

(1997) 09 MP CK 0074

In the Madhya Pradesh High Court

Case No : Income-tax Reference No"s. 52 of 1994

Commissioner of Income Tax

APPELLANT

Vs

Hindustan Electrographite Ltd.

RESPONDENT

Date of Decision : 11-09-1997

Acts Referred:

Finance Act — Section 28

Income Tax Act, 1961 — Section 139, 143, 143(1), 143(1A), 28

Citation : (1998) 229 ITR 16 : (1998) 96 TAXMAN 108

Hon'ble Judges : A.K. Mathur, C.J.;Dipak Misra, J

Bench : Division Bench

Advocate : Abhay Sapre, for the Appellant; B.L. Nema, Senior Advocate, for the Respondent

Judgement

A.K. Mathur, C.J.—This is a reference u/s 256(1) of the Income Tax Act, 1961, at the instance of the Revenue and the following question of law has been referred by the Tribunal for answer by this court:

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in deleting the addition made by the Assessing Officer u/s 143(1)(a) in view of the clear cut provisions of Sections 143(1)(a), 143(1A) and 234 ?"

2. The brief facts giving rise to this reference are that the assessee is a public limited company which filed its return of income for the assessment year 1989-90 on December 20, 1989. The Assessing Officer passed an order u/s 143(1)(a) of the Act on July 5, 1990, and added a sum of Rs. 1,31,41,030 representing cash compensatory support received by the assessee but not offered to tax as an adjustment. Accordingly, additional Income Tax u/s 143(1A) of the Act and consequential interest was levied. On appeal, the Commissioner of Income Tax (Appeals) confirmed the order passed by the Assessing Officer. The Tribunal deleted the addition. Hence, the Revenue approached the Tribunal for making a reference and, accordingly, the aforementioned question of law has been referred by the Tribunal for answer by this court.

3. In this case, the assessee is a company and was under an obligation to file a return of income for the assessment year 1989-90 u/s 139 of the Act by December 31, 1989. Accordingly, the assessee filed the return on December 29, 1989. Meanwhile, the Finance Act, 1990, came into force and received the assent of the President on May 31, 1990. By this Finance Act of 1990, Section 28 of the Income Tax Act was amended and Clause (iiib) was inserted with retrospective effect from April 1, 1967. Section 28(iiib) reads as under :

" (iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India."

4. This company, which was dealing in exports, received cash assistance. Earlier it was not subjected to tax but subsequently by the amendment in Section 28(iiib), it was sought to be taxed by the Finance Act of 1990 which was made retrospective in effect with effect from April 1, 1967.

5. At the time the assessee filed the return, the aforesaid provision in Section 28(iiib) was not there but by enactment of the Finance Act, 1990, Clause (iiib) in Section 28 of the Act was inserted with retrospective effect from April 1, 1967. Accordingly, treating it to have fictionally come into force from April 1, 1967, the Assessing Officer imposed additional tax u/s 143(1A) of the Act. Section 143(1A) (a) reads as under :

" (1A)(a) Where, in the case of any person, the total income, as a result of the adjustments made under the first proviso to Clause (a) of Sub-section (1), exceeds the total income declared in the return by any amount, the Assessing Officer shall, -

(i) further increase the amount of tax payable under Sub-section (1) by an additional Income Tax calculated at the rate of twenty per cent, of the tax payable on such excess amount and specify the additional Income Tax in the intimation to be sent under Sub-clause (i) of Clause (a) of sub-section (1) ;

(ii) where any refund is due under Sub-section (1), reduce the amount of such refund by an amount equivalent to the additional Income Tax calculated under Sub-clause (i)."

6. This Section 143(1A)(a) lays down that wherever the total income as a result of the adjustments made under the first proviso to Clause (a) of Sub-section (1) exceeds the total income declared in the return by any amount, the Assessing Officer shall increase the amount of tax payable under Sub-section (1) by an additional Income Tax calculated at the rate of 20 per cent. of the tax payable on such excess amount and specify the additional Income Tax in the intimation to be sent under Sub-clause (i) of Clause (a) of Sub-section (1). In the present case, obviously at the time when the assessee filed the return an intimation was sent to it and in that no defect of any sort was found, But, in the meanwhile, the Finance Act of 1990 came into force as a result of which the aforesaid amount came to be taxed fictionally with effect from April 1, 1967. Therefore, the

Assessing Officer charged additional Income Tax by adding the aforesaid amount as taxable. The difficulty in the present case is that at the time the return was filed, the aforesaid provision was not in force, the same having been inserted by the Finance Act, 1990, and made operative retrospectively with effect from April 1, 1967.

7. As per Section 143(1A), in the case of a return filed by an assessee if it is found that certain income is increased on the voluntary disclosure by the assessee, additional tax can be imposed. The idea behind this insertion of the provision is to keep the assessee under check not to file the return in a thoughtless manner so that the Revenue may not be cheated inadvertently or advertently. This was only with a view to keep the assessee under check and not to take liberty of filing rash and irresponsible return.

8. In the present peculiar case before us, in fact the assessee could not have thought of adding the compensation received from the Government of India which would be taxed with retrospective effect. Hence, at the time when the return was filed u/s 139 of the Act on December 29, 1989, the aforesaid provision of Section 28(iib) was not in existence. It was only when the Assessing Officer was finalising the return filed by the assessee that the law came into force with effect from April 1, 1967, and, therefore, the Assessing Officer levied additional tax. It is true that the Legislature is competent to enact a law prospectively as well as retrospectively ; but it is settled law that fiscal statutes shall not be given retrospective effect unless it is clearly intended by the Legislature. In the present case, there are no two opinions in the matter that the Legislature intended to bring this provision into force retrospectively and as a result of retrospective effect of this fiscal statute, it has caused a tax liability on the assessee. This provision has come into force with effect from April 1, 1967, and, therefore, the assessee would be liable to pay the tax on any compensation received against exports.

