Commr.Of Income Tax-I,New Delhi vs Vatika Township P.Ltd on 15 September, 2014

Author: A.K. Sikri

Bench: Rohinton Fali Nariman, A.K. Sikri, J. Chelameswar, Jagdish Singh Khehar, R.M. Lodha

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.8750 OF 2014
(arising out of SLP (C) No. 540 of 2009)

COMMISSIONER OF INCOME TAX (CENTRAL)-I, NEW DELHI	…..	APPELLANT(S)
VERSUS		
VATIKA TOWNSHIP PRIVATE LIMITED	…..	RESPONDENT(S)

W I T H

CIVIL APPEAL NO.8764 OF 2014
(arising out of SLP (C) No. 1362 of 2009)

CIVIL APPEAL NO.8762 OF 2014
(arising out of SLP (C) No. 1339 of 2009)

CIVIL APPEAL NO.8773 OF 2014
(arising out of SLP (C) No. 19319 of 2008)

CIVIL APPEAL NO.8763 OF 2014
(arising out of SLP (C) No. 1342 of 2009)

CIVIL APPEAL NO.8755 OF 2014
(arising out of SLP (C) No. 31528 of 2008)

CIVIL APPEAL NO.8775 OF 2014
(arising out of SLP (C) No. 22444 of 2008)

CIVIL APPEAL NO.8779 OF 2014
(arising out of SLP (C) No. 27162 of 2008)

CIVIL APPEAL NO.8780 OF 2014
(arising out of SLP (C) No. 27413 of 2008)

CIVIL APPEAL NO.8774 OF 2014
(arising out of SLP (C) No. 20855 of 2008)

CIVIL APPEAL NO.8765 OF 2014
(arising out of SLP (C) No. 4769 of 2009)

CIVIL APPEAL NO.8760 OF 2014
(arising out of SLP (C) No. 1257 of 2009)

CIVIL APPEAL NO.8756 OF 2014
(arising out of SLP (C) No. 31537 of 2008)

CIVIL APPEAL NO.8759 OF 2014
(arising out of SLP (C) No. 767 of 2009)

CIVIL APPEAL NO.8772 OF 2014
(arising out of SLP (C) No. 14204 of 2008)

CIVIL APPEAL NO.8777 OF 2014
(arising out of SLP (C) No. 26473 of 2008)

CIVIL APPEAL NO.8770 OF 2014
(arising out of SLP (C) No. 13886 of 2008)

CIVIL APPEAL NOS.8752-8753 OF 2014
(arising out of SLP (C) Nos. 4842-4843 of 2008)

CIVIL APPEAL NO.8754 OF 2014
(arising out of SLP (C) No. 5704 of 2008)

CIVIL APPEAL NO.8768 OF 2014
(arising out of SLP (C) No. 6897 of 2008)

CIVIL APPEAL NO.8758 OF 2014
(arising out of SLP (C) No. 745 of 2009)

CIVIL APPEAL NO.8776 OF 2014
(arising out of SLP (C) No. 24602 of 2008)

CIVIL APPEAL NO.8769 OF 2014
(arising out of SLP (C) No. 8901 of 2008)

CIVIL APPEAL NO. 1160 OF 2007

CIVIL APPEAL NOS. 8766-8767 OF 2014
(arising out of SLP (C) Nos. 6767-6768 of 2014)

J U D G M E N T

A.K. SIKRI, J.

Delay condoned.

2. Leave granted in all these matters.

3. In these batch of appeals, most of which are preferred by the Commissioner(s) of Income Tax (hereinafter referred to as 'the Department'), with the exception of few appeals filed by the assessees, the question of law which has fallen for consideration is as to whether the proviso appended to Section 113 of the Income Tax Act (hereinafter referred to as 'the Act') which was inserted in that Section by the Finance Act, 2002 is to operate prospectively or is clarificatory and curative in nature and, therefore, has retrospective operation.

The Background Facts:

4. This question has been referred to the Constitution Bench in the Civil Appeal arising out of S.L.P. No.540/2009 and, therefore, to start with, we would be justified in referring to facts of that case. In fact the answer to the aforesaid question would lead to the sealing of the fate of all these appeals one way or the other. The facts in this appeal, which need recapitulation, are that there was a search and seizure operation under Section 132 of the Act on the premises of the assessee on 10.02.2001. Notice under Section 158BC of the Act was issued to the assessee on 18.06.2001 requiring him to file his return of income for the block period ending 10.02.2000. In compliance, the assessee filed its return of income for the block period from 01.04.1989 to 10.02.2000. The Block Assessment in this case was completed under Section 158BA on 28.02.2002 at a total undisclosed income of Rs.85,18,819/-. After sometime, the Assessing Officer, on verification of working of calculation of tax, observed that surcharge had not been levied on the tax imposed upon the assessee. This was treated as a mistake apparent on record by the Assessing Officer and accordingly a rectification order was passed under Section 154 of the Act on 30.06.2003. This order under Section 154 of the Act, by which surcharge was levied by the Assessing Officer, was challenged in appeal by the assessee. The said order was cancelled by the CIT (Appeals)-I, New Delhi vide order dated 10.12.2003 on the ground that the levy of surcharge is a debatable issue and therefore such an order could not be passed taking umbrage under Section 154 of the Act. The undisclosed income was revised under Section 250BC/158BC by the Assessing Officer vide order dated 09.09.2003 to Rs.10,90,000/- to give effect to the above order of the CIT (Appeals), and thereby removing the component of the surcharge.

5. As the Department wanted the surcharge to be levied, the Commissioner of Income Tax (Central-I), New Delhi issued a notice under Section 263 of the Act to the assessee and sought to revise the order dated 09.09.2003 passed by the Assessing Officer by which he had given effect to the order of the CIT (Appeals) and in the process did not charge any surcharge. In the opinion of CIT, this led to income having escaped the assessment. According to the CIT, in view of the provisions of Section 113 of the Act as inserted by the Finance Act, 1995 and clarified by the Board Circular No.717 dated 14.08.1995, surcharge was leviable on the income assessed. According to the

CIT the charging provision was Section 4 of the Act which was to be read with Section 113 of the Act that prescribes the rate and tax for search and seizure cases and rate of surcharge as specified in the Finance Act of the relevant year was to be applied. In this particular case the search and seizure operation took place on 14.07.1999 and treating this date as relevant, the Finance Act 1999 was to be applied.

