments which had been completed could be revised within 6 years of the date of such completion, but when the right to revise the assessments under the unamended provision of the rule stood barred on the date the amendment was made, such assessments could not be reopened or revised. The said Notification did not either expressly or by necessary implication confer any power of revision of assessments which stood barred on the date on which it was issued. The High Court relied upon the decisions of this Court in S. S. Gadgil, ITO v. Lal and Co. [(1964) 8 SCR 72 : AIR 1965 SC 171 : 53 ITR 231] and J. P. Jani, ITO v. Induprasad Devshanker Bhatt [(1969) 72 ITR 595 : AIR 1969 SC 778]. It quashed the notices.

6. Hence, this appeal by special leave.

7. Mr. Tapas Ray, the learned counsel for the appellants, drew our attention to the judgments aforementioned. He submitted that the said Notification, issued under the provisions of Section 26(1) of the Act, as amended, expressly stated that the amendment of the period of 4 years to 6 years in Rule 80(5)(ii) was with effect from 1-11-1971. The said Notification, therefore, in terms provided the date from which the amended period of 6 years would operate. The notices had been issued within such period and were valid. The decisions of this Court in cases of S. S. Gadgil [(1964) 8 SCR 72 : AIR 1965 SC 171 : 53 ITR 231] and J. P. Jani [(1969) 72 ITR 595 : AIR 1969 SC 778] were distinguishable in that no provision expressly indicating when the retrospectively amended period should start had been made.

8. Mr. H. N. Salve, the learned counsel for the respondents, laid stress on the fact that even at the time when the amendment to Section 26(1) was made, the assessing officer had lost the power to reopen the assessments in question. He submitted that the words "with effect from 1st November, 1971" in the said Notification should be read as meaning that the amended provision would be applicable to assessments made after 1-11-1971. So read, no assessments that had achieved finality would be affected. Reopening was a matter of power, and of substantive law where assessments had reached finality. An intention should clearly be evinced in the amendment to confer the power to destroy such finality. Such intention was not evinced in the present case. Our attention was drawn to the judgment in ITO v. S. K. Habibullah [1962 Supp (2) SCR 716 : AIR 1962 SC 918 : (1962) 44 ITR 809].

9. In the case of S. S. Gadgil [(1964) 8 SCR 72 : AIR 1965 SC 171 : 53 ITR 231] this Court said, and the passages are self-explanatory :

> "Section 18 of the Finance Act, 1956, is, it is common ground, not given retrospective operation before April 1, 1956. The question then is, whether the Income Tax Officer may issue a notice of assessment to a person as an agent of a non-resident party under the amended provision when the period prescribed for such a notice had before the amended Act come into force expired ? Indisputably the period for serving a notice of reassessment under the unamended section had expired, and there was in the Act as it then stood, no provision for extending the period beyond the end of one year from the year of assessment. The Income Tax Officer could therefore commence a proceeding under Section 34 on March 27, 1957, only if the amended section applied and not otherwise. The amending Act came into force after the period provided for the issue of a notice under Section 34 before it was amended had expired. It is true that there was no determinable point of time between the expiry of the prescribed time within which the notice could have been issued against the assessee under Section 34 proviso (iii) before it was amended. But there was no overlapping period either. Prima facie, on the expiry of the period prescribed by Section 34 as it originally stood, there was no scope for issuing a notice unless the legislature expressly gave power to the Income Tax Officer to issue notice under the amended section notwithstanding the expiry of the period under the unamended provision or unless there was overlapping of the period within which notice could be issued under the old and the amended provision."

The Court quoted with approval the following observations in Ahmedabad Mfg. and Calico Printing Co. Ltd. v. S. C. Mehta, ITO [1963 Supp (2) SCR 92 : AIR 1963 SC 1436 : (1963) 48 ITR 154] :

> "Once a final assessment has been made, it can only be reopened to rectify a mistake apparent from the record (Section 35) or to reassess where there has been an escapement of assessment of income for one reason or another (Section 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 reassessment, 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 eligible if the bar is removed and the taxpayer 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 Court said that the legislature had given to Section 18 of the Finance Act, 1956, only a limited retrospective operation, i.e., up to 1-4-1956. That provision had to be read subject to the rule, that in the absence of an express provision or clear implication, the legislature did not intend to attribute to the amending provision a greater retrospectivity than was expressly mentioned nor to authorise the Income Tax Officer to commence proceedings which, before the new Act came into force, had, by

expiry of the period provided, become time-barred.

