ANDHRA PRADESH HIGH COURT

Kanmarlapudi Lakshminarayana Chetty

Vs.

First Additional Income-Tax Officer

Writ Petn. No. 340 of 1954

(Subba Rao, C.J. and Bhimasankaram, J.)

09.12.1955

JUDGMENT

Subba Rao, C.J.

1. This is an application under Article 226 of the Constitution of India for issuing a writ of certiorari to quash the orders of the First Additional Income-tax Officer, Nellore, dated 20-3-1954 and 31-3-1954.

2. The assessees are members of a Hindu undivided family. On 18-3-1948, the Income-tax Officer, Nellore assessed them to income-tax for the assessment year 1947-48. In doing so, he had taken into consideration a sum of Rs. 6,000/- as the share of the income of the joint family from the firm of C. P. V. Kotaiah Chetty and Co., Madras (Chillies Department). In due course the assessees paid the income-tax assessed on them. The assessment on the firm of M/s. C. P. V. Kotaiah Chetty and Co. was completed only on 31-7-1951. By reason of that assessment the share of the profits of the assessees' family for 1947-48 was found to be Rs. 21,659/- instead of Rs. 6,000/- which was the sum included in the assessment of the joint family by the assessment order dated 18-3-1948. On 15-2-1954 the Income-tax Officer gave the assessees notice to state their objections why the previous assessment dated 18-3-1948 should not be rectified under Section 35 of the Income-tax Act (hereinafter referred to as the Act) as amended by the Income-tax (Amendment) Act 1953 (hereinafter referred to as the Amending Act). The Assessees objected to the rectification on the ground, among others, that the said Act was not retrospective and would not affect the assessment completed prior to 1st April 1952. The Income-tax Officer rejected the objections and called upon the assessees to pay the additional tax before 10-5-1954.

3. Learned Counsel for the assessees contends that the Amending Act of 1953 is not retrospective and therefore it cannot be invoked to reopen an assessment completed before 1st April 1952, whereas the learned Advocate General argues that the amendment is only declaratory of the pre-existng law and therefore on the basis of the amendment even a completed assessment can be re-opened.

4. The relevant provisions of the Act may usefully be extracted at this stage :

"Section 35 : (before amendment)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 33-A 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.

* * *

Provided further that no such rectification shall be made of any mistake in any order passed more than one year before the commencement of the Indian Income-tax (Amendment) Act, 1939.

By the Indian Income-tax (Amendment) Act, 1953 the following sub.section, among others, was inserted in Section 35 of the principal Act after sub-section (4) :

"(5) Where in respect of any completed assessment of a partner in a firm it is found on the assessment or reassessment of the firm or on any reduction or enhancement made in the income of the firm under Section 31, Section 33, Section 33-A, Section 33-B, Section 66 or Section 66-A 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 provision 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."

Section 1 (2) :

Subject to any special provision made in this behalf in this Act, it shall be deemed to have come into force on the 1st day of April, 1952.

5. The effect of the aforesaid provisions may be stated thus. Under Section 35, as it originally stood the Commissioner, the Appellate Assistant Commissioner or the Income-tax Officer may within four years from the date of assessment or other orders mentioned in the section made by them rectify any mistake apparent from the record. But under the amendment inserted by Act XXV of 1953, if on assessment or re-assessment of a firm any reduction or enhancement is made in the income of the firm and it is found 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 though included, it was not correct, the assessment can be re-opened and corrected on the basis of the assessment of the firm within four years from the date of the final order passed in the case of the firm. The section further says that the inclusion of the share of the partner in the assessment or the correction thereof shall be deemed to be a rectification of a mistake apparent from the record within the meaning of section. To put it differently, Section 19 of the amending Act introduces a fiction to enable the Income-tax Authorities to invoke the provisions of Section 35 for amending the completed assessment for including the income falling to the share of the partner as ascertained from the final assessment of the firm. Under Section 1 (2) the amendment came into operation from the 1st

April 1952.

