

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8922 OF 2016

Nandkishor Kagliwal,
 Age : 66 Years, Occ. Business,
 R/o. Nath House, Nath Road
 (Paithan Road), Aurangabad.

..PETITIONER

VERSUS

1. Assistant Commissioner of
 Income Tax, Circle-1, Having
 his office address at Jeevan
 Suman, LIC Building, 2nd Floor,
 Cannought Place, Town Centre,
 N-5 CIDCO, Jalgaon Road,
 Aurangabad - 431 003.
2. Principal Commissioner of
 Income Tax-1, having his
 office at Aayakar Bhavan,
 Near Holy Cross English School,
 Aurangabad - 431 002.
3. Union of India, through Ministry
 of Finance, Aayakar Bhavan,
 2nd Floor, M.K. Road,
 Mumbai- 400 020.

..RESPONDENTS

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WITH

WRIT PETITION NO. 9009 OF 2016

Shrirang S. Agarwal,
 Age : 70 Years, Occ. Business,
 R/o. Nath Road (Paithan road)
 Aurangabad- 431 005

..PETITIONER

VERSUS

1. Assistant Commissioner of
 Income Tax, Circle-1, Having
 his office address at Jeevan
 Suman, LIC Building, 2nd Floor,
 Cannought Place, Town Centre,
 N-5 CIDCO, Jalgaon Road,
 Aurangabad.- 431 003

2. Principal Commissioner of Income Tax-1, having his office at Aayakar Bhavan, Near Holy Cross English School, Aurangabad - 431 002.
3. Union of India, through Ministry of Finance, Aayakar Bhavan, 2nd Floor, M.K. Road, Mumbai- 400 020.

..RESPONDENTS

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WITH

WRIT PETITION NO. 9012 OF 2016

Mohammad Zamir Khan,
Age : 62 Years, Occ. Business,
R/o. Nath House, Nath Road,
(Paithan road), Aurangabad - 431 005. .. PETITIONER

VERSUS

1. Assistant Commissioner of Income Tax, Circle-1, Having his office address at Jeevan Suman, LIC Building, 2nd Floor, Cannought Place, Town Centre, N-5 CIDCO, Jalgaon Road, Aurangabad - 431 003.
2. Principal Commissioner of Income Tax-1, having his office at Aayakar Bhavan, Near Holy Cross English School, Aurangabad - 431 002.
3. Union of India, through Ministry of Finance, Aayakar Bhavan, 2nd Floor, M.K. Road, Mumbai- 400 020.

..RESPONDENTS

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Advocate for Petitioners : Mr. S.G. Dodya
Advocate for respondent Nos. 1 and 2 : Mr.A.M.Sharma
A.S.G. For respondent No.3 :-

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**CORAM : T.V. NALAWADE AND
SUNIL K. KOTWAL,JJ.**

ORDER RESERVED ON : 09-01-2019

ORDER PRONOUNCED ON : 01-02-2019**COMMON ORDER :-**

1. All the Writ Petitions are filed to challenge the order passed by the Tax Recovery Officer under Section 179(1) of The Income Tax Act, 1961. By this order, the Income Tax Department has directed the petitioners, from the three Writ Petitions who were directors of Private Limited Company, to pay not only the Income Tax which was liability of the Company, but also to pay interest and penalty. M/s. Nath Holdings and Investment is a Private Company and order is made for issuing warrant of arrest and for keeping the petitioners in the Civil Prison for non payment of tax, penalty and interest. The submissions are made that Tax is already paid by the petitioners, but the penalty and the interest are not paid and only to that extent, the petitioners are challenging the order.

2. The aforesaid Company was in the business of dealing in shares and securities and it was assessed to income tax since inception. Assistant Commissioner passed order under Section 179(1) of the Income-Tax Act, 1961, on 16.08.2010 for recovery of income tax, interest and penalty and the total amount was Rs. 336.84 lakh. The amount was assessed for the years 1995-96, 1996-97 and 2002-2003 and this order was against both the Company and the Directors. In the petitions, it is contention of the directors that word "tax" used in Section 179 of the Income-Tax Act, 1961, does not include penalty and interest and so

these amounts cannot be recovered from them. Argument was advanced only on that point. Learned counsel for the Income Tax Department supported the order made against the directors.

3. The respondent-authority has given finding that the word 'tax' used in Section 179 of the Income-Tax Act, 1961 includes both- the penalty and the interest. It is further held that in view of the explanation added to Section 179 the tax includes penalty and interest.

