

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.10.2020

CORAM

THE HON'BLE MR. JUSTICE P.D. AUDIKESAVALU

W.P. No. 39175 of 2015

and

M.P. No. 1 of 2015

M/s. Esjaypee Impex (P) Ltd.
Rep. by its Director
Mr. Mahendra Parmar
No.12, I-Cross
Sathya Nagar Extension
Saram, Puducherry. Petitioner

-vs-

1. The Commissioner
Commercial Taxes Department
Government of Puducherry
100 Feet Road
Puducherry - 605 005.
2. The Deputy Commercial Tax Officer-II
Commercial Taxes Building
100 Feet Road
Puducherry - 605 005. Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records of the First Respondent proceedings in RP. No.3/CTD/Revision/2015-16 dated 26.10.2015 confirming the proceedings of the Second Respondent bearing No. TIN 34740003257/DCTO-II/2009-10 dated 30.03.2013 and quash the same with consequential direction to the First and Second Respondents to drop the penalty proceedings in the absence of completion of Assessment for the year 2009-10.

For Petitioner :Mr. P.Haribabu

For Respondent :Mr. J.Kumaran
Additional Government Pleader (Puducherry)

O R D E R

(through video conference)

Heard Mr. P.Haribabu, Learned Counsel for the Petitioner and Mr. J.Kumaran, Learned Additional Government Pleader (Puducherry) appearing for the Respondents, and perused the materials placed on record, apart from the pleadings of the parties.

2. The Petitioner, who was assessed to sales tax under the Puducherry Value Added Tax Act, 2007 (hereinafter referred to as the 'PVAT Act' for short) had not made the monthly remittances within the due dates for the year 2009-2010 on which it had fallen due and the same had been paid belatedly. In the same financial year, Section 24-A had been introduced to the PVAT Act with effect from 29.09.2009, which provides for interest at the rate of 2% for each month of default after the due date. In pursuance thereof, the Second Respondent calculated the penalty for belated remittances of the sales tax for the year 2009-2010 as amounting to Rs. 13,66,936/- as per the calculation shown in the tabular statement below:-

Sl · No ·	Month	Tax Paid	Date on which tax ought to have been paid	Date of payment	Delay in months & days	Penal ty for month s delay ed	Penal ty for days delay ed	Total amoun t of penal ty
(i)	04/20 09	2,07, 890	15/05/2 009	10/02/2 010	8 26	33,26 2	3,60 3	36,86 5
(i i)	05/20 09	2,52, 140	15/06/2 009	05/04/2 011	21 21	1,05, 899	3,53 0	1,09, 429
(i ii)	06/20 09	2,62, 550	15/07/2 009	18/04/2 011	21 3	1,10, 271	525	1,10, 796
(i v)	07/20 09	2,60, 765	15/08/2 009	27/04/2 011	20 12	1,04, 306	2,08 6	1,06, 392
(v)	08/20 09	2,64, 250	15/09/2 009	28/10/2 011	25 13	1,32, 125	2,29 0	1,34, 415
(v i)	09/20 09	3,48, 124	15/10/2 009	28/10/2 011	24 13	1,67, 100	3,01 7	1,70, 117
(v ii)	10/20 09	3,01, 426	15/11/2 009	28/10/2 011	23 13	1,38, 656	2,61 2	1,41, 268

Sl No	Month	Tax Paid	Date on which tax ought to have been paid	Date of payment	Delay in months & days		Penal ty for month s delay ed	Penal ty for days delay ed	Total amoun t of penal ty
(v ii i)	11/20 09	2,42, 160	15/12/2 009	28/10/2 011	22	13	1,06, 550	2,09 9	1,08, 649
(i x)	12/20 09	2,60, 090	15/01/2 010	28/10/2 011	21	13	1,09, 238	2,25 4	1,11, 492
(x)	01/20 10	3,28, 125	15/02/2 010	25/06/2 012	28	10	1,83, 750	2,18 8	1,85, 935
(x i)	02/20 10	2,76, 059	15/03/2 010	25/06/2 012	27	10	1,49, 072	1,84 0	1,50, 912
(x ii)	03/20 10	1 ,259	15/04/2 010	25/06/2 012	26	10	655	8	663
	Total	30,04 ,838					13,40 ,884	26,0 52	13,66 ,936