6. Before attempting to answer the question raised, it will be convenient at this stage to notice briefly the well-settled rules of statutory construction in regard to the retrospective operation of Amending Acts. Craies on Statute Law 5th Edition says about retrospective enactments at p. 357 as follows :

> "A statute is to be deemed to be retrospective which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty or attaches a new disability in respect to transactions or considerations already past .... In *Lauri v. Renad*[1], Lindley L. J. said : "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction. And the same rule involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

At p. 360 the learned author states the rule of construction as follows :

> "And perhaps no rule of construction is more firmly "established than this .... that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed interpretation, it ought to be construed as prospective only."

Maxwell on the Interpretation of Statutes, Tenth Edition, says much to the same effect at p. 213 as follows :

> "It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the term of the Act, or arises by necessary and distinct implication."

At page 214, the learned author proceeds to state :

> "A statute is not to be construed to have a greater retrospective operation than its language renders necessary."

In Halsbury's laws of England, vol. 27, page 159 it is stated :

> "A statute is prima facie prospective, and does not interfere with existing rights, unless it contains clear words to that effect, or unless having regard to its object it necessarily does so. Further, A statute is not to be construed to have a greater retrospective operation than its language renders necessary."

Bowen L. J. in *Reid v. Reid*[2], states the scope of the rules of

[1]1892-3 Ch. 402 [2]1886-31 oh. D. 402

construction in clear terms at page 408 as follows :

> "Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain is embodied in the well-known trite maxim OMNIS NOVA CONSTITUTIO FUTURIS FORMAN IMPONERE DEBET NOVA PRAETERITIS, that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the legislature meant."

7. It is, therefore, clear from the statement of law made by recognized authorities that a statute affecting vested rights is prima facie prospective unless the statute expressly or by necessary implication indicates to the contrary. Even where it is retrospective in operation, Courts should confine its operation only to the extent the language renders it necessary. Further if an Act is to a certain extent retrospective, when we reach the line at which the words of the section cease to be plain, the same rule of construction leaning against retrospectivity should be applied.

8. Bearing the aforesaid principles in mind, let us approach the relevant provisions of the Indian Income-tax Amendment Act, 1953. Does the Amending Act affect vested rights or does it only regulate the procedure ? Before the amending Act came into force, the final assessment made by an Income-tax Officer could not be reopened except under Sections 34 and 35 of the Act. If an authority is necessary for this obvious proposition, it is found in the decision of the Judicial Committee in Commissioner of Income-tax, Bombay Presidency and *Aden v. Khemchand Ramdas*[3], Lord Romer says at p. 125 (of Mad LJ) :

> "But when once a final assessment is arrived at, it cannot, in their Lordships' opinion, be reopened except in the circumstances detailed in Sections 34 and 35 of the Act (to which reference is made hereafter) and within the time limited by those sections."

It is not suggested that this assessment could have been re-opened under Section 34 of the Act. But it is said that Section 35 of the Act even without the amendment would have enabled the income-tax authorities to re-open the assessment on the ground that there was a mistake apparent from the record. But from the record of final assessment, it is impossible to say that there was a mistake apparent from the record for the assessing authority accepted a certain figure as representing the share of the assessees in the firm and made a final assessment. The mistake is not in the record but by a subsequent assessment of the firm, it was discovered that the earlier assessment was

[3]1938 2 Mad LJ 115 (c)

wrong to the extent of the assessees' share in the firm. It is not a mistake apparent from the record but a mistake discovered from the disposal of another case. It is, therefore manifest that before the amendment came into force, the assessment on the assessees had become final and it could not have been rectified on the ground of a mistake apparent from the record, and therefore the assessees have acquired a vested right against any interference with the finality of the assessment made on them. The income-tax Authorities, therefore had to rely only on the Amending Act, which must be deemed to have come into force on 1st April 1952 for amending the assessment. Sub-section 5 inserted by the new Act clearly indicates that Parliament did not consider that the inclusion of the correct figure on the basis of the final assessment of the firm was an error apparent from the record of the earlier assessment, for it designedly used the words "shall be deemed to be a rectification of a mistake apparent from the record" indicating thereby that a fiction was introduced to treat a rectification which is not in terms "a mistake apparent from the record" as one of that category. Further Sub-Section (5) introduces a fresh point for computing the period of limitation. While under Section 35 (1) four years is computed from the date of the final order of assessment, under Sub-Section 5, four years would be computed from the date of the final order passed in the case of a firm. This will enable the Income-tax Authorities to correct an assessment long after the expiry of four years from the date of the final assessment. Therefore Sub-Section 5 is not declaratory of a pre-existing law as the learned Advocate-General contends but it clearly affects vested rights which have accrued to the assessee. If so, the well-settled rule of construction precludes the Court from construing the section as retrospective.

