CTR ENCYCLOPAEDIA ON INDIAN TAX LAWS

MARUTHI BABU RAO JADAV vs. ASSISTANT COMMISSIONER OF INCOME TAX

HIGH COURT OF KERALA

K.VINOD CHANDRAN & T.R.RAVI, JJ.

WA.No.984 OF 2019 (Against the Order/Judgment in WP(C) 101/2019(K) of High Court of Kerala)

23rd September, 2020

(2020) 109 CCH 0268 KerHC

(2021) 430 ITR 0504 (Ker)

Legislation Referred to

Section 3, 3(1), 4, 68, 69, 69A, 69B, 80IB, 80IB(10), 115BBE, 115BBE(1)(i)

Case pertains to

Asst. Year 2018-2019

Cases referred:

C.I.T vs. Sarkar Builders (2015) 375 ITR 392 (SC)

C.I.T vs. Vatika Township Private Ltd. (2015) 1 SCC 1

CIT Kerala vs. K Srinivas. (1972) 4 SCC 526

Commissioner of Income Tax vs. S.A. Wahab (1990) 182 ITR 464 (KER)

Guffic Chem P. Ltd vs. C.I.T (2011) 4 SCC 245

Karimtharuv i Tea Estate ltd. vs. State of Kerala (AIR (1966) SC 1385)

Kesoram Industries vs. Commissioner of Wealth Tax, (AIR 1966 SC 1385)

Loknath Goenka vs. C.I.T (2019) 417 ITR 521(Patna)

Shiv Raj Gupta vs. C.I.T (2020) 425 ITR 420(SC)

State of Kerala vs. Alex George (2004) 271 ITR 290(SC)

Counsel appeared:

Latha Anand, M.N. Radhakrishna Menon, Joseph Sebastian (Parackal), S.Vishnu (Arikkattil) for the Petitioner.: Jose Joseph, Standing Counsel for Income Tax (B/O) for the Respondent.

K.VINOD CHANDRAN, J.:

The writ petition sought for a declaration that the amendments made by the Taxation Laws (Second Amendment) Act, 2016, to Section 115BBE of the Income Tax Act, 1961 enhancing the rate of income tax, for specified incomes which are unexplained, to 60% and the surcharge provided in the Finance Act, 2016 to 25% for income covered under Section 69A, to be prospective. The above referred enactments are herein after referred to as the '2nd Amendment Act', 'IT Act' and the 'Finance Act'. The 2nd Amendment Act was dated 15th December, 2016 and the amendment to Section 115BBE was specified to be effective from 01st April, 2017. The amendment enhancing the rate of tax was incorporated in the I T Act and that of surcharge in the Finance Act. On declaration, consequential relief is sought against Ext.P2 assessment order levying tax at the enhanced rate of 60% and surcharge @25% on the 'advance tax'. The learned Single Judge rejected the writ petition by a cryptic judgment relying on Commissioner of Income Tax v. S.A.Wahab.((1990) 182 ITR 464 (KER)).

2. The learned Counsel Sri.Vishnu S Arikkattil appearing for the appellant would contend that even going by the decision in Karimtharuv i Tea Estate ltd. v. State of Kerala (AIR (1966) SC 1385) an amendment made on the 1st day of April of any financial year would apply to the assessments of that year. That is, if an amendment is brought into force on 01st April, 2017, as is the case here, it can only apply to the assessment made in 2018-2019 (Assessment Year) of the income accrued for the previous financial year; which is 2017-2018. The learned Counsel would seek to draw a distinction insofar as a modification of the rate as brought out in the Finance Act and a substantive provision altering accrued rights or creating new liabilities, on the 1st of April of an year. In the former, it could apply to the assessments of the previous year, made in that financial year, but a substantive amendment not relating to the rates, could only be applied to the assessments of that financial year and not of the previous year. Reliance is placed on the Constitution Bench decision of the Hon'ble Supreme Court in C.I.T Vs. Vatika Township Private Ltd. (2015) 1 SCC 1. The learned Counsel would also place before us a number of decisions of the Hon'ble Supreme Court in Kesoram Industries v. Commissioner of Wealth Tax, [AIR 1966 SC 1385], Guffic Chem P. Ltd v. C.I.T [2011(4) SCC 245] C.I.T v. Sarkar Builders [(2015) 375 ITR 392 (SC)], Shiv Raj Gupta v. C.I.T [(2020) 425 ITR 420(SC)] and State of Kerala v. Alex George [(2004) 271 ITR 290 (SC), to further buttress his arguments. Reliance is also placed on the Full Bench decision of the Patna High Court in Loknath Goenka v. C.I.T[2019 417 ITR 521(Patna)].

