



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C) No. 8359/2010**

% **Reserved on:** 5th March, 2012.

Date of Decision: 25th May, 2012.

C.B. RICHARDS ELLIS MAURITIUS LTD. Petitioner
Through : Mr. Ajay Vohra,
Ms.Kavita Jha and Mr. Somnath
Shukla, Advocates.

VERSUS

ASSISTANT DIRECTOR OF INCOME
TAX AND ORS Respondents
Through : Mr. Anupam Tripathi, Sr.
Standing Counsel and Ms. Anusha
Singh, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.

C.B. Richards Ellis Mauritius Limited has filed this writ petition challenging the re-assessment notice dated 30.3.2009 under Section 148 of the Income Tax Act, 1961 (hereinafter, referred to as 'the Act') in respect of the assessment year 1998-99. The petitioner has also prayed for quashing of the order dated 1.12.2010 passed by the Assistant Director of Income Tax, Circle 1(1), Directorate of International Taxation, New Delhi, dismissing their objections to the initiation of the re-assessment proceedings.



2. The petitioner had filed return of income for the assessment year 1998-99 on 20.11.1998 declaring total income of Rs.1,07,75,850/-. The return was taken up in scrutiny and an assessment order under Section 143(3) of the Act was passed on 28.2.2001.

3. As noticed above, the re-assessment notice under Section 148 of the Act was issued on 30.3.2009, i.e. after the expiry of nine years from the assessment year in which the return of income for the assessment year 1998-99 was filed. The question and issue raised by the petitioner is whether the notice under Section 148 of the Act dated 30.3.2009 is barred and beyond time. This issue is live and is required to be decided as the time limit for issuance of notice under Section 148 as stipulated and stated in Section 149 of the Act underwent substitution by Finance Act, 2001 with effect from 1.6.2001. By the Finance Act, 2001, the period was restricted to six years from the end of the relevant assessment year. Before the said substitution, till 31.5.2001 re-assessment proceedings could be initiated for up to 10 years from the end of the relevant assessment year.

4. For the sake of completeness, we are reproducing below Section 149 of the Act as amended by the Direct Tax Laws (second amendment) Act, 1989 with retrospective effect from 1.4.1989 before substitution by the Finance Act, 2001:-



“149. Time limit for notice.--(1) No notice under section 148 shall be issued for the relevant assessment year,--

(a) in a case where an assessment under sub-section (3) of section 143 or section 147 has been made for such assessment year,--

(i) if four years have elapsed from the end of the relevant assessment year, unless the case falls under sub-clause (ii) or sub-clause (iii) ;

(ii) if four years, but not more than seven years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty-thousand or more for that year ;

(iii) if seven years, but not more than ten years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to more than rupees one lakh or more for that year ;

(b) in any other case,--

(i) if four years have elapsed from the end of the relevant assessment year, unless the case falls under sub-clause (ii) or sub-clause (iii) ;

(ii) if four years, but not more than seven years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees twenty-five thousand or more for that year ;

(iii) if seven years, but not more than ten years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year.

Explanation.--In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 of section



147 shall apply as they apply for the purposes of that section.

(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.

(3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non-resident under section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year.”

5. Section 149 of the Act, after the substitution of the Finance Act, 2001, reads as under:-

“149. Time limit for notice.--(1) No notice under section 148 shall be issued for the relevant assessment year,--

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b) ;

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.

Explanation.--In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section.

(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.

(3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non-



resident under section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year.”

6. It is an accepted and admitted position that the re-assessment notice dated 30.3.2009 would be barred and beyond time, in case, the period stipulated in substituted Section 149 with effect from 1.6.2001 is applied. However, the contention of the Revenue is that the substituted Section is not applicable and Section 149 of the Act before its substitution by the Finance Act, 2001 would apply. It is stated that the return in question was filed on 20.11.1998 and the law/limitation period prescribed/applicable on the first day of the assessment year determines and decides the time period for issue of notice under Sections 147/148 of the Act. Reliance was placed on Section 6 of the General Clauses Act, 1897. A statute it was stated is *prima facie* prospective, unless expressly or by necessary intendment is made retrospective. Revenue states that the Finance Act, 2001 did not make the substituted provision retrospective.