9. The question is whether the assessee in the present case is liable to be levied with additional tax as contemplated u/s 143(1A) of the Act. In our opinion, it would be unfair and unjust to levy additional tax on the assessee because the assessee had not misled the Assessing Officer while filing the return u/s 139 of the Act and the Assessing Officer had already intimated the assessee u/s 143(1) (a) of the Act, on July 5, 1990, though a notice was issued subsequently u/s 143(2). But we are not concerned whether the assessee has made any concealment of income while filing the return. Section 143(1A) of the Act read with the proviso to Clause (a) of Sub-section (1) will come into play only where the assessee on his voluntary return makes certain statements for purposes of claiming certain deductions and allowances and if they are found to be inadmissible prima facie, in that case additional tax can be charged. But where an assessee has filed a return and the Assessing Officer has not found it wanting in any way and meanwhile law is amended retrospectively attracting levy of tax, in that case holding the assessee guilty and levy him with additional dose of tax

will be unfair and unjust.

10. So far as levy of penalty and criminal liability is concerned, it has been laid down in a catena of decisions of the Supreme Court that an act which was committed was not an offence but if it has become an offence because of retrospective operation of law, then the incumbent will not be held liable for that part. It has been observed that penal statutes will only be prospective by reason of constitutional restriction imposed by article 20. Reference in this connection may be made to the case of *G.J. Fernandez Vs. State of Mysore and Others*, . It has also been observed that if an Act creates a new offence, it would be binding only in those cases of offences which were committed after the Act came into operation. Therefore, to hold the assessee guilty and to subject him to the additional tax on account of the fiscal statute being given retrospective effect will be unfair and unjust.

11. In the present case, as we have already pointed out above, at the time when the assessee filed the return, the Finance Act of 1990, had not come into being, much less making it to be retrospective with effect from April 1, 1967. Section 143(1A) will only come into play when the return is filed and it is found to be wanting by the Assessing Officer, then it will expose the assessee to the additional tax. That is not the case here, in the present case. Therefore, construing Sections 139, 143(1A) and Section 28(iib) cumulatively, the effect would be that where the assessee had voluntarily filed the return at the time when a particular law was in existence and if it is retrospectively amended, the assessee cannot be held liable for filing a wrong return and cannot be subjected to levy of additional tax. This interpretation will be advancing the cause of justice. In this connection, our attention was invited to a decision of the Supreme Court in the case of *Reliance Jute and Industries Ltd. Vs. Commissioner of Income Tax, West Bengal*, , wherein it has been laid down thus (page 923) :

"It is a cardinal principle of the tax law that the law to be applied is that in force in the assessment year unless otherwise provided expressly or by necessary implication . . ."

12. In the case of *Sulemanji Ganibhai Vs. Commissioner of Income Tax*, , which is a case of penalty, their Lordships of this court held that the quantum of penalty is to be determined by the law applicable in 1966 and the revised return not being u/s 139(5) had to be ignored and that the amendment of 1968 not being retrospective was not applicable. The general principle of law of interpretation of statutes is that normally a law will come into force from the date specifically provided therein. In the present case, as it has been specifically provided to be effective with effect from April 1, 1967, hence the income received by the assessee by way of cash compensatory support is subject to the tax from April 1, 1967. But so far as the question of levy of additional tax u/s 143(1A) is concerned, it cannot be said that the assessee had deliberately made a wrong return exposing himself to additional tax under the said provision. In this connection, a reference can be made to the decision of the Calcutta High

Court in the case of Modern Fibotex India Ltd. and Another Vs. Deputy Commissioner of Income Tax and Others, in which a similar view has been taken. It has been held as under (page 512) :

" Without going into the question as to whether the provisions are penal in nature, but keeping in mind the consequences of an adjustment made and the insistence upon the assessee filing a correct return, it would follow that the date for judging the question of adjustment must be the actual date of the return in the light of the law then prevailing. To hold otherwise, manifestly shocks one's sense of justice that an act, correct at the time of doing it, should become incorrect by some new enactment. The injustice in my view is more shocking in this case having regard to the fact that the assessee had itself, in its return, drawn the attention of the Income Tax authorities to the basis upon which the cash compensatory support had not been included as income and had clearly offered to include the same in any assessment if the basis is shown to exist."

13. A similar view was taken by the Gujarat High Court following the Calcutta High Court judgment in the case of Gujarat Poly-Avx Electronics Ltd. Vs. Deputy Commissioner of Income Tax, .

14. Our attention was also invited to a decision of this court given in the case of Sanctus Drugs Pharmaceuticals Private Ltd. and Another Vs. Union of India (UOI) and Others, wherein this court has taken the view that Section 143(1A)(a)(B) is valid and is not penal in character. The question of validity of Section 143(1A)(a) (B) is not involved here. It has been held in the aforesaid case that the provisions are compensatory in nature. Therefore, this judgment will not come in the way of the assessee.

15. In view of the above, we are of the opinion that the view taken by the Tribunal appears to be justified. We answer the question against the Revenue and in favour of the assessee.