6. The CIT, accordingly, cancelled the order dated 09.09.2003 not levying surcharge upon the assessee, as being erroneous and prejudicial to the interests of the revenue. The Assessing Officer was directed by the CIT to levy surcharge @ 10% and the amount of income tax computed and issue revised notice of demand. The order covered block period 01.04.1989 to 10.02.2000. This order of the CIT under Section 263 of the Act was passed on 23.03.2004. The assessee filed the appeal before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') against the said order of the CIT. The Tribunal vide its order dated 23.06.2006 allowed the appeal of the assessee. The Tribunal held that the insertion of the proviso to Section 113 of the Income Tax Act cannot be held to be declaratory or clarificatory in nature and was prospective in its operation. Against the order of the Tribunal dated 23.06.2006 the revenue approached the High Court of Delhi by way of an appeal filed under Section 260 A of the Act for the block period 01.04.1989 to 10.02.2000. This appeal has been dismissed vide order dated 17.04.2007 by the High Court. It is this order of the High Court which is the subject matter of the appeal in question.

7. It is clear from the aforesaid narration that the High Court has taken the view that proviso inserted in Section 113 of the Act by the Finance Act, 2002 was prospective in nature and the surcharge as leviable under the aforesaid proviso could not be made applicable to the block assessment in question of an earlier period i.e. the period from 01.04.1989 to 10.02.2000 in the instant case.

The Reference Order

8. It so happened that this very issue about the said proviso to Section 113, viz., whether it is clarificatory and curative in nature and, therefore, can be applied retrospectively or it is to take effect from the date i.e. 01.06.2002 when it was inserted by the Finance Act, 2002, attracted the attention of this Court and was considered by the Division Bench in the case of Commissioner of Income Tax, Central II v. Suresh N. Gupta[1]. The Division Bench held that the said proviso is clarificatory in nature. When the instant appeal came up before another Division Bench on 06.01.2009 for hearing, the said Division Bench expressed its doubts about the correctness of the view taken in Suresh N. Gupta and directed the Registry to place the matter before Hon'ble the Chief Justice of India for constitution of a larger Bench. We reproduce order dated 06.01.2009 in its entirety as under:

> “Delay condoned.
>
> The question which fell for consideration before the High Court was as to whether the proviso appended to Section 113 of the Income Tax Act is clarificatory and/or curative in nature. The said provision had come into force with effect from 01.06.2002. It

reads as under:

"Provided that the tax chargeable under this section shall be increased by a surcharge, if any, levied by any Central Act and applicable in the assessment year relevant to the previous year in which the search is initiated under Section 132 or the requisition is made under Section 132-A. In this case, the search and seizure took place on 06.10.2001. An order of block assessment in terms of Section 158BC was made in respect of the assessment years 1984 to 2003. The surcharge was levied on 30.06.2003.

In support of its contention that the said proviso was retrospective in nature, the learned Additional Solicitor General relies upon a Division Bench decision of this Court in Commissioner of Income Tax, Central II v. Suresh N. Gupta, (2008) 4 SCC 362 wherein it has been held:

"37. According to the assessee, prior to 01.06.2002, the position was ambiguous as it was not clear even to the Department as to which year's FA would be applicable. To clear this doubt precisely, the proviso has been inserted in Section 113 by which it is indicated that FA of the year in which the search was initiated would apply. Therefore, in our view, the said proviso was clarificatory in nature. In taxation, the legislation of the type indicated by the proviso has to be read strictly. There is no question of retrospective effect. The proviso only clarifies that out of the four dates, Parliament has opted for the date, namely, the year in which the search is initiated, which date would be relevant for applicability of a particular FA. Therefore, we have to read the proviso as it stands.

38. There is one more reason for rejecting the above submission. Prior to 01.06.2002, in the 1961 Act and sometimes in FA and often in both. This made liability uncertain. In the present case, however, the rate of tax in case of block assessment at 60% was prescribed by Section 113 but the year of FA imposing surcharge was not stipulated. This resulted in the above four ambiguities. Therefore, clarification was needed. The proviso was curative in nature. Hence, the proviso inserted in Section 113 merely clarifies that out of the above four dates, the relevant date for applicability of FA would be the year in which the search stood initiated under Section 158-BC." As the said proviso was introduced with effect from 01.06.2002, i.e. with prospective effect and by reason thereof, tax chargeable under Section 135 of the Income Tax Act is to be increased by surcharge levied by a Central Act, we are of the opinion that keeping in view the principles of law that the taxing statute should be construed strictly and a statute, ordinarily, should not be held to have any retrospective effect, it is necessary that the matter be considered by a larger Bench.

We, while issuing notice, direct the Registry to place the matter before Hon'ble the Chief Justice for constitution of a larger Bench."

9. A three Member Bench was constituted before which the matter came up for hearing on 08.04.2010. On that date, the said Bench passed the following order :

> "Vide order dated 06.01.2009 the lead matter was referred to be listed before a larger Bench and consequently the matter, along with connected matters, were listed before a three Judge Bench.
>
> After having heard learned counsel on both sides at length, looking to the important questions of law involved having wide ramifications and pendency of several matters on the same issue before several High Courts and Tribunals, we deem it appropriate to refer the matters for being placed before Five Judges Bench. Matter be placed accordingly."

10. This is precisely raison d'etre for hearing the matter by the present Constitution Bench. We may observe here that after the aforesaid reference, other connected appeals raising the identical issue have been tagged with direction to be heard along with this appeal.