4. The provision of Section 179 of the Income-Tax Act, 1961, along with explanation runs as under :-

"179. (1) Liability of directors of private company in liquidation.

Notwithstanding anything contained in the Companies Act,1956 [1 of 1956] [where any tax due from a private company in respect of any income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company] cannot be recovered, then, every person who was a director of the private company at any time during the relevant previous year shall be jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

[2] Where a private company is converted into a public company and the tax assessed in respect of any income of any previous year during which such company was a

private company cannot be recovered, then, nothing contained in sub-section(1) shall apply to any person who was a director of such private company in relation to any tax due in respect of any income of such private company assessable for any assessment year commencing before the 1st day of April, 1962.

[**Explanation-** For the purpose of this section, the expression "tax due" includes penalty, interest or any other sum payable under the Act.] "

5. The explanation to Section 179 of the Income-tax Act, 1961, was added w.e.f. 01.06.2013, and on that ground, it is contention of the directors that the explanation cannot be used against them, in view of the assessment years, which are quoted above. The learned counsel for the petitioners placed reliance on the decision given by the Division Bench of this Court in the case reported at **(2010) 326 ITR 85 (Bom.) (Dinesh T. Tailor Vs. Tax Recovery Officer and others)**. There was defence of a director that he had resigned as the director at the relevant time and non-recovery of "Taxes Due" from the Private Company was not result of his neglect, misfeasance or breach of duty on his part and so the amount cannot be recovered from him. The Division Bench has observed that this submission was not considered by the Assessing Officer/Tax Recovery Officer and the matter was remanded back. The director had resigned on 14.10.1989 and the demand of tax was raised on the company for the assessment years, 1990-91 to 1995-96.

Basically, the order of remand was made to give an opportunity to the said director to substantiate his aforesaid contention. However, the Division Bench of this Court quoted some provisions like Sections 2(43), 170, 177, 179, 188-A, 189, 220, 221(1) etc and also placed reliance on the observations made by the Apex Court in the case of *Harshad Shantilal Mehta Vs. Custodian reported at (1998) 231 ITR 871 Supreme Court.*

6. In the case of *Dinesh Tailor* cited (supra), the Division Bench used the observations made by the Apex Court, which are as under :

"33. Tax, penalty and interest are different concepts under the Act.

The definition of 'tax' under section 2(43) does not include penalty or interest. Similarly, under section 156, it is provided that when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand as prescribed. The provisions for imposition of penalty and interest are distinct from the provisions for imposition of tax. The learned Special Court Judge, after examining various authorities in paragraphs 51 to 70 of his judgment, has come to the conclusion that neither penalty nor interest can be considered as tax under section 11(2) (a). We agree with the reasoning and conclusion drawn by the Special Court in this connection"

7. The Division Bench considered the interpretation made by other Division Bench of this Court in the past and the case was reported as

The Union of India Vs. Manik Dattatraya Lotlikar (1988) 172 ITR 1 (Bom). In the case of *Manik Lotlikar*, the Division Bench has held that the 'Tax' for the purpose of Section 179 would include penalty. In the *Dinesh Tailor* cited (supra), the Division Bench held that in view of the ratio of *Harshad Mehta's* case cited (supra), the decision given by the other Division Bench in the case of *Manik* cited (supra) cannot be accepted as correct position of law. The case of *Dinesh Tailor* was decided on 27.04.2010. The explanation to section 179 of the Income Tax Act came into effect on 01.06.2013.

8. The learned counsel for the respondent-department placed reliance on the observations made in the case reported at **(2008)9 SCC 662 (Commissioner of Income Tax-I, Ahmedabad Vs. Gold Coin Health Food Private Limited)**. The counsel representing the department submitted that explanation added to Section 179 of the Income Tax Act w.e.f. 01.06.2013 came into the statute only to remove the doubt created and only to make clear that the word "Tax" used in Section 179 of the Income Tax Act includes penalty and interest. There is force in this submission made for the department. The facts of the *Gold Coin* case cited (supra) shows that the matter was decided by the Bench of three Judges of the Apex Court for considering the correctness of the ratio of **Virtual Soft System Limited Vs. Commissioner of Income Tax, Delhi-I (2007) 207 CTR, 733 Supreme Court**. The larger Bench has held that the amendment, which is clarificatory in nature, is applicable

retrospectively. The relevant observations in *Gold Coin* case cited (supra) at para Nos. 13 to 17 are as under :-