The Second Respondent by Notice No. TIN 34740003257 dated 30.03.2013 called upon the Petitioner to pay the said amount, failing which it was informed that recovery action would follow. Since there was attachment of the bank account of the Petitioner, the Petitioner approached this Court in the Writ Petition in W.P. No. 8929 of 2015 which was disposed by order dated 30.03.2015 holding as follows:-

"7. Since the petitioner Company has got a right of appeal, it is open to them to prefer an appeal in accordance with law, if they are so advised, within a period of 15 days from the date of receipt of a copy of this order. It is made clear that if no appeal is filed within the time stipulated, it is open to the respondent to recover the balance penalty amount, after informing the same to the petitioner."

The Petitioner then filed Revision Petition before the First Respondent who by order dated 26.10.2015 upheld the demand for penalty for delayed remittances of sales tax made under Section 24-A of the PVAT Act. The present Writ Petition has been filed challenging the correctness of the said order.

3. It is not in dispute that Section 24-A of the PVAT Act, which provides for penalty for delayed remittance of sales tax, had come into force with effect from 29.09.2009, but the actual demand has been made for the entire period from 01.04.2009 to 31.03.2010. The question as to whether any claim for recovery of penalty for delayed remittance of tax could be made with retrospective effect has been considered by the Constitution Bench of the Hon'ble Supreme Court of India in Commissioner of Income Tax (Central)-I, New Delhi -vs- Vatika Township Private Limited [(2015) 1 SCC 1], where it has been laid down as follows:-

"General principles concerning retrospectivity

27. A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Vis-à-vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit*: law looks forward not backward. As was observed in Phillips -vs- Eyre [(1870) LR 6 QB 1], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when

introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in *L'Office Cherifien des Phosphates -vs- Yamashita-Shinnihon Steamship Co. Ltd.* [(1994) 1 AC 486 : (1994) 2 WLR 39 : (1994) 1 All ER 20 (HL)]. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

30. We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators' object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In *Govt. of India -vs- Indian Tobacco Assn.* [(2005) 7 SCC 396], the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in *Vijay -vs- State of Maharashtra* [(2006) 6 SCC 289]. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are (sic not) confronted with any such situation here.

31. In such cases, retrospectivity is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to Section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by outweighing factors.

32. Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labelled as "declaratory statutes". The circumstances under which provisions can be termed as "declaratory statutes" are explained by Justice G.P. Singh [Principles of Statutory Interpretation, (13th Edn., LexisNexis Butterworths Wadhwa, Nagpur, 2012)] in the following manner:

"Declaratory statutes"

The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES [W.F. Craies, Craies on Statute Law (7th Edn., Sweet and Maxwell Ltd., 1971)] and approved by the Supreme Court [Ed.: The reference is to Central Bank of India -vs- Workmen, AIR 1960 SC 12, para 29] : 'For modern purposes 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 introduced 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' 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 pre-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 which the Constitution came into force, the amending Act also will be part of the existing law."

The above summing up is factually based on the judgments of this Court as well as English decisions.

33. A Constitution Bench of this Court in Keshavlal Jethalal Shah -vs- Mohanlal Bhagwandas [AIR 1968 SC 1336 : (1968) 3 SCR 623] , while considering the nature of amendment to Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows: (AIR p. 1339, para 8)

"8. ... The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was before the amendment derived from Section 115 of the Code of Civil Procedure, and the legislature has by the amending Act not attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission

or to clear up doubts as to the meaning of the previous Act."

34. It would also be pertinent to mention that assessment creates a vested right and an assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective. (See CED -vs M.A. Merchant [1989 Supp (1) SCC 499 : 1989 SCC (Tax) 404] .)

35. We would also like to reproduce hereunder the following observations made by this Court in Govind Das -vs- ITO [(1976) 1 SCC 906 : 1976 SCC (Tax) 133] , while holding Section 171(6) of the Income Tax Act to be prospective and inapplicable for any assessment year prior to 1-4-1962, the date on which the Income Tax Act came into force: (SCC p. 914, para 11)

"11. Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that

'all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.'"

36. In CIT -vs- Scindia Steam Navigation Co. Ltd. [AIR 1961 SC 1633 : (1962) 1 SCR 788] , this Court held that as the liability to pay tax is computed according to the law in force at the beginning of the assessment year i.e. the first day of April, any

change in law affecting tax liability after that date though made during the currency of the assessment year, unless specifically made retrospective, does not apply to the assessment for that year."