The Statutory Provisions

11. Before adverting to the submissions of the Department, as argued by Mr. P.S. Narsimha, learned Additional Solicitor General and rebuttal thereto given by various counsel appearing for the assessees, we deem it apposite to take note of the relevant statutory provisions, having bearing over the matter, along with proviso to Section 113, which is the bone of contention and subject mater of interpretation. As is well known, Section 4 of the Act is the charging Section in the Act. It reads as under:

> "S.4(1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person :
>
> Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.
>
> (2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act."
>
> 12. Though, Section 4 of the Act is the charging Section, it is well known that rate or rates at which the income tax is to be charged is specified each year by enacting a Finance Act at the time of presentation of the annual Budget.

13. While Section 4 of the Act deals with the charge of income tax, the Parliament also has the power to levy surcharge on income tax. Power to levy a surcharge is contained in Article 271 of the Constitution of India which read as under:

"271. Surcharge on certain duties and taxes for purposes of the Union Notwithstanding anything in Articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part the Consolidated Fund of India."

14. The surcharge on the income tax was introduced for the first time by the Finance Act, 1995, in Section 2 (3) thereof. However, initially, this surcharge was levied only on the income of companies i.e. corporate entities incorporated under the Indian Companies Act by specified surcharge at the rate of 15% in the Finance Act, 1996, which was reduced to 7.50% in the Finance Act, 1997. In the next two Finance Acts i.e. 1998 and 1999, there was no surcharge levied even in the cases of companies. However, by Finance Act, 2000, surcharge at a flat rate of 10% came to be levied in respect of individuals, HUF, BOI, AOP as well as co-operative societies, partnership firms, local authorities and also the companies. In subsequent years, the rates at which the surcharge is levied on the aforesaid entities are of varying nature. A tabulated form showing surcharge in respect of different category of assessees in different assessment years, levied under each Finance Act, shall be reproduced at the relevant stage.

15. In the present case, since we are concerned with the surcharge on the block assessment, it also becomes imperative to take note of the relevant provisions pertaining to the block assessment. These provisions are contained in Chapter XIV-B. The purpose of this Chapter is to lay down a special procedure for assessment of search cases with a view to combat tax evasion and also to expedite and simplify assessments in search cases. We reproduce hereinbelow the provisions of Section 158B, 158BA, 158BB, 158BC and 158BH of that Chapter, which have bearing on the issue at hand:

"158B. In this Chapter, unless the context otherwise requires,-

(a) 'block period' means the period comprising previous years relevant to six assessment years preceding the previous year in which the search was conducted under Section 132 or any requisition was made under Section 132A and also includes the period up to the date of the commencement of such search or date of such requisition in the previous year in which the said search was conducted or requisition was made.

Provided that where the search is initiated or the requisition is made before the 1st day of June, 2001, the provisions of this clause shall have effect as if for the words "six assessment years" the

words "ten assessment years" had been substituted.

(b) "undisclosed income" includes any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property which has not been or would not have been disclosed for the purposes of this Act.

158BA. Assessment of undisclosed income as a result of search.- (1) Notwithstanding anything contained in any other provisions of this Act where after the 30th day of June, 1995, a search is initiated under Section 132 or books of account, other documents or any assets are requisitioned under Section 132A in the case of any person, then, the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter.

(2) The total undisclosed income relating to the block period shall be charged to tax, at the rate specified in Section 113, as income of the block period irrespective of the previous year or years to which such income relates and irrespective of the fact whether regular assessment for any one or more of the relevant assessment years is pending or not.

Explanation- For the removal of doubts, it is hereby declared that-

(a) the assessment made under this Chapter shall be in addition to the regular assessment in respect of each previous year included in the block period;

(b) the total undisclosed income relating to the block period shall not include the income assessed in any regular assessment as income of such block period;

(c) the income assessed in this Chapter shall not be included in the regular assessment of any previous year included in the block period.

(3) Where the assessee proves to the satisfaction of the Assessing Officer that any part of income referred to in sub-section (1) relates to an assessment year for which the previous year has not ended or the date of filing the return of income under sub-section (1) of section 139 for any previous year has not expired, and such income or the transactions relating to such income are recorded on or before the date of the search or requisition in the books of account or other documents maintained in the normal course relating to such previous years, the said income shall not be included in the block period.

158BB. Computation of undisclosed income of the block period.- (1) The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed, in accordance with the provisions of Chapter IV, on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with the Assessing Officer, as reduced by the aggregate of the total income, or, as the case may be, as increased by the aggregate of the losses of such previous years,

determined,-

(a) where assessments under section 143 or section 144 or section 147 have been concluded, on the basis of such assessments;

(b) where returns of income Have been filed under section 139 or section 147 but assessments have not been made till the date of search or requisition, on the basis of the income disclosed in such returns;

(c) where the due date for filing a return of income has expired but no return of income has been filed, as nil;

(d) where the previous year has not ended or the date of filing the return of income under Sub-section (1) of Section 139 has not expired, on the basis of entries relating to such income or transactions as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition relating to such previous years;

(e) where any order of settlement has been made under sub-section (4) of section 245D, on the basis of such order;

(f) where an assessment of undisclosed income had been made earlier under Clause (c) of section 158BC, on the basis of such assessment.

Explanation.- For the purposes of determination of undisclosed income,

(a) the total income or loss of each previous year shall, for the purpose of aggregation, be taken as the total income or loss computed in accordance with the provisions of Chapter IV without giving effect to set off of brought forward losses under Chapter VI or unabsorbed depreciation under sub-section (2) of section 32;

(b) of a firm, returned income and total income assessed for each of the previous years falling within the block period shall be the income determined before allowing deduction of salary, interest, commission, bonus or remuneration by whatever name called to any partner not being a working partner:

> Provided that undisclosed income of the firm so determined shall not be chargeable to tax in the hands of the partners, whether on allocation or on account of enhancement;
>
> (c) assessment under Section 143 includes determination of income under sub-

section (1) or sub-section (1B) of section 143.

(2) In computing the undisclosed income of the block period, the provisions of sections 68, 69, 69A, 69B and 69C shall, so far as may be, apply and references to financial year in those sections shall be construed as references to the relevant previous year falling in the block period including the previous year ending with the date of search or of the requisition.