"13. In Commissioner of Wealth Tax, Punjab, Jammu and Kashmir Chandigarh, Patiala Vs. Yuvraj Amrinder Singh and Others, the relevance of Notes on Clauses was highlighted. Para 15 reads as follows :

15. The proviso to Sib-clause (vi) has been reproduced above. It has the effect of cutting down the exemption contained in the sub-clause to some extent. It commences with the words "Provided that in the case of a policy of insurance the premium or other payment whereon is payable during a period of less than 10 years and the argument is that the italicized words suggest that the expression "any policy of insurance" in the main sub-clause must mean a policy based on human life and that too where periodical premia are payable and as such annuity on life which consists of lump sum investment followed by deferred annual or monthly payments is excluded. It is impossible to read the italicized words in the proviso in this manner which has the effect of unduly narrowing down the expression "any policy of insurance" used in the main sub-clause, which as indicated earlier, is of very wide import covering all types of insurance policies like life, marine, fire etc. In the first place the main provisions [Sub-clause (vi)] was enacted in 1957 and continued to operate for 17/18 years till March 31, 1975, without any qualification and as such it will be absurd to attribute to the Legislature, because of the insertion of the

proviso (containing the italicized words) in 1975, an intention of having used the wide expression 'any policy of insurance' throughout all this period in a narrow sense as suggested. Secondly, if the main provision and the proviso are read together the italicised words do not suggest that any narrow construction, much less as urged, was intended and to say so would be missing the real object or purpose of the proviso. In our view the proper way to read the proviso would be to treat the main provision as creating or granting an exemption and the proviso carving out something from the exemption. The main provision creates an exemption in respect of the assessee's "right or interest in any policy of insurance" and the proviso seeks to cut down that exemption to a limited extent, namely whenever there is a policy of insurance in respect whereof periodical premia are payable for a duration of less than 10 years, then in such a case a proportionate exemption specified therein will be available to the assessee irrespective of what type of policy it is the proviso has no other effect. That such was the object or purpose of inserting the proviso will be clear if regard is had to relevant part of Notes on Clauses accompanying the Bill and the relevant portion of the speech of the Finance Minister while introducing the Bill. We were taken through the relevant portions of Notes and Clauses [vide [1974] 93 ITR (St.)125] and the speech of the Hon'ble Finance Minister while introducing the Bill [vide (1974)93 (St)74] and in our view far from supporting the contention of counsel for the Revenue

these lend support to the view which we have just expressed. The relevant portion of " Notes on Clauses' states that,' under this amendment (the insertion of proviso) the value of the taxpayer's right or interest in a policy of insurance will be exempt from tax only if the premia are payable over a period of ten years or more. In case where premia are payable over a period of less than ten years, only a proportionate amount of the value of the taxpayer's right or interest in the policy of insurance will be exempt from wealth tax". The Finance Minister's speech, though strictly not relevant as an aid to construction, substantially reiterates what has been stated in the " Notes on Clauses" accompanying the Bill. On this account, therefore, there is no warrant to put a narrow construction on the expression" any policy of insurance" occurring in Sub-clause (vi) of Section 5(1)".

14. As noted by this Court in Commissioner of Income Tax, Bombay etc. Vs. M/s Podar Cement Pvt. Ltd, [(1997)]5 SCC 482 the circumstances under which the amendment was brought in existence and the consequences of the amendment will have to be taken care of while deciding the issue as to whether the amendment was clarificatory or substantive in nature and, whether it will have retrospective effect or it was not so.

15. In Principles of Statutory Interpretation, 11th Edn. 2008, Justice G.P. Singh has stated the position regarding retrospective operation of Statues as follows:

The presumption against retrospective operation is not applicable to declaratory statutes. As stated in Craies and approved by the Supreme Court: For modern purpose a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word 'declared' as well as the word 'enacted'. But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language shall be deemed always to have meant 'or shall be deemed never to have included' is declaratory and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the amended provision was clear and unambiguous. An

amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the constitution came into force, the amending Act also will be part of the existing law.

16. In Zile Singh Vs. State of Haryana [2004] 8 SCC 1, it was observed as follows:

13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only- " nova Constitutio futuris formam imponere debet non praeteritis-a new law ought to regulate what is to follow, not the past. (See Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edition, 2004 at Page 438). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole.

14. The presumption against retrospective operations is not applicable to declaratory statutes. In determining,

therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is "to explain" an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well-settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect.

