

CALCUTTA HIGH COURT

Shew Bhagwan Goenka

Vs

Commercial Tax Officer

(Debiprosad Pal, J.)

17.08.1973

JUDGMENT

Debiprosad Pal, J.

1. The petitioner is the karta of a joint Hindu mitakshara family consisting of his sons and other descendants. The said joint family carries on business under the trade name of "Goenka Coal Company" (hereinafter referred to as the said firm). The said firm owns a colliery known as "Goenka Kajora Colliery" situated at P.O. Ukhra; District. Burdwan. The said firm is a registered dealer under the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as the said Act). The said firm is also a registered dealer under the Central Sales Tax Act, 1956. It is stated that for the raising of coal, the said firm had installed several machineries and equipments and used such machineries and equipments and other stores for raising coal from the said colliery. The machineries and equipments so installed at the said colliery and the stores are occasionally sold or disposed of when they become old and unserviceable. It is stated that the sales of such old and discarded machineries, equipments and stores do not form any part of the business activities of the said firm, which consisted mainly of raising of coal from the said colliery and selling the same. It is further stated that such sales of the old and discarded machineries, equipments and stores are occasional and the said firm does not deal in and/or purchases any old or discarded machineries, equipments and/or stores for the purpose of selling them with any intention of making any profit or gain thereby. It is stated that the firm does not carry on any business of selling such old machineries equipments and/or stores.

2. During the year 1964 the said firm sold old and discarded machineries, equipments and stores and realised a sum of Rs. 44,240. Out of the said sum of Rs. 44,240, a sum of Rs. 26,140 is stated to represent the sale of iron scrap. For the four quarters ending on Kartick Badi 15,2021, which corresponded roughly the four quarters of the year 1964, the Commercial Tax Officer, Asansol Charge, being respondent No. 1, made an assessment under the Act and included in the

taxable turnover the said sum of Rs. 44,240 in view of the amendment in Section 2 of the Act by inserting the definition of business. The said sales were treated by respondent No. 1 as ancillary or incidental to the business and hence constitute business within the meaning of the amended provisions of the Act. The petitioner preferred an appeal before the Assistant Commissioner of Commercial Taxes, who also by his order made under Section 20(1) of the Act upheld the said inclusion in view of the insertion of the new definition of business in the Act. Aggrieved by the said order the petitioner has challenged the inclusion of the said sum in its taxable turnover and obtained a rule nisi.

3. The learned counsel for the petitioner has confined his argument mainly to the validity of the retrospective operation of the West Bengal Taxation Laws (Amendment) Act, (hereinafter referred to as the amending Act). It is contended that Section 4 of the amending Act in so far as it introduces the definition of business by inserting Section 2(1a) in the Act with retrospective operation from the inception of the Act offends Article 19(1)(f) and (g) of the Constitution.

4. In order to examine the validity of this contention it is necessary to trace the circumstances which led to the introduction of the amending Act and to note the various legislative amendments made from time to time in this respect. By an Ordinance known as the West Bengal Taxation Laws (Amendment) Ordinance, 1967, promulgated by the Governor of West Bengal, several provisions of, inter alia, the Act were amended. By Clause 4 of the said Ordinance, a definition of the word "business" was for the first time incorporated in Section 2 of the Act by inserting Sub-section (1a) in Section 2 of the Act. It was further provided by Clause 4 of the said Ordinance that the new Sub-section (1a) of Section 2 of the Act defining the word "business" shall be and shall always be deemed to have been inserted in the Act. The business under the amended Section 2(1a) of the Act includes :

(i) Any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with the motive to make profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern ;

(ii) Any transaction in connection with, or ancillary or incidental to, such trade, commerce, manufacture, adventure or concern.

5. Thereafter another Ordinance was promulgated by the Governor of West Bengal on 9th January, 1968, known as the West Bengal Taxation Laws (Amendment) Second Ordinance, 1968 and similar provisions were introduced incorporating the definition of business in Section 2(1a) of the Act with retrospective effect. The earlier West Bengal Taxation Laws (Amendment) Ordinance, 1967, was repealed but all proceedings commenced or things done or action taken

under the said Ordinance shall continue to be in force and shall be deemed to have been validly commenced or done or taken under the Act as amended by the Second Ordinance. Thereafter the West Bengal Taxation Laws (Amendment) Act, 1968 (President's Act No. 6 of 1968) was enacted by the President of India. By Section 4 of the said amending Act, the definition of "business" as introduced in the earlier Ordinance was reenacted with the same retrospective effect and although the Second Ordinance was repealed by Section 8 of the amending Act, proceedings commenced or action taken under the Act were deemed to have been taken or commenced under the Act as amended by the amending Act. The Presidential Act was thereafter replaced by the West Bengal Taxation Laws (Amendment) Act, 1969 (West Bengal Act No. 25 of 1969) and the definition of business as appearing in Section 4 of the Presidential Act was reenacted by Section 4 of the amending Act with retrospective operation.