(3) The burden of proving to the satisfaction of the Assessing Officer that any undisclosed income had already been disclosed in any return of income filed by the assessee before the commencement of search or of the requisition, as the case may be, shall be on the assessee.

(4) For the purpose of assessment under this Chapter, losses brought forward from the previous year under Chapter VI or unabsorbed depreciation under sub-section (2) of section 32 shall not be set off against the undisclosed income determined in the block assessment under this Chapter, but may be carried forward for being set off in the regular assessments.

158BC. Procedure for block assessment.- Where any search has been conducted under section 132 or books of account, other documents or assets are requisitioned under section 132A, in the case of any person, then,-

(a) the Assessing Officer shall-

(i) in respect of search initiated or books of account or other documents or any assets requisitioned after the 30th day of June, 1995, but before the 1st day of January, 1997, serve a notice to such person requiring him to furnish within such time not being less than fifteen days;

(ii) in respect of search initiated or books of account or other documents or any assets requisitioned on or after the 1st day of January, 1997, serve a notice to such person requiring him to furnish within such time not being less than fifteen days but not more than forty-five days, as may be specified in the notice a return in the prescribed form and verified in the same manner as a return under clause (i) of sub-section (1) of section 142, setting forth his total income including the undisclosed income for the block period:

> Provided that no notice under Section 148 is required to be issued for the purpose of proceeding under this Chapter:
>
> Provided further that a person who has furnished a return under this clause shall not be entitled to file a revised return;
>
> (b) the Assessing Officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of section 142, sub-sections (2) and (3) of section 143 and section 144 shall, so far as may be, apply;
>
> (c) the Assessing Officer, on determination of the undisclosed income of the block period in accordance with this Chapter, shall pass an order of assessment and

determine the tax payable by him on the basis of such assessment;

(d) the assets seized under section 132 or requisitioned under section 132A shall be retained to the extent necessary and the provisions of section 132B shall apply subject to such modifications as may be necessary and the references to 'regular assessment' or 'reassessment' in section 132B shall be construed as references to 'block assessment'.

158BH. Application of other provisions of this Act.- Save as otherwise provided in this Chapter, all other provisions of this Act shall apply to assessment made under this Chapter."

16. It would be of some significance to point out at this stage that in so far as rates of tax chargeable in case of block assessment is concerned, that is not provided in the Finance Act. Pertinently, the provision to this effect has been made in the Income Tax Act itself and is contained in Section 113 of the Act. This Section, before insertion of proviso thereto, read as under:

"113. Tax in the case of block assessment of search cases. - The total undisclosed income of the block period, determined under section 158BC, shall be chargeable to tax at the rate of sixty per cent."

17. The proviso to Section 113 was inserted by Finance Act, 2002 with effect from June, 2002 and is to the following effect:

"Provided that the tax chargeable under this section shall be increased by a surcharge, if any, levied by any Central Act and applicable in the assessment year relevant to the previous year in which the search is initiated under section 132 or the requisition is made under section 132A."

18. From the reading of the aforesaid statutory provisions in abstract, particularly relating to surcharge, it is clear that though provision for surcharge under the Finance Act has been in existence since 1995, in so far as levy of surcharge for block assessment is concerned, it is introduced by insertion of aforesaid proviso of Section 113. It is in this background, the question has arisen as to whether this surcharge on block assessment has been levied for the first time by the aforesaid proviso coming into effect from 01.06.2002 or it is only clarificatory in nature because of the reason that the provision for surcharge was made in the Finance Act in the year 1995 and that covered surcharge on block assessment as well.

Judgment in Suresh N. Gupta

19. As already noticed above, this very proviso to Section 113 of the Act came up for interpretation in Suresh N. Gupta and the Division Bench of this Court took the view that this proviso is clarificatory in nature as it simply clarifies the date with reference to which the rate of surcharge is payable, namely, the surcharge levied by the Central Act and applicable in the assessment year relevant to the previous year in which the search is initiated. It would be advisable to take note of the reasons which

prevailed with the Bench to come to the aforesaid conclusion, inasmuch as it is the ratio of this judgment which was doubted by the Bench making the reference to the larger Bench.

20. The Court in Suresh N. Gupta formulated two points for consideration, viz.;

"1. Whether on the facts and circumstances of this case, the Finance Act, 2001 was applicable to "block assessment" under Chapter XIVB in respect of search carried out on January 17, 2001?

2. Whether the proviso inserted in Section 113 by the Finance Act, 2002, is clarificatory?" Dealing with the first question, the Court noted the contention of the assessee that Chapter XIVB, which was inserted by the Finance Act, 1995 with effect from July 1, 1995 was a self-contained chapter as it lays down a special procedure for assessment of undisclosed income found during search for the "block period". It was argued by the assessee that this Chapter contains a charging section (158BA), a computation section (158BB), a procedural section for block assessment (158BC), limitation provision for completion of block assessment (158BE) and the provisions for imposition of interest and penalty (158BFA). It was also argued that the scheme of assessment of "undisclosed income" under Chapter XIV-B is different from the scheme of assessment of "total income" of any person in terms of Section 4(1) of the Act. In support of this argument, it was submitted that whereas Chapter XIV-B deals with assessment of "undisclosed income", Section 4 of the Act relates to the assessment of "total income". Moreover, "block period" mentioned in Chapter XIV-B was different from the assessment of income of the "previous year" under Section 4(1) of the Act. Even the rate of tax at which the "undisclosed income" is assessed is different inasmuch as it is 60% as specified in Section 158BA(2) read with section 113 of the Act, in contradistinction to the taxation of normal income which is at the rates specified in the relevant Finance Act. In nutshell, it was argued that block assessment falls in Chapter XIV-B for which charging section was section 158BA and for assessment of block period, charging section was not section 4(1) of the Act. On that basis, the assessee wanted the Court to hold that it was not open to the Assessing Officer to levy surcharge prior to June 1, 2002, i.e. before the insertion of proviso to Section 113 of the Act.