7. Having considered the contentions of the parties and the legal issues raised therein, we feel that the petitioner is entitled to succeed. Section 6 of General Clauses Act deals with effect of repeal of an enactment and stipulates that unless a different intention appears, the



repeal will not affect the previous operation of any enactment repealed or any right, privilege, obligation or liability acquired, accrued or affect any penalty, investigation, legal proceeding or remedy. The said Section deals with substantive rights and liabilities. It is also subject to intention to the contrary. Intention can be implied. The procedural law when it is repealed should be applied from the date the new provision or procedure comes into force. The reason is that no person has a vested right or an accrued right in the procedure. No obligation or liability is normally imposed by a procedure. Sometime distinction is drawn between the right acquired or accrued and legal proceedings to acquire a right. In the latter case, there is only hope which is destroyed by the repeal. What is protected is the preserved right and privileges acquired and accrued and corresponding obligation and liability incurred on the other party. The legal process or the procedure for the enjoyment of the said right is not protected. Section 6, normally does not apply to procedural law. The procedural law when amended or substituted is generally retroactive and applies from the day of its enforcement and to this extent it can be retrospective. The question raised is whether the amendment/substitution of the period with effect from 1.6.2001 in Section 149 of the Act, is procedural or substantive.



8. Law of limitation is a procedural law and the provision or t
 limitation period stipulated on the date when the suit is filed applies.
 (see, *Mathukumalli Ramayya and Ors. v. uppalapati Lakshmayya*,
 AIR 1942 PC 54 and *C. Beepathuma v. Velasari Shankaranarayana*
Kadambolithaya, AIR 1965 SC 241).

9. In *T. Kaliamurthi v. Five Gori Thaikkal Wakf*, (2008) 9 SCC
 306, it has been held as under:-

“40. In this background, let us now see whether this section has any retrospective effect. It is well settled that no statute shall be construed to have a retrospective operation until its language is such that would require such conclusion. The exception to this rule is enactments dealing with procedure. This would mean that the law of limitation, being a procedural law, is retrospective in operation in the sense that it will also apply to proceedings pending at the time of the enactment as also to proceedings commenced thereafter, notwithstanding that the cause of action may have arisen before the new provisions came into force. However, it must be noted that there is an important exception to this rule also. Where the right of suit is barred under the law of limitation in force before the new provision came into operation and a vested right has accrued to another, the new provision cannot revive the barred right or take away the accrued vested right.”

(emphasis supplied)

10. Similarly, in *Thirumalai Chemicals Limited v. Union of India*,
 (2011) 6 SCC 739, it was observed as under:-



“24. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.

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26. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective.

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30. Learned author in order to establish the above proposition referred to the decision of the Court of Appeal in The Ydun case [THE YDUN (1899) Probate Division at page 236 (The Court of Appeal) where the Court held that the amending legislation dealt with procedure only and therefore applied to all actions whether commenced before or after the passing of the Act and even in respect of previously accrued rights. The principle laid down in 'The Ydun' was applied in The King v. Chandra Dharma (1905) 2 KB 335 and it was held that if a statute shortening the time within which proceedings can be taken is retrospective then it is impossible to give good reason, why a statute extending the time within which proceedings be taken, should not be held to be retrospective.”



11. Law of limitation, therefore, being procedural law has to be applied to the proceedings on the date of institution/filing. No person can have a vested right in the procedure. Therefore, the procedural law on the date when it was enforced is applied. Bennion Statutory interpretation (1st addition page 446 para 191) has elucidated:-

“Because a change made by the legislator in procedural provisions is expected to be for the general benefit of litigants and others, it is presumed that it applies to pending as well as future proceedings.”