10. In the case of J. P. Jani [(1969) 72 ITR 595 : AIR 1969 SC 778] the decision in the case of S. S. Gadgil [(1964) 8 SCR 72 : AIR 1965 SC 171 : 53 ITR 231] was followed. It was contended on behalf of the Revenue that Section 297(2)(d)(ii) of the Income Tax Act, 1961, was wide in its sweep and it took in all assessment years after the year ending 31-3-1940, irrespective of the question whether the right to reopen the assessment in respect of any such assessment years was barred or not under the 1922 Act when the 1961 Act came into force. The argument was found unacceptable because such construction was tantamount to giving retrospective operation to the provision which was not warranted either by its express language or by necessary implication. The provision did not disclose in express terms or by necessary implication that there was a revival of the right of the Income Tax Officer to reopen an assessment which was already barred under the 1922 Act.

11. In the case of S. K. Habibullah [1962 Supp (2) SCR 716 : AIR 1962 SC 918 : (1962) 44 ITR 809] the Income Tax Officer had sought to rely upon Section 35(5) which had been incorporated by Section 19 of the Indian Income Tax (Amendment) Act, 1953, with effect from 1-4-1952. Clause (5) was one of a group of clauses added by the Amending Act which dealt with the rectification of assessments. It dealt with the inclusion of income or correction of the income of a partner in a firm consequent upon assessment or reassessment of the firm of which he was a partner. The legislature by a fiction had regarded the inclusion and correction as the rectification of a mistake apparent from the record and prescribed a special terminal reckoning for the period of four years within which the rectification had to be made. Under clause (5) the inclusion of the shares in the assessment of the partners or the correction thereof was deemed to be a mistake apparent from the record within the meaning of the section and sub-section (1) applied thereto accordingly, the period of four years being computed from the date of the final order passed in the case of the firm. The discrepancy disclosed as a result of the assessment or reassessment of a firm between the share of a partner included in the individual assessment of that partner and his share disclosed in the assessment of the firm was not an error apparent from the record within the meaning of Section 35(1) and the legislature enacted a fiction making the inclusion of the share in the assessment or correction thereof such a mistake. If the inclusion of the share or correction of the assessment were an error apparent from the record and falling under clause (1) of Section 35, the enactment of clause (5) was unnecessary. The legislature having deliberately enacted a fiction of the nature set out in clause (5), the Court rejected the contention raised by the counsel for the Revenue that the enactment of the fiction was ex abundanti cautela. Rectification of the nature contemplated by clause (5) could not have been effected under clause (1). The legislature declared that what was not a mistake should for the purpose of rectification of assessment be regarded as a mistake apparent from the record and provided a terminus for the computation of the period of four years. The question which fell to be considered was whether, relying upon clause (5) of Section 35, an Income Tax Officer could rectify the assessment of a person who was a partner in a firm when the assessment of the firm was completed before 1-4-1952. The legislature had given to clause (5) a partial retrospective operation. The provision enacted by clause (5) was not procedural in character : it affected the vested rights of the assessee. Therefore, in the absence of compelling reasons the Court would not be justified in giving a greater retrospectivity to the provision than was warranted by the plain words used by the legislature. If, by the law prevailing at the time when the assessment was made, no such result as was contemplated by the new clause (5) arose, to give a larger retrospective operation than was directed was to ascribe to the legislature an intention different from the one expressed and to make a larger inroad upon the finality of the assessment than was permitted by the legislature.

12. What, therefore, we have to seek is the clear meaning of the said Notification. If there be no

doubt about the meaning, the amendment brought about by the said Notification must be given full effect. If the language expressly so states or clearly implies, retrospectivity must be given with effect from 1-11-1971, so as to encompass all assessments made within the period of six years theretofore, whether they have become final by reason of the expiry of the period of four years or not.

13. By reason of the said Notification, with effect from 1-11-1971, Rule 80(5)(ii) has to be read as barring the Commissioner (or other authority to whom power in this behalf has been delegated by the Commissioner) from revising of his own motion any assessment made or order passed under the Act or the rules if the assessment has been made or the order has been passed more than six years previous to 1-11-1971. Put conversely, with effect from 1-11-1971, Rule 80(5)(ii) permits the Commissioner (or other authority) to revise of his own motion any assessment made or order passed under the Act or the rules provided the assessment has not been made or the order passed more than six years previously. This being the plain meaning, the said Notification must be given full effect. Full effect can be given only if the said Notification is read as being applicable not only to assessments which were incomplete but also to assessments which had reached finality by reason of the earlier prescribed period of four years having elapsed. Where language as unambiguous as this is employed, it must be assumed that the legislature intended the amended provision to apply even to assessments that had so become final; if the intention was otherwise, the legislature would have so stated.

14. In the result, the appeal is allowed. The judgment and order under appeal is set aside. The respondents shall be entitled to proceed upon the notices dated 7-11-1974, issued to the 1st respondent reopening its assessments for the Assessment Years Chaitra Sudi 2023 and 2024.

15. There shall be no order as to costs.