21. This argument was rejected by the Court. The Bench took note of Article 271 of the Constitution along with Entry 82 of List 1 of the Seventh Schedule to the Constitution of India and Section 4 of the Act which is the charging section. It held that the power to levy surcharge on income tax is traceable to Article 271 read with Entry 82 and not to Section 4 of the Act. The rate at which the charge on total income on the previous year is imposed is not laid down in the Income Tax Act but in the Finance Act indicated every year by the Parliament to give effect to the financial proposals of the Central Government. It further held that since Income Tax Act deals with tax on income and nothing else, nor with charge should be a legal charge under Section 4, it must be a tax on the income of the assessee. Therefore, Section 4(1) of the Act was the charging section and the rate of tax is prescribed under that very Act i.e. Section 113. As long as the charge is on the "total income" of the previous year and so long as the rate relates to the subject matter of the tax, there is nothing to prevent the Parliament from fixing the date. What is to be seen is that the rate is applied to the "total income" and the tax which the assessee has to pay must be at the rate in respect of the total income of the previous year.

22. The Bench was of the view that the concepts of "previous years" as well as "total income" in Chapter XIV-B were retained. Therefore Section 158BB was to be read with Section 4 of the Act implying thereby that Section 4 remains the charging section. The procedure contained in Section 4 was not ruled out from block assessment procedure even in the case of assessment of block period. It was, nevertheless, an assessment on the total income of the previous years falling within the block period including returned/assessed incomes as per regular returns and regular assessment. As a fortiori, the provisions of the relevant Finance Act have got to be read into the block assessment scheme under Chapter XIV-B, even prior to June 1, 2002. As a sequential, even without the proviso to section 113, which was inserted by the Finance Act, 2002 with effect from June 1, 2002, the Finance Act 2001, was applicable to block assessment under Chapter XIV-B and accordingly surcharge was leviable.

23. Adverting to the second question formulated by the Bench, namely, whether insertion of the proviso in section 113 by the Finance Act, 2002 was applicable to search of the earlier period as well i.e. upto May 31, 2002, the Court pointed out that in view of its answer to the first question, second question did not even require any examination. It, however, proceeded to answer this question as well having regard to the submission of the assessee that before the said proviso, there was inconsistency with regard to levy of surcharge and the position was ambiguous as it was not clear even to the Department as to which year's Finance Act would be applicable. Brushing aside this argument, the Court held that to clear this very doubt precisely, the proviso had been inserted in section 113 and therefore it was only clarificatory in nature. The Court specifically noted that before the proviso was inserted, there was some doubts in the mind of the Department and the taxpayers about the date with reference to which the rate at which surcharge is payable. The confusion was as to whether surcharge was leviable with reference to the rates provided for in the Finance Act of the year in which the search was initiated or the year in which the search was concluded or the year in which block assessment proceedings under Section 158BC were initiated or the year in which block assessment order was passed. The Court opined that proviso only clarifies that out of the aforesaid 4 dates, the Parliament has opted for the date in which the search is initiated, as the date relevant for applicability of a particular Finance Act.

24. Aforesaid were the reasons to arrive at a conclusion that the proviso was clarificatory and/or curative in nature.

25. It would be our duty to point out at this stage that another Division Bench in the case of CIT v. Sanjiv Bhatara[2], has followed the aforesaid judgment by giving same reasons in support.

26. It is not necessary to take note of the arguments advanced by the learned ASG for the Department and various counsel who appeared for the assessees in these appeals, in detail. The reason for making these remarks by us is that Mr. Narasimha, learned ASG, had argued on the same lines which formed the basis of rendering the decision of the Division Bench in Suresh N. Gupta that have already been summarised above. Of course, it was his incessant effort with all effervescence, to persuade this Court to accept the conclusion arrived at in the said judgment. Learned counsel for the assessees also emphasised those very submissions advanced in that case which did not find favour with the Division Bench. In addition, these counsel articulated some more arguments with all

enthusiasm and temerity, reference to which would be made while giving our analysis to the various provisions leading up to the answer to the issue involved. Scheme of Chapter XIVB

27. Before we proceed to answer the question, it would be necessary to keep in mind the scheme of block assessment introduced in Chapter XIVB to Finance Act, 1995 w.e.f. 1st July, 1995. As already mentioned in brief by us, Chapter XIVB of the Act which deals with block assessment lays down a special procedure for search cases. The main reason for adding these provisions in the Act was to curb tax evasion and expedite as well as simplify the assessments in such search cases. Undisclosed incomes have to be related in different years in which income was earned under block assessment. This is because in such cases, the "block period" is for previous years relevant to 10/6 assessment years and also the period of the current previous year up to the date of the search, i.e., form April 1, 2000, to January 17, 2001, in this case. The essence of this new procedure, therefore, is a separate single assessment of the "undisclosed income", detected as a result of search and this separate assessment has to be in addition to the normal assessment covering the same period. Therefore, a separate return covering the years of the block period is a pre-requisite for making block assessment. Under the said procedure, the Explanation is inserted in section 158BB, which is the computation section, explaining the method of computation of "undisclosed income" of the block period. It is now well accepted that this Chapter is a complete code in itself providing for self-contained machinery for assessment of undisclosed income for the block period of 10 years or 6 years, as the case may be. In case of regular assessments for which returns are filed on yearly basis, Section 4 of the Act is the charging section. However, at what rate the income is to be taxed is specified every year by the Parliament in the Finance Act. In contradistinction, when it comes to payment of tax on the undisclosed income relating to the block period, rate is specified in Section 113 of the Act. It remains static at 60% of the undisclosed income which is the categorical stipulation in the Section 113 of the Act. Section 158BA(2) of the Act clearly states that the total undisclosed income relating to the block period "shall be charged to tax" at the rates specified under Section 113 as income of the block period irrespective of previous year or years. Under Section 113 of the Act, the undisclosed income is chargeable to tax at the rate of 60%.