3. Sri. Jose Joseph, learned Standing Counsel, Government of India(Taxes) would submit that the position has been clearly established from the 1960's and it requires no further consideration. Considering the specific arguments put forth by the learned Counsel, we are of the opinion that it warrants some elucidation of the law on the point; especially since the distinction drawn appeals to us, at first blush. We hence first look at the various decisions placed before us dealing, the amendments brought into force on the 1st of April of a particular year; which under the IT Act is the assessment year (AY) for the previous financial year.

4. Karimtharuvi Tea Estate dealt, Kerala Agricultural Income Tax Act 1950, wherein the assessment made in an year is of the previous year. A surcharge @ 5% was levied by virtue of Kerala Surcharge on Taxes Act, 1957 which came into force from 01st September, 1957. The question raised was whether the surcharge would be applicable for the assessments made in the assessment year 1957-58, which is of the previous year 1956-57. It was held that since the Surcharge Act came into force in September of 1957 and not as on the 1st of April of that year it could not be regarded as the law in force at the commencement of the assessment year. A Division Bench of this Court in A Wahab followed the above Constitution Bench. A.Wahab in the assessment year 1980-81 claimed 40% depreciation on motor vehicles as per the amendment which came into effect on 24th July, 1980. Prior to the amendment such depreciation was allowable only at 30%. The Division Bench found that the depreciation allowable in the subject assessment year relating to the assessments of the previous year was that allowable as on 01st April, 1980.

5. The other decisions relied on by the learned Counsel for the appellant is to urge that a substantive provision coming into effect on 01st April, 2007 stands distinguished from a

mere reduction or enhancement of rate prescribed by a Finance Act as on the 1st of April. Kesora m Industries considered three questions, one of which is relevant for our purpose. That relevant question was as to whether, in computing the net wealth of an assessee under the Wealth Tax Act 1957, the provision for payment of income tax and super tax in respect of the year of account, was a debt owed within the meaning of Section 2(m). The Wealth Tax assessment which was the subject matter of the above case was of the Financial Year 1956-57 and the valuation day as per the Wealth Tax Act was 31st March, 1957. The Revenue argued that Finance Act, 1957 provides the charge of income tax and therefore the liability accrues only on 01st April, 1957. The assessee on the other hand argued that Finance Act, 1957 only prescribes the rate of tax payable and not the liability to tax. The Hon'ble Supreme Court held that though the expression 'charged' is used both in the Finance Act, 1957 and the IT Act, they are used in a different sense. It was held in Paragraph 47 that "The tax is to be charged for that year in accordance with, and subject to, the provisions of the Income-tax Act, but the said charge will be in accordance, the rates prescribed under the Finance Act ". Section 3 of the IT Act, 1922 was held to be the charging section, while the Finance Act, 1957 provided the rate for quantifying the tax in the assessment year. On the above reasoning it was held that the tax liability arose on the last day of the accounting year, ie, the 31st of March, though the rate of tax applicable in carrying out an assessment would be that as on the 01st of April of the Assessment Year. The question stood answered against the Revenue., but before Karimtharuvi Tea Estate. It was held so in paragraph 60:

> "60.Looking from a practical standpoint also, there cannot possibly be any difficulty in ascertaining the liability. As the actual assessment will invariably be made subsequent to the close of the accounting year, the rate would certainly be available to the authorities concerned for the purpose of quantification."

6. Guffic Chem P. Ltd, was concerned, the assessment year 1997-1998 and the issue arose as to whether the amounts received by the assessee as non-competition fee would be a capital receipt, not taxable under the IT Act. The Court highlighted the dichotomy between a compensation received for loss of agency, which is a revenue receipt and that received as against a negative/restrictive covenant, which is a capital receipt. Finding the income received by the assessee to be a capital receipt, it was also noticed that the non competition fee received was always treated as a capital receipt till the assessment year 2003-04. By Finance Act 2002, w.e.f 01st April, 2003 the said receipts were made taxable. The settled proposition that " a liability cannot be created retrospectively " was noticed. Shi v Raj Gupta was also on identical facts and law. We are of the opinion that nothing turns on these decisions since there was no consideration as to whether in an assessment of the previous year, ie: of the financial year 2002-03 carried out in the year 2003-04, whether a capital receipt received in that financial year could have been taxed.