12. Law of limitation does not create any right in favour of a person or define or create any cause of action, but simply prescribes that the remedy can be exercised or availed of by or within the period stated and not thereafter. Subsequently, the right continues to exist but cannot be enforced. The liability to tax under the Act is created by the charging Section read with the computation provisions. The assessment proceedings crystallize the said liability so that it can be enforced and the tax if short paid or unpaid can be collected. If this difference between liability to tax and the procedure prescribed under the Act for computation of the liability (i.e. the procedure of assessment), is kept in mind, there would be no difficulty in understanding and appreciating the fallacy and the error in the primary argument raised by the Revenue. It is a settled position that liability to tax as a levy is



normally determined as per statute as it exists on the first day of t
assessment year, but this is not the issue or question in the present case.
The issue or question in the present case relates to assessment i.e.
initiation of re-assessment proceedings and whether the time/limitation
for initiation of the re-assessment proceedings specified by the Finance
Act, 2001 is applicable. We are not determining/deciding the liability
to tax but have to adjudicate and decide whether the re-assessment
notice is beyond the time period stipulated. This is a matter/issue of
procedure i.e. the time period in which the assessment or re-assessment
proceedings can be initiated. Thus the time period/limitation period
prescribed on the date of issue of notice will apply. In our opinion, the
answer is clear and has to be in affirmative, i.e. in favour of the
assessee.

13. This question is not debatable or *res integra* and was examined
and answered with lucid and clear reasoning in the opinion expressed
by Hidayatullah, J. on behalf of himself and Raghubar Dayal, J. in *S.C.*
Prashar, Income Tax Officer v. Vasantsen Dwarkadas, AIR 1963 SC
1356; 1963 (49) ITR 1 (SC). The relevant portion reads:-

“93.If the 1948 Amendment could be treated as
enabling the Income Tax Officer to take action at any
point of time in respect of back assessment years
within eight years of March 30, 1948 then such cases



were within his power to tax. We have such a case here in CA No. 509 of 1958 where the notice was issued in 1949 to the lady whose husband had remitted Rs 9180 to her from Bangkok in the year relative to Assessment Year 1942-43. That lady was assessable in respect of this sum under Section 4(2) of the Income Tax Act. She did not file a return. If the case stood governed by the 1939 Amendment the period applicable would have been four years if she had not concealed the particulars of the income. She had of course not deliberately furnished inaccurate particulars thereof. If the case was governed by the 1948 Amendment she would come within the eight-year rule because she had failed to furnish a return. Now, we do not think that we can treat the different periods indicated under Section 34 as periods of limitation, the expiry of which grant prescriptive title to defaulting tax-payers. It may be said that an assessment once made is final and conclusive except for the provisions of Sections 34 and 35 but it is quite a different matter to say that a "vested right" arises in the assessee. On the expiry of the period the assessments, if any, may also become final and conclusive but only so long as the law is not altered retrospectively. Under the scheme of the Income Tax Act a liability to pay tax is incurred when according to the Finance Act in force the amount of income, profits or gains is above the exempted. That liability to the State is independent of any consideration of time and, in the absence of any provision restricting action by a time limit, it can be enforced at any time. What the law does is to prevent harassment of assesseees to the end of time by prescribing a limit of time for its own officers to take action. This limit of time is binding upon the officers, but the liability under the charging section can only be said to be unenforceable after the expiry of the period under the law as it stands. In other words, though the liability to pay tax remains it cannot be enforced by the officers administering the tax laws. If the disability is removed or according to a new law a new time limit is created retrospectively, there is no reason why the liability should not be treated as still enforceable. The law does not deal with concluded claims or their revival but with the enforcement of a



liability to the State which though existing remained to be enforced...

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95.It says that the limit of time mentioned in Section 34 is removed in certain cases that is to say, action can be taken at any time in these cases. In our judgment, each case of a notice must be judged according to the law existing on the date the notice was issued or served, as the law may require. So long as the notice where the notice is in question, and the assessment, where the assessment is in question, are within the time limited by the law, as it exists when the respective actions are taken, the actions cannot be questioned provided the law is clearly retrospective. The only case in which no further action can be taken is one in which action was not taken under the old law within the period prescribed by that law and which is not also within the period mentioned in the new law if its operation is retrospective. All other cases are covered by the law in force at the time action is taken. It is from these viewpoints that these appeals, in our opinion, should be judged.”