28. From the above, it becomes manifest that Chapter XIVB comprehensively takes care of all the aspects relating to the block assessment relating to undisclosed income, which includes Section 156BA(2) as the charging section and even the rate at which such income is to be taxed is mentioned in Section 113 of the Act. No doubt, Section 4 of the Act is also a charging section which is made applicable on 'total income of previous year'. As per Section 2 (45), 'total income' means the total amount of income referred to in Section 5, computed in the manner laid down in the Act. Section 5 of the Act enumerates the scope of total income and prescribes, inter alia, that it would include all income which is received or is deemed to receive in India in any previous year by or on behalf of a person who is a Resident. No doubt, undisclosed income referred to in Chapter XIVB is also an income which was received but not disclosed, therefore, in the first blush, argument of the Department that undisclosed income referred to in Chapter XIVB is also a part of total income and consequently Section 4 becomes the charging section in respect thereof as well. However, a little closer scrutiny leads us to conclude that that is not the position as per the scheme of Chapter XIVB. In the first place, income referred to in Section 5 talks of total income of any 'previous year'. As per Section 2 (34) of the Act, 'previous year' means previous year as defined in Section

3. Section 3 lays down that previous year means 'the financial year immediately preceding the assessment year'. Undisclosed income referred to in Chapter XIVB is not relateable to the previous year. On the contrary, it is for the block period which may be 6 years or 10 years, as the case may be. Consequently, as already mentioned, while analyzing the scheme of Chapter XIVB, such Chapter is a complete code in respect of assessments of 'undisclosed income'. Not only it defines what is undisclosed income, it also lays down the block period for which undisclosed income can be taxed. Further, it also lays down the procedure for taxing that income. It is very pertinent to note at this stage that for this purpose, specific provision in the form of Section 158BA(2) is inserted making it a charging section. Thus, a diagnostic of Chapter XIVB of the Act leads to irresistible conclusion that it contains all the provisions starting from charging section till the completion of assessment, by prescribing special procedure in relation thereto, making it a complete Code by itself. Looking it from this angle, the character and nature of 'undisclosed income' referred to in Chapter XIVB becomes quite distinct from 'total income' referred to in Section 5. It is of some significance to observe that when a separate charging section is introduced specifically, to assess the undisclosed income, notwithstanding a provision in the nature of Section 4 already on the statute book, this move of the legislature has to be assigned some reason, otherwise, there was no necessity to make a provision in the form of Section 158BA(2). It could only be that for assessing undisclosed income, charging provision is Section 158BA(2) alone.

29. Notwithstanding the aforesaid position clarified with us, we are of the opinion that dehors this discussion, in any case on the application of general principles concerning retrospectivity, the proviso to Section 113 of the Act cannot be treated as clarificatory in nature, thereby having retrospective effect. To make it clear, we need to understand the general principles concerning retrospectivity.

General Principles concerning retrospectivity

30. 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, lay-out and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

31. 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 bed rock 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[3], 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.

32. 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 the decision reported in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co.Ltd[4]. 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.

33. 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 Government of India & Ors. v. Indian Tobacco Association[5], 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 the case of Vijay v. State of Maharashtra & Ors.[6] 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 confronted with any such situation here.

34. In such cases, retrospectively 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 out weighing factors.

35. 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 labeled as "declaratory statutes". The circumstances under which a provision can be

termed as “declaratory statutes” is explained by Justice G.P. Singh[7] in the following manner:

> “Declaratory statutes The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES and approved by the Supreme Court : “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.
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> A Constitution Bench of this Court in Keshavlal Jethalal Shah v. Mohanlal Bhagwandas & Anr.[8], 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:
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> “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 juris-diction was before the amendment derived from s. 115, Code of Civil Procedure, and the legislature has by the amending Act 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.”

36. 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 Controller of Estate Duty Gujarat-I v. M.A. Merchant[9]. We would also like to reproduce hereunder the following observations made by this Court in the case of Govinddas v. Income-tax Officer[10], while holding Section 171 (6) of the Income- Tax Act to be prospective and inapplicable for any assessment year prior to 1st April, 1962, the date on which the Income Tax Act came into force:

> "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 prospectively 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 constued as prospective only."

37. In the case of C.I.T., Bombay v. Scindia Steam Navigation Co. Ltd.[11], 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.

Anwer to the Reference

38. When we examine the insertion of proviso in Section 113 of the Act, keeping in view the aforesaid principles, our irresistible conclusion is that the intention of the legislature was to make it prospective in nature. This proviso cannot be treated as declaratory/statutory or curative in nature. There are various reasons for coming to this conclusion which we enumerate hereinbelow:

Reasons in Support

39. (a) The first and foremost poser is as to whether it was possible to make the block assessment with the addition of levy of surcharge, in the absence of proviso to Section 113? In Suresh N. Gupta itself, it was acknowledged and admitted that the position prior to the amendment of Section 113 of the Act whereby the proviso was added, whether surcharge was payable in respect of block assessment or not, was totally ambiguous and unclear. The Court pointed out that some assessing officers had taken the view that no surcharge is leviable. Others were at a loss to apply a particular rate of surcharge as they were not clear as to which Finance Act, prescribing such rates, was applicable. It is a matter of common knowledge and is also pointed out that the surcharge varies from year to year. However, the assessing officers were in-determinative about the date with

reference to which rates provided for in the Finance Act were to be made applicable. They had four dates before them viz.:

> (i) Whether surcharge was leviable with reference to the rates provided for in the Finance Act of the year in which the search was inititated; or
>
> (ii) the year in which the search was concluded; or
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> (iii) the year in which the block assessment proceedings under Section 158 BC of the Act were initiated; or
>
> (iv) the year in which block assessment order was passed.