7. Sarkar Builders was concerned, the deduction of 100% of profits allowable in the case of housing projects as permissible under Section 80IB(10). Section 80IB was introduced, effect from 01st April, 2000, the benefit of which was available to the builders/assessees. By Finance Act, 2004 w.e.f. 01st April, 2005 there was a condition laid down, for the first time, which if applied to the previous year would deny the benefit to the builders. The Revenue contended on the basis of Karimtharuv i Tea Estate that the amendment having come in to effect on 01st April, 2005, it applies to the assessments made in the assessment year 2005-06. The assessees before Court had commenced their projects prior to 01st April, 2005 as sanctioned by the authorities; the date of completion of which projects were after 01st April, 2005. The amendment brought into Section 80IB(10) as on 01st April, 2005 reduced the permissible extent of commercial space in the housing projects. The Hon'ble Supreme Court posed a question as to whether the builders who have commenced their projects, which had progressed considerably, were expected to demolish the coverage meant for commercial purpose to bring it within the reduced extent provided by the amendment. The specific question as to whether the assessment made on a return filed after 1st April, 2005, the law prevailing on that day would be applicable was answered in the negative on the specific circumstance arising in that case. The assessees/builders were found to have arranged their affairs in accordance, the law that existed on the commencement of the projects by which they acquired a vested right to claim deduction as per the existing law, which cannot be

taken away. The Bench also relied on Reliance Jute and Industries Ltd. V CIT 1980(1) SCC 139. Specifically the declaration that " 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. ".. (sic para 6) In the instant case it was held that by necessary implication the amendment made to restrict the extent of commercial space in a housing project, was to be read prospectively and not retrospectively.

8. Alex George was concerned, the revision made to the Kerala Plantation Tax Act 1960, effect from 01st July, 1987. The Assessing authority applied the earlier provision for period up to 01st July, 1987 and for the balance period the amended provision. The Court found that the scheme of the Act read, the Rules indicate that the charging section makes the subject of charge; the extent of plantation held by an assessee on the first day of each financial year (the 'valuation date') at the rates prescribed in SC, schedule (1) to the Act. Section 3(1) also indicates that the tax assessed is payable for the Financial Year until the extent is revised and that even in the event of a revision it would be payable only from the financial year, immediately following such revision. It was found in Paragraph 24:

> "24... As stated above, chargeability is independent of the passing of the Finance Act. Therefore, one has to read the Finance Act in consonance, the provisions of the charging section. The function of the Finance Act primarily is to prescribe the rate of tax and the manner of calculation of tax; and it is not intended to incorporate the entire procedural and substantive law relating to tax. In the circumstances, we do not find merit in the contention advanced on behalf of the appellant-State that the object of the Finance Act, 18 of 1987 was only to revise the rates of plantation tax."
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> [underlining by us for emphazis]

9. The Full Bench of the Patna High Court was concerned, a provision introduced in the Income Tax Act, effect from 01st April, 1976. The issue was as to whether the share income of minor sons, from a firm in which they were admitted as partners, was assessable in the hands of their fathers by virtue of S.64(1)(iii) brought into the IT Act on 01st April, 1976. Karimtharuv i Tea Estate was relied on by the Revenue where as Kesoram Industries was urged by the assessee. The assessee argued that the liability to pay income tax hinges on accrual of income and is not concerned, the time when computation is made by the taxing authority. Karimtharuvi Tea Estate was specifically referred to especially paragraph 10 which is extracted hereunder:

> "10. Now, it is well-settled that the Income-tax Act, as it stands amended on the first day off April of any financial year must apply to the assessments of that year. Any amendments in the Act which come into force after the first day of April of a financial year, would not apply to the assessment for that year, even if the assessment actually made after the amendments come into force."