14. In the said case, question of validity of notice had arisen because of repeated/frequent changes made in the period in which re-assessment proceedings could be initiated under Section 34 of the income Tax Act, 1922 during the years 1939-59. Revalidation Act had also been enacted. This ratio was followed and applied in *CIT v. Sardar Lakhmir Singh* (1963) 49 ITR 70 (SC), *CIT, Madras v. Janabha Muhammad Hussain Nachiar Ammal*, AIR 1963 SC 1401 and in *ITO, A-Ward, Sitapur v. Murlidhar Bhagwandas, Lakhimpur Kheri*, (1964) 52 ITR 335 (SC).



15. Referring to this decision in *Hussain Bhai and Ors. v. CI*, *Madras* (1971) 80 ITR 477 (SC), the Supreme Court examined whether Section 4 of the Income Tax (Amending) Act of 1959 saves a fresh notice under Section 34 from the bar of limitation. It was held that Section 4 of the Income Tax (Amending) Act, 1959 does not save the fresh notice. It was observed as under:-

“We are supported in the view we have taken by certain observations of Sarkar J., as he then was, in *S. C. Prashar v. Vasantsen Dwarkadas* (1). The court in that case was not concerned with assessment years in respect of which a notice could be issued under section 34(1)(a) of the Act, as amended by the Finance Act of 1956, but the present case was visualised by Sarkar J. in that case. He observed :

" So, though section 4 of the 1959 Act freed a notice from the bar of limitation in respect of it imposed by the 1948 amendment, it did not altogether do away with all prescriptions of time. In spite of section 4, a notice contemplated by it would be subject to the prescription of time as to its issue under the 1939 Act and may be, under section 34 as it stood before the 1939 amendment. If the notice was issued after the 1956 amendment, it would also be subject to the prescription as to time provided by that amendment. (emphasis supplied)

Then it was said that if section 4 applied to a notice issued more than eight years after the year in which the income escaped assessment but before the 1956 amendment came into force in a case where the escaped income of the year was less than Rs. 1,00,000, the position would be curious. A notice issued in a



similar case after the 1956 amendment would be bad under section 34 as it then stood and section 4 could not save it for it saved notices only from the effect of the 1948 amendment. The position then would be that in a case involving the same amount of escaped income for the same year, a notice issued before the 1956 amendment and invalid under the 1948 amendment would be validated and a more recent notice equally invalid under both the earlier and present laws would remain invalid. Assume that the position is somewhat curious or incongruous. But that seems to me to be the result of the words used. For all we know that might have been intended. However strange, if at all, the result may be, I do not think the courts can alter the plain meaning of the language of the statute only on the ground of incongruity if there is nothing in the words which would justify the alteration. As I have said earlier, in this case there is nothing to justify the alteration of the plain meaning. "

16. Going back a little in point of time in *J.P. Jani, ITO v. Induprasad Devshankar Bhatt*, (1969) 72 ITR 595 (SC), it was held that the Income Tax Officer cannot issue notice under Section 148 of the Act, where the right to re-open an assessment was barred under the Income Tax Act, 1922 on the date when the 1961 Act came into force. This is a separate issue and aspect which need not be examined and dealt with in this case. The issue/question in *Induprasad Devshankar* (supra) was what would be the legal position in case the period prescribed for initiation of the re-assessment proceedings is enhanced or extended under the new statute. We are not required to and do not examine or consider this aspect/question.



17. In view of the aforesaid reasoning, we allow the writ petition and quash the re-assessment notice dated 30.3.2009 and the order dated 1.12.2010 passed by the Assessing Officer and Assistant Commissioner of Income Tax, respectively dismissing the objections of the assessee. Other aspects and contentions raised by the petitioner/assessee are not examined/answered. The respondent will also pay costs of Rs.10,000/- to the petitioner. The writ petition stands disposed of in the aforesaid terms.

(SANJIV KHANNA)
JUDGE

(R.V. EASWAR)
JUDGE

MAY 25th , 2012

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