6. It may be mentioned that under Section 2(c) of the Act "dealer" is defined as meaning any person who carries on the business of selling goods in West Bengal and includes the Government. The liability to pay sales tax under Section 4 of the Act is fixed upon every dealer whose gross turnover during the year exceeds the taxable quantum. In the Act there was no definition of business. The amending Act defining business for the first time has now done away with motive for making profit or the making of profit as an element in determining what constitutes a business. The amendment has also included within the definition of business, transaction in connection with or ancillary or incidental to such trade, commerce or manufacture or adventure or concern. By Section 4 of the amending Act, Section 2(1a) shall be and shall always be deemed to have been inserted. In other words, the definition of business had been introduced by the amending Act with retrospective operation from the date when the original Act came into force.

7. It is now well-settled that the Legislature in the exercise of its plenary power of legislation in respect of topics covered by the several entries can enact laws, which may provide not only for their prospective operation but also for retrospective operation. Although the Legislature can pass such a law which would make its provision retrospective, it is open to a party affected by the provisions of the Act to contend either that the retrospective operation of the law so completely alters the character of the tax imposed by it as to take it outside the limits of the legislative competence of the Legislature or that the restrictions imposed by the Act are so unreasonable that they should be struck down on the ground that they contravene the fundamental rights guaranteed under Article 19(1)(f) and (g) of the Constitution : Rai Ramkrishna and Ors. v. State of Bihar [1963] 50 I.T.R. 171 (S.C.). It would be, therefore, relevant in an appropriate case when such a challenge is thrown, to consider the effect of the retrospective operation of the law . both in respect of the legislative competence of the Legislature and the reasonableness of the restriction imposed by it.

8. In the present case, no attempt has been made to question the legislative competence of the State Legislature to introduce for the first time the definition of the word "business" with retrospective effect. The argument has been confined mainly to the reasonableness of the restriction imposed by the retrospective operation of the newly inserted definition of "business". It is contended that by Clause 2(1a)(ii) a transaction which is in connection with, or ancillary or incidental to, trade or commerce or manufacture even without any motive to make profit is now clothed with the character of business and by the retrospective operation of the definition of "business", transactions which were concluded several years back would now be liable to taxation under the Act as in respect of such a transaction, a person will be treated as a dealer for the purpose of his liability to tax under the Act. This, it is contended, imposes an unreasonable restriction upon a person's fundamental right to carry on business and to hold property under Article 19(1)(f) and (g) of the Constitution.

9. It is now well-settled that the taxing statutes are not beyond the constitutional limitation prescribed by Articles 19 and 14 of the Constitution. In the application of the principles, the courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature so that it can adjust its system of taxation in all proper and reasonable ways within the field of wide range of flexibility.

10. The Legislature sometimes is faced with a situation when the courts in the exercise of their powers of judicial review declare a particular statute or some provisions of the statute to be invalid because of some lacuna or infirmity. To remove and rectify such defects or infirmities and to validate the proceedings, including realisation of tax, which have taken place in pursuance of the earlier enactment which has been subsequently declared to be invalid, an amending and a validating Act has to be enacted. Such an Act by its very nature is to be given a retrospective operation so as to validate the actions which have been taken and the realisation of tax made under the law declared to be invalid. Its aim is to effectuate and carry out the object for which the earlier Act had been enacted. Such an amending and validating Act to make "small repairs" has been held to be a permissible mode of legislation and is frequently resorted to in fiscal enactments: Krishnamurthi & Co. v. State of Madras [1973] 31 S.T.C. 190 (S.C.): "It is necessary that the Legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called 'small repairs'. The interest in the retroactive curing of such a defect in the administration of Government far outweighs the individual's interest in benefiting from the defect.... The court has been extremely reluctant to override the legislative judgment as to the necessity for retrospective taxation, not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of Government among those who benefit from it" (73 Harvard Law Review 692 at p. 705), quoted with approval by the

Supreme Court in the case of Assistant Commissioner of Urban Land Tax v. The Buckingham & Carnatic Co. Limited [1970] 75 I.T.R. 603 (S.C.).