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the Legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the Courts may be called upon to construe the provisions and answer the question whether the Legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant (i) general scope and purview of the statute (ii) the remedy sought to be applied (iii) the former state of the law and (iv) what it was the Legislature contemplated. The rule against retrospectivity does not

extend to protect from the effect of a repeal, a privilege which did not amount to accrued right.

17. The above being the position, the inevitable conclusion is that Explanation 4 to Section 271(1)(c) is clarificatory and not substantive. The view expressed to the contrary in Virtual's case [2007]9 SCC 665 is not correct. "

9. In the matter of **Gold Coin** cited (supra), the explanation was taken as the addition only to clarify the initial intention of the Parliament. It is observed that the explanation was added as some of the High Courts had taken the contrary view. In the present matter also, in view of the aforesaid circumstances, it can be said that the explanation is added to make clear the intention of the Parliament. This Court holds that the ratio of the **Gold Coin case** cited(supra) needs to be applied to the present matters.

10. The learned counsel for the petitioners placed reliance on some other reported cases like -

- (i) **(2005) 279 ITR 310 (SC) [SEDCO FOREX INTERNATIONAL DRILL INC AND OTHERS VS. COMMISSIONER OF INCOME-TAX AND ANOTHER]**
- (II) **(2014) 367 ITR 466 (SC) Commissioner of Income-Tax Vs. Vatika Township Privated Limited.**
- (iii) **(2018) 401 ITR 445 (SC) Commissioner of Income-Tax Vs. Essar Teleholdings Ltd.**
- (iv) **(2014)42 taxmann.com 284 (Allahabad)**

Smt. Pratibha Garg Vs. Commissioner of Income-tax, Muzaffar Nagar

11. The facts of all the aforesaid cases are different. Whether only additional liability was created by the amendment in such circumstances needs to be ascertained by the Court.

12. In view of the aforesaid position of law, if we have to go with the presumption that the Parliament had intended to provide that the liability of the Company and the directors would be joint and several to pay the tax and the Parliament also intended that the word 'Tax' includes penalty and interest and as the burden of proof is shown on the directors to prove that they were not negligent etc., then it follows that the directors can be held responsible to pay penalty and interest when the company was liable to pay the penalty and interest. The non-obstante clause with which Section 179 starts shows that the provisions of Company Act 1956 will not come in the way of fastening the liability created by Section 179 on the directors and it also shows that right from the beginning, there was such intention of the Parliament.

13. The Court is expected to keep in mind some principles of interpretation when such point comes for interpretation. The language of each provision may be restricted to its own object. Many a times when there are two provisions, both the provisions can be allowed to

run in parallel lines though there may be conflict on the surface. The Court needs to interpret the statute in such a way that the provision is not rendered meaningless. If the Court gives only limited meaning to a provision it may result in non-compliance of the provisions in entirety and to that extent, the intention of the Legislature gets defeated. In the present matter, in view of the explanation given and also the intention, which can be gathered from Section 179 itself, it can be said that the word "Tax" used in Section 179 was to be used also for penalty and interest. If the word "Tax" is not read in that way, there will be loss of interest and penalty to the State Exchequer. The provision is made to see that the amount is recovered from the directors when the company is not able to make the payment of the amount of liability. Reliance can be placed on the observations made by the Apex Court in the cases reported as AIR 1987 Supreme Court 1454 (Utkal Contractors and Joinery Pvt. Ltd and others etc., Vs. State of Orissa and others). Thus, the word used in "enactment" is important, but the context is no less important and the definition clause does not necessarily apply in the same context in all the provisions of the statute and it can be ascertained as to whether in particular provision, meaning to that word is in excess than given in the definition. In the present matter also, unless such interpretation is made, the provision of Section 179 of the Act will not become meaningful in entirety. Further, there is one more circumstance like, the same procedure is provided for recovery of tax,

penalty and interest and it is up to the directors to show that they were not negligent and there are the grounds of defense for them as provided in Section 179.

14. The aforesaid interpretation also allows to hold and interpret that the provisions of Sections 170, 177, 188-A and 189 are only enabling provisions. They cover specific situations mentioned in those Sections and the Parliament had no other intention for making such specific provisions. Those provisions cannot be read to ascertain the scheme of the Act.

15. For the aforesaid reasons, this Court holds that no interference is warranted in the order made by the respondent- authority against the petitioners. In the result, all the three petitions stand dismissed.

[SUNIL K. KOTWAL]
JUDGE

[T.V. NALAWADE]
JUDGE

YSK/