Kesoram Industries and the harmonious construction given to a Finance Act and the I.T Act was specifically referred to. It was held that reading the above two decisions of the Hon'ble Supreme Court the applicability to assessments in a particular year, of an amendment brought into effect on the 1st of April of that year, is confined to the rate prescribed and a surcharge brought into force. When a new liability is prescribed as distinguished from a mere enhancement or reduction of rate it cannot be given retrospective effect, was the authoritative declaration. It was held that the amendment enabling accrual of income, of a minor, on his parent, which came into effect from 01st April, 1976 cannot be made applicable to assessments of the previous accounting year ie: 1975-76, carried out in the year 1976-77.

10. As we noticed herein before Karimtharuv i Tea Estate refused applicability of the surcharge introduced in September to the assessments carried out in that year. There was no occasion to consider whether a new surcharge introduced on 1st of April could be applied to the assessments in that year; is the contention raised by the appellant here. The well established position as argued by the learned Standing Counsel, as is clearly discernible from

the precedents too; is that the rate prescribed by a Finance Act brought into effect from the 1st of April of an year would apply to the assessments made in that year relating to the previous year. The precedents would also indicate that there cannot be disturbance caused to accrued rights or obligations imposed, unless the legislative intent clearly indicates a retrospective effect as has been declared by another Constitution Bench in Vatik a Township Pvt. Ltd. This is the legal aspect on which the facts in the present case has to be applied.

11. Before we look at the amendments carried out, on facts, there were two seizures of cash made on 02nd August, 2016 and 03rd November, 2016 respectively of Rs.1,05,03,500/-and Rs.1,24,68,750/-both in the F.Y 2016-2017. The persons from whom the cash was seized as also the appellant herein admitted that it belonged to the appellant who carries on trading in gold bullion. The appellant not having produced any books of accounts or cash flow statements failed to establish the source of the money seized; which was included in the total income under Section 69A of the IT Act. The writ petition or the appeal does not challenge such inclusion. On the said amounts tax was imposed @60% under Section 115BBE and surcharge @25%. The amendments to the Finance Act were by the 2nd Amendment Act dated 15th December, 2016. The enhancement of tax under Section 115BBE was made effective only from 01st April, 2017; the commencement of the assessment year 2017-2018, in which the assessments of the previous year are carried out.

12. The assessee contends that the seizures were made prior to the amendment. The affidavits admitting the ownership of amounts seized were also submitted prior to the amendment. The assessee was not aware of the enhanced tax liability when the admissions were made before the authorities. The assessee has also made an attempt to relate the amendments to the demonetization of the specified currencies announced on 08th November, 2016 which contention we reject at the outset. The subject amendments which are relevant for our consideration have no direct link, the demonetization introduced or the taxation and investment regime of Pradhaan Mantri Garib Kalyan Yojana 2016 brought in under Chapter IX A of the 2nd amendment Act. The 2nd amendment Act as is clear from the Statements of Objects and Reasons, was to curb, evasion of tax and black money as also plug loopholes in the IT Act and to ensure that defaulting assessees are subjected to higher tax and stringent penalty provision. Both the measures spoken of herein were to further the said objects and there cannot be any nexus assumed nor is it discernible.

13. Section 115 BBE was inserted by Finance Act 2012 w.e.f 01st April, 2013. As on 01st April, 2016 the financial year in which the subject seizures occurred Section 155BBE provided for 30% tax on income refereed to in Sections 68,69,69A, 69B, 69C and 69D. The same was amended by the 2nd Amendment Act; w.e.f. 01st April, 2017, enhancing the rate to 60%. Hence there was no new liability created and the rate of tax merely stood enhanced which is applicable to the assessments carried on in that year. The enhanced rate applies from the commencement of the assessment year, which relates to the previous financial year.

14. Likewise it was by Chapter II, heading 'Rates of Income Tax', as provided in the Finance Act 2016, that a surcharge was introduced by way of the 3rd proviso of Section 2(9) of that Finance Act. This comes into effect from the Financial Year 2016-2017; which is the year in which the subject seizures were occasioned. The proviso refers to various provisions where the advanced tax computed under the first proviso stands increased by a surcharge for the purpose of the Union. Section 115BBE is one of the provisions referred to in the 3rd proviso and in the case of individuals the surcharge was @15% where the total income exceeds one crore, as on 01st April, 2016. By the 2nd Amendment Act Section 2 of the Finance Act, 2016 stood amended by which 115BBE was omitted from the 3rd proviso. After the 6th proviso yet another proviso was inserted which provided for the 'advance tax' computed under the first proviso, in respect of any income chargeable to tax under Section 115BBE(1)(i), to be increased by a surcharge for the purposes of the Union, calculated @25%. Hence there is no new liability of surcharge created and it is a mere enhancement of the rate of surcharge.