The position which prevailed before amending Section 113 of the Act was that some Assessing Officers were not levying any surcharge and others who had a view that surcharge is payable were adopting different dates for the application of a particular Finance Act, which resulted in different rates of surcharge in the assessment orders. In the absence of a specified date, it was not possible to levy surcharge and there could not have been an assessment without a particular rate of surcharge. As stated above, in Suresh N. Gupta itself, the Court has pointed out four different dates which were bothering the assessees as well as the Department. The choice of a particular date would have material bearing on the payment of surcharge. Not only the surcharge is different for different years, it varies according to the category of assessees and for some years, there is no surcharge at all. This can be seen from the following table prescribing surcharge for different assessment years:

| | |PART – I | |Finance |Relevant |Para - A |Para – B |Para – |Para – D|Para - E | |Act |Section | | |C | | | |of | | | | | | |Finance | | | | | | |Act | | | | | | | |IND, HUF,|Co-operati|Firm |Local |Companies| | | |BOI, AOP |ve Society| |Authorit| | | | | | |y | | | | | | | | | |1995 |Section 2|- |- |- |- | | | |(3) | | | | | | |1996 |Section 2|- |- |- |- |15% | | |(3) | | | | | | |1997 |Section 2|- |- |- |- |7.50% | | |(3) | | | | | | |1998 |Section 2|- |- |- |- |- | | |(3) | | | | | | |1999 |Section 2|- |- |- |- |- | | |(3) | | | | | | |2000 |Section 2|10% |10% |10% |10% |10% | | |(3) | | | | | | |2001 |Section 2|12% or |12% |12% |12% |13% | | |(3) |17% | | | | |2002 |Section 2|2% |2% |2% |2% |2% | | |(3) | | | | | | |2003 |Section 2|5% |5% |5% |5% |5% | | |(3) | | | | | | Rate at which tax, or for that matter surcharge is to be levied is an essential component of the tax regime in Govindasaran Gangasaran v. Commissioner of Income Tax[12], this Court, while explaining the conceptual meaning of a tax, delineated four components therein, as is clear from the following passage from the said judgment :

> “The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy

will be fatal to its validity." It is clear from the above that the rate at which the tax is to be imposed is an essential component of tax and where the rate is not stipulated or it cannot be applied with precision, it would be difficult to tax a person. This very conceptualisation of tax was rephrased in C.I.T., Bangalore v. B.C. Srinivasa Shetty[13], in the following manner:

"The character of computation of provisions in each case bears a relationship to the nature of the charge. Thus, the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section." In absence of certainty about the rate because of uncertainty about the date with reference to which the rate is to be applied, it cannot be said that surcharge as per the existing provision was leviable on block assessment qua undisclosed income. Therefore, it cannot be said that the proviso added to Section 113 defining the said date was only clarificatory in nature. From the aforesaid table showing the different rates of surcharge in different years, it would be clear that choice of date has to be formed as in some of the years, there would not be any surcharge at all.

(b) Pertinently, the Department itself acknowledged and admitted this fact which is clear from the manner the issue was debated in a Conference of Chief Commissioners which was held sometime in the year 2001. In this Conference, some proposals relating to simplification and rationalisation of procedures and provisions were noted in respect of block assessment.

The foofaraw made in the Conference by those who had to apply the provision, was not without substance because of the garboil situation which this provision had created and in amply reflected in the proposals which was submitted in the following terms:

"In the case of a block assessment, there are two problems in relation to the levy of surcharge. The first is that Section 113 does not mention a Central Act. In the absence of a reference to another Central Act in the charging section, it becomes difficult to justify levy of surcharge. Even if it is assumed that reference in the Finance Act to section 113 is a sufficient authority to levy surcharge, the second problem is that the Finance Act levies surcharge on the amount of income-tax on the income of a particular assessment year whereas in the block assessment tax is levied on the undisclosed income of the block period. Absence of a specific assessment year in the block assessment may render the levy suspect. Yet another problem is the rate of surcharge applicable. To illustrate, if the search took place on, say, April 4, 1996, whether the rate of surcharge is to be adopted as applicable to the assessment year 1996-97 or the assessment year 1997-98, the rate of surcharge being different for the two years? The provisions of section 113 or the provisions of the Finance Act do not offer any guidance on the issue.

> Suggestions :
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> The foregoing problem indicates that levy of surcharge on undisclosed income is a matter of uncertainty and is prone to litigation. In the circumstances, it is suggested that section 113 may be amended retrospectively in order to provide for levy of surcharge at the rate applicable to the assessment year relevant to the financial year in which the search was concluded." The Chief Commissioners accepted the position, in no uncertain terms, that as per the language of Section 113, as it existed, it was difficult to justify levy of surcharge. It was also acknowledged that even if Section 113 empowered to levy surcharge, since block assessment tax is levied on the undisclosed income of the block period, absence of specific assessment year in the block assessment would render the levy suspect.

(c) We would like to embark on a discussion on some basic and fundamental concepts, which would shed further light on the subject matter. No doubt, there is no scope for accepting the Libertarian theory which postulates among others, no taxation by the State as it amounts to violation of individual liberty and advocates minimal interference by the State. The Libertarianism propounded by the Australian-born economist philosopher Friedrich A. Hayek and American economist Milton Friedman stands emphatically rejected by all civilised and democratically governed States, in favour of strongly conceptualised "welfare state". To attain welfare state is our constitutional goal as well, enshrined as one of its basic feature, which runs through our Constitution. It is for this reason, specific provisions are made in the Constitution, empowering the legislature to make laws for levy of taxes, including the income-tax. The rationale behind collection of taxes is that revenue generated therefrom shall be spent by the governments on various developmental and welfare schemes, among others.

At the same time, it is also mandated that there cannot be imposition of any tax without the authority of law. Such a law has to be unambiguous and should prescribe the liability to pay taxes in clear terms. If the concerned provision of the taxing statute is ambiguous and vague and is susceptible to two interpretations, the interpretation which favours the subjects, as against there the revenue, has to be preferred. This is a well established principle of statutory interpretation, to help finding out as to whether particular category of assessee are to pay a particular tax or not. No doubt, with the application of this principle, Courts make endeavour to find out the intention of the legislature. At the same time, this very principle is based on "fairness" doctrine as it lays down that if it is not very clear from the provisions of the Act as to whether the particular tax is to be levied to a particular class of persons or not, the subject should not be fastened with any liability to pay tax. This principle also acts as a balancing factor between the two jurisprudential theories of justice – Libertarian theory on the one hand and Kantian theory along with Egalitarian theory propounded by John Rawls on the other hand.