11. Different considerations may arise where by an amendment with retrospective operation a fresh tax is sought to be levied. In the case of Krishnamurthi & Co. v. State of Madras [1973] 31 S.T.C. 190 (S.C.), the amending Act was intended to cure an infirmity as revealed by the judgment of the High Court and to validate the past levy and collection of tax in respect of all kinds of nonlubricating mineral oils, including furnace oil with effect from 1st April, 1964. It is in such circumstances that the amending Act was upheld by the Supreme Court. In the case of Hira Lal Rattan Lal v. Sales Tax Officer, Section III, Kanpur and Anr. [1973] 31 S.T.C. 178 (S.C.), the U. P. Sales Tax (Amendment and Validation) Act, 1970, was upheld as the amendment of the U. P. Sales Tax Act, 1948, was necessitated because of the Legislature's failure to bring out clearly in the principal Act, its intention to separate the processed or split pulses from unsplit or unprocessed pulses. Further, the retrospective amendment became necessary as otherwise the State would have to refund large sums of money.

12. It is necessary, therefore, to enquire as to the circumstances under which the amendment in question was introduced. Neither the Ordinance nor the Act discloses any object or reason for which the amendment of Section 2(1a) of the Act was introduced. In the West Bengal Taxation Laws (Amendment) Act, 1968 (President's Act No. 6 of 1968), the reasons for the amendment were stated to be the need of additional resources for financing the development schemes of West Bengal and also to meet the vastly increased commitments in the nonplan budget of the State. It is true that the statement of objects and reasons is not admissible as an aid to the construction of statute. It is however permissible to refer to such objects and reasons for the limited purpose of ascertaining the conditions prevailing at the time which necessitated the introduction of the amendment and the extent and urgency of the evils which the amendment sought to remedy. These are matters which must enter into the judicial verdict as to the reasonableness of the restriction which can be imposed on the exercise of the right guaranteed under Article 19(1)(f) and (g) of the Constitution : State of West Bengal v. Subodh Gopal Bose and Ors. A.I.R. 1954 S.C. 92.

13. The word "business" was not defined earlier in the Act. The Supreme Court in the case of State of Andhra Pradesh v. H. Abdul Bakshi & Brothers [1964] 15 S.T.C. 644 (S.C), in interpreting the meaning of the expression "business" observed as follows :

The expression 'business' though extensively used is a word of indefinite import. In taxing statutes it is used in the sense of an occupation or profession which occupies the time, attention and labour of a person, normally with the object of making a profit. To regard an activity as business, there must be a course of dealings either actually continued or contemplated to be

continued with a profitmotive and not for sport or pleasure.

14. The said judgment was delivered on 8th April, 1964. This view has been reiterated in the case of State of Gujarat v. Raipur Manufacturing Co. Ltd. [1967] 19 S.T.C. 1 (S.C). It appears, therefore, that the law was fairly settled since the decision of the Supreme Court in the case of State of Andhra Pradesh v. H. Abdul Bakshi & Bros. [1964] 15 S.T.C. 644 (S.C) that to regard an activity as a business there must be a course of dealings either actually continued or contemplated to be continued with a profitmotive. There is nothing to suggest that the State Government before the present amendment understood the meaning and scope of the expression "business" in a different way and levied tax on sales which were effected not in the course of business of a dealer and without any profitmotive. In fact, from the Manual of Sales Tax Laws and Administration (1958 Edition), Part V, it appears that while stating the legal principles and case laws, the Manual points out that casual sales and sales of goods not in relation to a business or trade are not liable to be taxed (page 124 of Part V of the Manual). The object of the present amending Act does not appear to remove and rectify any defect in phraseology or lacuna or to validate the proceedings, including realisation of tax which had taken place on the basis of the earlier enactment. Its object is to enlarge the scope and ambit of the expression "business" by including within it transactions which without the amendment could not be brought within the meaning of the word "business" as understood in a commercial sense and as interpreted by courts of law. As a result of the amendment, under both parts of the definition of "business" appearing in Section 2(1a) of the Act, profitmotive is now immaterial and the concept of business as understood and judicially interpreted has been modified in respect of matters falling under Section 2(1a) of the Act. If it is found that a person is carrying on trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, which falls within the definition of Section 2(1a)(i) of the Act, any transaction in connection with or ancillary or incidental to such trade, commerce or manufacture, adventure or concern would also amount to business within the meaning of Section 2(1a)(ii) of the Act, Under both parts of the definition profitmotive is now immaterial : State of Tamil Nadu v. Burtnah Shell Oil Storage & Distributing Co. of India Ltd.[1973] 31 S.T.C. 426 (S.C.)

15. The question as to whether the restriction imposed on the petitioner's right under Article 19(1)(f) and (g) by the retrospective operation of the Act is reasonable so as to attract the provisions of Article 19(5) and (6) is to be considered in the context, of the circumstances which have been set out above. It appears that if the Legislature has introduced an amendment in a fiscal law in order to validate the proceedings, including the realisation of tax under a law, declared by a court to be invalid, such retrospective legislation has been upheld within the permissible limits of reasonable restriction under Article 19(5) and (6) of the Constitution. The test of the length of time covered by the retrospective operation by itself was not treated as a

decisive test: Rai Ramkrishna v. State of Bihar [1963] 50 I.T.R. 171 (S.C.). The mere fact that by such retrospective legislation, the dealer is not in a position to pass on the sales tax to others does not affect the competence of the Legislature to enact a law imposing sales tax retrospectively, because that is a matter of legislative policy : Krishnamurthi & Co. v. State of Madras [1973] 31 S.T.C. 190 (S.C.).