9. Learned Counsel relied upon Section 1 (2) of the Amending Act in support of his contention that the Legislature expressly made the said Act retrospective. Under Section 1 (2), the said Act shall be deemed to have come into force on the first day of April 1952 subject to any special provisions made in that behalf. We cannot read into the section more than what it says. The amending Act received the assent of the President on 24th May 1953 and ordinarily it should have come into force on that date. The Legislature expressly gave a limited retroactivity to the operation of the Act by fixing the date 1st April 1952. The Act, therefore, subject to any special provisions must be deemed to have come into force on 1st April 1952 instead of on 24th May 1953. Then the dating back cannot give the provisions of the Act a greater retrospective operation than its language renders necessary. If the assessments made prior to the Act could not have been re-opened had the Act come into force on 20th May 1953 the fictional dating back of the Act could not enable the authorities concerned to reopen assessments completed prior to 1st April 1952. This would enable them to do so only in respect of assessments completed between 1st April 1952 and 24th May 1953.

10. The Legislature also expressly provided for the reopening of the assessments where it intended to do so. Under section 3 (2) the amendments made by sub-Clause (iii) of clause (b) of Sub-Section (1) shall be deemed to be operative in relation to all assessments for any year whether such assessments have or have not been completed before the commencement of the Indian Income-tax (Amendment) Act, 1953. Section 7 (2) prescribes that the amendments made by clause (a) of Sub-Section (1) shall be deemed to be operative for any assessment for the year ending on 3lst day of March 1952 whether made before or after the commencement has been made before such commencement the Income-tax Officer concerned shall revise it wherever necessary to give effect to this amendment. Under Section 30 (2) the amendments made by section 1 shall be deemed to be operative in relation to any assessment subsequent to the assessment for the year ending on 31th March 1951, whether such assessment has or has not

been made before such commencement it shall be lawful for the Income-tax Officer to revive it, wherever necessary to give effect to such amendments. The aforesaid specific provisions for reopening the assessments already made prior to the coming into force of the Act is a sure indication that in other cases, the Legislature did not intend to give power to reopen assessments made prior to the coming into force of the Act. Reliance is placed upon the proviso to section 35 of the Act which says that no rectification shall be made of any mistake if any order passed more than one year before the commencement of the Indian Income tax (Amendment) Act 1939 and it is contended that the absence of any such proviso in the Amending Act leads to the conclusion that sub section (5) inserted in section 35 has unlimited retrospective activity. The said omission does not lead to any such irresistible conclusion. It may be that the proviso to Section 35 was added expressly to give a limited retrospective operation to the amendment introduced by the Income-tax (Amendment) Act, 1939.

11. Learned Advocate-General strongly relied upon the decision of a Division Bench of the Calcutta High Court in *Income-tax Officer, Companies District I, Calcutta v. Calcutta Discount Co. Ltd*[4]*.,* There under Section 23 (3), Indian Income-tax Act, the respondent company was assessed to income-tax for the assessment years 1942-1943; 1943, 1944 and 1944-1945 on 24-1-1944, 12-2-1944 and 15-2-1945, respectively. The tax was paid in due course. Subsequently under Section 34, Indian Income-tax Act as amended by the Income-tax and Business Profits Tax (Amendment) Act XLVIII of 1948 fresh notices were issued to the respondent on 28-3-1951 on the ground that the Income-tax Officer concerned had reason to believe that the income for each of the years had been under assessed. It was contended, inter alia, that the notices were bad on the ground that the amendment had no retrospective operation. Under section 1 (2) of Act XLVIII of 1948, Sections 3 to 12 shall be deemed to have come into force on 30th March 1948. The learned Judges held having regard to the history of Section 34 and the provisions of section 1 (2) of the Act that Section 34 was to be deemed to have been on the statute book on 30-3-1948 and therefore by its own express language it applied on and from that date to all assessments in cases coming under clause (a) of Sub-Section (1) and in which 8 years had not elapsed on the date of the issue of notice. Chakravarti, C.J., observed at page 481 (of ITR) :