Tax laws are clearly in derogation of personal rights and property interests and are, therefore, subject to strict construction, and any ambiguity must be resolved against imposition of the tax. In Billings v. U.S.[14], the Supreme Court clearly acknowledged this basic and long- standing rule of statutory construction:

"Tax Statutes . . . should be strictly construed, and, if any ambiguity be found to exist, it must be resolved in favor of the citizen. Eidman v. Martinez, 184 U.S. 578, 583; United States v. Wigglesworth, 2 Story, 369, 374; Mutual Benefit Life Ins. Co. v. Herold, 198 F. 199, 201, aff'd 201 F. 918; Parkview Bldg. Assn. v. Herold, 203 F. 876, 880; Mutual Trust Co. v. Miller, 177 N.Y. 51, 57." Again, in United States v. Merriam[15], the Supreme Court clearly stated at pp. 187-88:

"On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. Gould v. Gould, 245 U.S. 151, 153" As Lord Cairns said many years ago in Partington v. Attorney- General[16]: "As I understand the principle of all fiscal legislation it is this : If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

(d) There are some other circumstances which reflect the legislative intent. The problem which was highlighted in the Conference of Chief Commissioners on the rate of surcharge applicable is noted above. In view of the aforesaid difficulties pointed out by the Chief Commissioners in their Conference, it becomes clear that as per the provisions then enforced, levy of surcharge in the block assessment on the undisclosed income was a difficult proposition. It is for this reason retrospective amendment to Section 113 was suggested. Notwithstanding the same, the legislature chose not to do so, as is clear from the discussion hereinafter.

"Notes on Clauses" appended to Finance Bill, 2002 while proposing insertion of proviso categorically states that "this amendment will take effect from 1st June, 2002". These become epigraphic words, when seen in contradistinction to other amendments specifically stating those to be clarificatory or retrospectively depicting clear intention of the legislature. It can be seen from the same notes that few other amendments in the Income Tax Act were made by the same Finance Act specifically making those amendments retrospectively. For example, clause 40 seeks to amend S.92F. Clause iii (a) of S.92F is amended "so as to clarify that the activities mentioned in the said clause include the carrying out of any work in pursuance of a contract." This amendment takes effect retrospectively from 01.04.2002. Various other amendments also take place retrospectively. The Notes on Clauses show that the legislature is fully aware of 3 concepts:

(i) prospective amendment with effect from a fixed date;

(ii) retrospective amendment with effect from a fixed anterior date; and

(iii) clarificatory amendments which are retrospective in nature.

Thus, it was a conscious decision of the legislature, even when the legislature knew the implication thereof and took note of the reasons which led to the insertion of the proviso, that the amendment is to operate prospectively. Learned counsel appearing for the assessees sagaciously contrasted the aforesaid stipulation while effecting amendment in Section 113 of the Act, with various other provisions not only in the same Finance Act but Finance Acts pertaining to other years where the legislature specifically provided such amendment to be either retrospective or clarificatory. In so far as amendment to Section 113 is concerned, there is no such language used and on the contrary, specific stipulation is added making the provision effective from 1st June, 2002.

(e) There is yet another very interesting piece of evidence that clarifies the provision beyond any pale of doubt, viz. understanding of CBDT itself regarding this provision. It is contained in CBDT circular No.8 of 2002 dated 27th August, 2002, with the subject "Finance Act, 2002 – Explanatory Notes on provision relating to Direct Taxes". This circular has been issued after the passing of the Finance Act, 2002, by which amendment to Section 113 was made. In this circular, various amendments to the Income Tax Act are discussed amply demonstrating as to which amendments are clarificatory/retrospective in operation and which amendments are prospective. For example, explanation to Section 158BB is stated to be clarificatory in nature. Likewise, it is mentioned that amendments in Section 145 whereby provisions of that section are made applicable to block assessments is made clarificatory and would take effect retrospectively from 1st day of July, 1995. When it comes to amendment to Section 113 of the Act, this very circular provides that the said amendment along with amendments in Section 158BE, would be prospective i.e. it will take effect from 1st June, 2002.

(f) Finance Act, 2003, again makes the position clear that surcharge in respect of block assessment of undisclosed income was made prospective. Such a stipulation is contained in second proviso to sub-section (3) of Section 2 of Finance Act, 2003. This proviso reads as under:

> "Provided further that the amount of income-tax computed in accordance with the provisions of section 113 shall be increased by a surcharge for purposes of the Union as provided in Paragraph A, B, C, D or E, as the case may be, of Part III of the First Schedule of the Finance Act of the year in which the search is initiated under section 132 or requisition is made under section 132A of the income-tax Act." Addition of this proviso in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in nature. The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to Section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove 'hardships' only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose

to make the proviso effective from 1.6.2002.

40. The aforesaid discursive of ours also makes it obvious that the conclusion of the Division Bench in Suresh N. Gupta treating the proviso as clarificatory and giving it retrospective effect is not a correct conclusion. Said judgment is accordingly overruled.

41. As a result of the aforesaid discussion, the appeals filed by the Income Tax Department are hereby dismissed. Appeals of the assessees are allowed deleting the surcharge levied by the assessing officer for this block assessment pertaining to the period prior to 1st June, 2002.

.....CJI.

(R.M. Lodha) .....J. (Jagdish Singh Khehar) .....J. (J. Chelameswar) .....J. (A.K. Sikri) .....J. (Rohinton Fali Nariman) New Delhi;

September 15, 2014.

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[1] (2008) 4 SCC 362 [2] (2009) 310 ITR 105 (SC) [3] (1870) LR 6 QB 1 [4] (1994) 1 AC 486 [5] (2005) 7 SCC 396 [6] (2006) 6 SCC 286 [7] Principles of Statutory Interpretation, 13th Edition 2012 published by LexisNexis Butterworths Wadhwa, Nagpur [8] (1968) 3 SCR 623 [9] 1989 Supp (1) SCC 499 [10] (1976) 1 SCC 906 [11] 1962 (1) SCR 788 [12] 155 ITR 144 [13] 125 ITR 294 [14] 232 U.S. 261, at p.265, 34 S.Ct. 421 (1914) [15] 263 U.S. 179, 44 S.Ct. 69 (1923) [16] (1869) LR 4 HL 100