16. The test of reasonableness should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. "The nature of the rights alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evils sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict" :State of Madras v. V G. Rao A.I.R. 1952 S.C, 196. As stated by Mahajan, J., in Chintamanrao and Anr. v. The State of Madhya Pradesh A.I.R. 1951 S.C. 118 the word "reasonableness" implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed under Article 19(1)(g) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in that quality. Applying this test one has to examine whether there is any nexus between the retrospective operation of the amendment in question and the mischief sought to be remedied by such amendment. I have already stated that the amendment was not introduced to validate the proceedings which were taken on the basis of any enactment declared by court of law to be invalid. The object of the amendment is to widen the definition of business so as to include for the first time transactions which without the amendment fell outside the concept of business hitherto understood and judicially determined. The amendment for all intents and purposes seeks to impose sales tax for the first time on transactions which till the amendment fell outside the purview of the Act. In my view, the effect of retrospective operation of such an amendment would be to impose an unexpected liability in respect of transactions which when took place were not subject to any charge or liability under the Act. Under the Act, a dealer will be saddled with a liability to pay sales tax with respect to transactions which will now constitute business as defined by the amendment. He might have entered into such transactions several years back and at the time when these transactions took place such sales were not tax. As a result of the retrospective operation of the amendment, he is now to be treated as a dealer liable to pay tax in respect of such transactions of sales. A dealer who is liable to pay tax is prohibited under Section 7 of the Act from carrying on business as a dealer unless he has been registered and possesses a registration certificate. Any contravention of the statutory obligation of being registered as a dealer is treated as an offence under Section 22(1)(a) of the Act and is punishable with simple imprisonment which may extend to six months or with fine or with both. Thus, by introducing the amendment with retrospective effect, the petitioner is subjected to pay tax which could never

be contemplated or foreseen at the time when sales were actually effected. No tax could be recovered by the petitioner from the purchasers nor any declaration form could be obtained from such of them as were registered under the Act. The fact that the dealer is not in a position to shift the incidence of sales tax to others may not be relevant for determining the legislative competence to enact the law with retrospective effect but is a relevant and cogent consideration to be taken into account in judging the reasonableness of the restrictions imposed by the retrospective operation of the law. For the reasons set out above, the retrospective amendment, in my view, imposes an unreasonable restriction upon the petitioner's fundamental rights guaranteed under Article 19(1)(f) and (g) of the Constitution and as such is not protected by Article 19(5) and (6). In my view Section 2(1a) of the Act, in so far as it has been given retrospective operation by Section 4 of the amending Act, is ultra vires the Constitution as it offends Article 19(1)(f) and (g).

17. Learned counsel for the petitioner has also challenged the retrospective operation of Section 2(1a) of the Act as it violates Article 20 of the Constitution. Article 20 provides an injunction against conviction of a person or his subjection to a penalty under ex post facto laws. "The phrase 'law in force' as used in Article 20 should be understood in its natural sense as being the law in fact in existence and in operation at the time of the commission of the offence as distinct from the law 'deemed' to have become operative by virtue of the power of the Legislature to pass retrospective laws" : Shiv Bahadur Singh v. State of Vindhya Pradesh A.I.R. 1953 S.C. 394. The combined effect of Section 2(1a), Section 4, Section 7 and Section 22(1)(a) of the Act is that a contravention of the statutory obligation of a dealer to be registered in respect of the transactions which are now liable to be taxed will be treated as an offence punishable under Section 22(1)(a) of the Act although such sales were not liable to be taxed under the Act at the time when such sales were effected. In my view, the retrospective operation of Section 2(1a) of the Act also offends Article 20 of the Constitution.

18. In view of my decision that the said provisions offend Article 19(1)(f) and (g) of the Constitution, it is not necessary to deal with the other contention raised that such provisions also are violative of Article 14 of the Constitution.

19. The result is that this rule is made absolute. There will be a writ in the nature of certiorari quashing the order of the Commercial Tax Officer and the order of the Assistant Commissioner of Commercial Taxes, being annexures A and C, in so far as such orders impose tax on sales amounting to Rs. 44,240, which have been found to be ancillary or incidental to the business of the petitioner. There will be also a writ in the nature of mandamus commanding the respondents to forbear from giving effect to the said orders in respect of the sum of Rs. 44,240 being sales which are ancillary or incidental to the business of the petitioner. The rule is made absolute to the

extent indicated above. There will be no order as to costs.