15. In the financial year 2016-17 itself the tax as provided under section 115BBE and the

surcharge on advance tax was available as discernible from the IT Act and Finance Act, 2016 as it stood on 1st April, 2016 itself. A major misdemeanor leading to assessment of income as accrued under Section 69A invites the consequences of Section 115BBE and surcharge provided under Section 2(9) of the Finance Act, 2016. When it stands enhanced from 01st April, 2017, for every assessment carried out in that year, related to the previous year, the rates as applicable on 01st April, 2017 has to be applied. There being no new liability created or obligation imposed, the arguments raised by the appellant's Counsel fails. The appellant cannot have a contention that he committed the misconduct on the expectation that if he were caught he would have to shell out only lesser amounts as tax and surcharge. There is no right accrued on the assessee to commit an offence on the expectation of a lesser penalty.

16. It was also argued that Income Tax at the rate or rates specified, as prescribed in any Central Act to be charged for any assessment year, shall be so charged in respect of the total income of the previous year as per Section 4 Of the IT Act. However, there is no such provision to enable a surcharge to be so taxed, on the Finance Act prescribing an enhanced rate at the commencement of an year. The said contention however, cannot be sustained especially looking at the decision of the Hon'ble Supreme Court in CI T Kerala v. K Srinivas. [(1972) 4 SCC 526]. The facts are not relevant to the issue raised here and we need only look at the declaration as to the nature of a surcharge imposed in the Finance Act. The legislative history, respect to the concept of surcharge was traced by the Court, which, for the first time was found to have been recommended, in the report of the Committee on Indian Constitutional Reforms Volume I Part I. The word surcharge was used compendiously for the special addition to taxes on income imposed in September 1931. It was held so in paragraph 7 and 8:

> "7. The above legislative history of the Finance Acts, as also the practice, would appear to indicate that the term "Income tax" as employed in Section 2 includes surcharge as also the special and the additional surcharge whenever provided which are also surcharges within the meaning of Article 271 of the Constitution. The phraseology employed in the Finance Acts of 1940 and 1941 showed that only the rates of income tax and super tax were to be increased by a surcharge for the purpose of the Central Government. In the Finance Act of 1958 the language used showed that income tax which was to be charged was to be increased by a surcharge for the purpose of the Union. The word 'surcharge" has thus been used to either increase the rates of income tax and super tax or to increase these taxes. The scheme of the Finance Act of 1971 appears to leave no room for doubt that the term "Income tax" as used in Section 2 includes surcharge.
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> 8. According to Article 271 notwithstanding anything in Articles 269 and 270 Parliament may at any time increase any of the duties or taxes referred to in those Articles by a surcharge for the purpose of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India. Article 270 provides for taxes levied and collected by the Union and distributed between the Union and the States. Clause (1) says that tax on income other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the States in the manner provided in clause (2). Article 269 deals, taxes levied and collected by the Union but assigned to the States. The provisions of Article 268 which is the first one under the heading "distribution of revenue between the Union and the States" relate to duties levied by the Union but collected and appropriated by the States. Thus these Articles deal, the levy, collection and distribution of the proceeds of the taxes and duties mentioned therein between the Union and the States. The legislative power of Parliament to levy taxes and duties is contained in Articles 245 and 246(1) read, the relevant entries in List I of the Seventh SC, schedule."

17. In the instant case surcharge was imposed by Finance Act, 2016 and the rate stood enhanced by Finance Act, 2017. The Income Tax even as per the Finance Act was to be at the rate specified in Part I of the 1st SC, schedule which shall be increased by surcharge for

purposes of the Union. Surcharge hence partakes the character of Income-tax and Article 271 itself empowers the Parliament, at any time to increase any of the duties or taxes by a surcharge for the purpose of the Union and it forms part of the consolidated fund. So when a surcharge is imposed it is in effect an enhancement of the tax or duty. The provision in the Finance Act also employs the words 'the income tax computed … shall be increased by a surcharge'. Section 4 of the IT Act squarely applies to the surcharge imposed.

The judgment of the learned Single Judge is affirmed for the reasoning herein above and the Writ Appeal would stand dismissed without any order as to costs.

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