4. Applying the aforesaid principles to the facts of the present case, it would necessarily follow that the sales tax which had fallen due ought to have been paid till 29.09.2009 could not be levied with penalty for the period prior to that date. This would mean that the liability to pay penalty for the sales tax due which ought to have been paid for the period from 01.04.2009 to 29.09.2020 would commence only from 29.09.2009 and not for the earlier period, and consequently, the claim made in serial nos. (i) to (v) in that tabular statement for the monthly remittances from April 2009 to August 2009 would have to be re-worked-out only from 29.09.2009 onwards. However, the calculation made in serial nos. (vi) to (xii) in that tabular statement for the monthly remittances for the period from September 2009 to March 2010 shall remain undisturbed.

5. The result of the foregoing discussion is that the impugned proceedings for penalty levied for delayed remittances of sales tax for the year 2009-2010 shall stand modified to that effect and the Second Respondent shall re-work-out the amount due and after adjusting payments received from the Petitioner, if any, the balance amount recoverable shall be ascertained and intimated to the Petitioner by 31.12.2020 under written acknowledgment. If the Petitioner fails to remit the same by 31.01.2021, the Respondents shall be entitled to proceed for recovery of that amount due from the Petitioner in the manner recognized by law.

6. The Writ Petition is disposed on the aforesaid terms. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-

सत्यमेव जयते
Assistant Registrar(CS VII)

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Sub Assistant Registrar

To

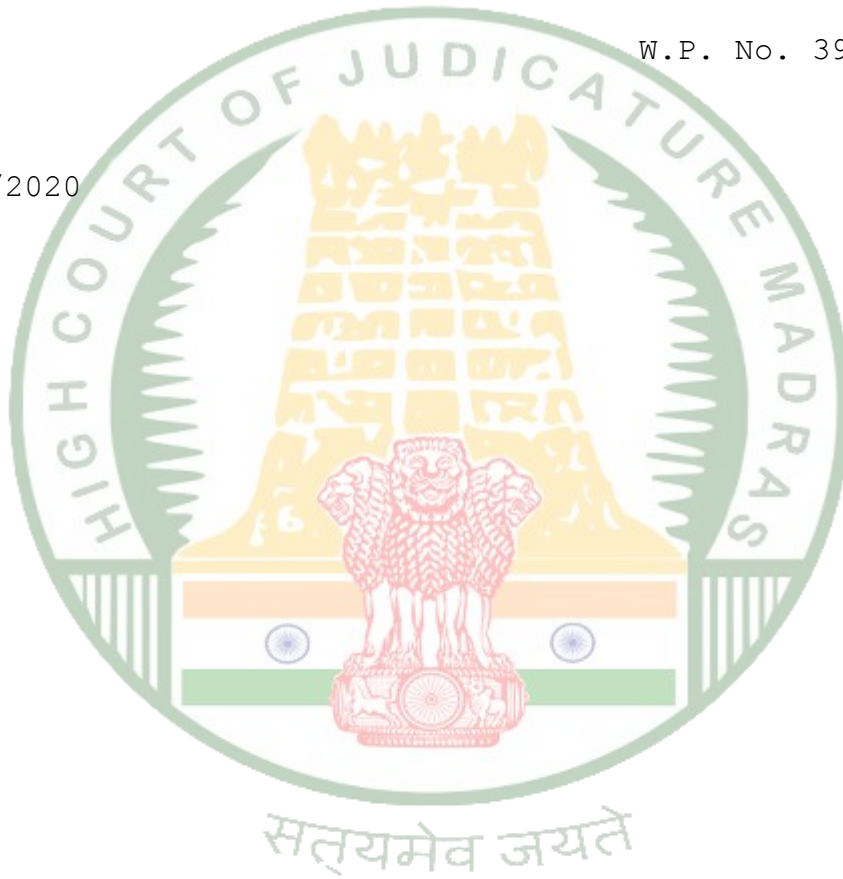
1. The Commissioner,
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Government of Puducherry,
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2. The Deputy Commercial Tax Officer-II,
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+1cc to the Government Pleader Sr.35339

W.P. No. 39175 of 2015

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