> "The question is not one of retrospective operation at all but a question of what the section says and how far the section, having come into force on 30th March 1948 extends by its own words. . . . The plain effect of the substitution of the new Section 34 with effect from 30th March 1948 is that from that date the Income-tax Act is to be read as including the new section as part thereof and it is to be so read, the further effect of the express language of the section is that so far as cases coming within clause (a) of such Section 1 are concerned, all assessment years ending within 8 years from 30th March 1948 and from subsequent dates, are within its purview and it will apply to them,

[4](1953) 23 ITR 471 : (AIR 1953 Cal 721)

provided the notice contemplated is given within such eight years."

We regret our inability to accept the reasoning of the learned Chief Justice. Section 1 (2) of Act XLVIII of 1948 gave a limited retrospective operation to the Act. Though the Act itself came into force on 8th September 1948 for certain purposes, it was deemed to have come into force on 30th March 1948. The effect was that to the extent the Act must be deemed to have come into

force on that date. Unless retrospective operation was given to the amended section, the assessment which became final before 30th March 1948 could not be reopened. Though the learned Chief Justice stated that the question was not one of retrospective operation at all, in effect the construction adopted by him gave retrospective operation to the amending Act in that it enabled the reopening of the assessment made prior to 30th March 1948. It is not necessary to express our view whether the conclusion of the learned Judges was correct and whether it could be sustained on their reasoning.

12. Equally strong reliance is placed by the Counsel for the assessees of the judgment of a divisional Bench of the Bombay High Court in the Bombay Dyeing and *Manufacturing Co., Ltd., v. M. K. Venkatachelam*[5], In that case the assessment on the petitioners for the year 1952-53 was completed in October 1952 and by the order of assessment made on 9-10-1952 credit for the sum of Rs. 50,603-15-0 representing interest at 2 per cent on the advance payment of income-tax in accordance with the provisions of Section 18-A (5), Income-tax Act, 1922 as it then stood was given to the petitioners. On 24-5-1953 Section 18A (5) was amended by Section 13, Income-tax (Amendment) Act 1953. Under s. l (2) the amendment came into operation from 1-4-1952. Pursuant to the amendment the Income-tax Officer, purporting to act under section 35 of the Act passed an order that the petitioners were entitled to interest amounting to Rs. 21,187-6-0 only for the year 1952-53 and issued notice of demand for the balance of Rs. 29,446-9-0. The petitioners filed an application for the issue of a writ in the nature of prohibition, prohibiting the respondents from enforcing the said order and notice of demand. The Court held that the liability of the petitioners to be assessed in a particular amount for the year 1952-53 was finally determined according to law on 9-10-1952 and that the liability cannot be altered because the law was subsequently altered or amended. Chagla, C.J., at page 975 (of ILR Bom) .

> "The assessment order was made on the basis of the law as it then stood and it was only because the law was subsequently altered that the liability of the petitioner might be considered to have arisen under the amended law. But the liability of the petitioner to be assessed in a particular amount was finally determined on 9-10-1952 and that liability was determined according to law. That liability cannot be altered because the law has been subsequently altered or amended,"

Though the learned Judges were dealing with a different point, they held that the retrospective operation of the amending Act would not extend to the extent of re-opening an assessment finally made on the basis of the then existing law by the change of law introduced by the amendment. If it was so in the case of final assessment made subsequent to the coming into force of the Amending Act, it would

[5] ILR (1954) Bom 971 : (s) AIR 1955 Bom 80

a fortiori be not permissible to reopen the final assessment made prior to coming into force of the Amending Act on the basis of change in law.

13. In the result we hold that the Income-tax Officer, has no jurisdiction to reopen assessments finally made before 1-4-1952 on the basis of the provisions of Sub-Section (5) inserted in section 35 by the amending Act of 1953. We therefore quash the orders made by the First Additional Income-tax Officer, Nellore dated 20-3-1954 and 31-3-1954. The applicant will have his costs. Advocates' fee Rs. 200/-.

Order quashed.