

THE HONOURABLE SRI JUSTICE SUJOY PAUL

AND

THE HONOURABLE SRI JUSTICE NAMAVARAPU RAJESHWAR RAO

INCOME TAX TRIBUNAL APPEAL NO.506 OF 2006

JUDGMENT: *(per Hon'ble Sri Justice Namavarapu Rajeshwar Rao)*

The present appeal has been filed under section 260-A of the Income Tax Act, 1961 (for short the "Act") aggrieved by the order passed by Income Tax Appellate Tribunal, Bench-B, Hyderabad (for short "Tribunal") in I.T.A. No.1132/Hyd/2004, dated 15.09.2005 for the Assessment Year 2001-2002.

I.T.A. No.1132/Hyd/2004 is an appeal filed by the Assessee, i.e. Public Limited Company. It is in the business of manufacture of Ferro Silicon and Ferro Chrome, against the Order of the CIT (Appeals) IV, Hyderabad, dated 06.10.2004 for the Assessment Year 2001-2002. The said appeal is allowed in part.

2. We have heard Sri J.V. Prasad, learned Senior Standing counsel for the Income Tax and Sri Challa Gunaranjan, learned counsel for the respondent.

3. The following substantial question of law is framed in the present appeal:

Whether the finding of the Tribunal that the Assessee is entitled to claim exemption in regard to capital gains in question in terms of Section 10(23G) of the Income Tax Act without due consideration of detailed reasoning given by the Assessing Officer and the related facts on record, is sustainable in law?

4. The learned counsel for the appellant submitted that the appellant rightly sustained the order of the Assessing Officer in bringing long-term capital gains of Rs.31,43,80,590/- earned by the Appellant on the sale of 26,80,000 shares of Andhra Pradesh Gas Power Corporation Ltd., to tax while computing the income under normal provisions of the Act and also under the Special provisions of section 115JB of the Act stating that the provision of section 10(23G) do not apply to the respondent as the investment was made by the respondent prior to 01.04.1998.

5. The learned counsel for the Appellant further submitted that the appellant rightly did not take into consideration the explanation 2 to clause (23G) of Section 10 of the Act, which says that income by way of long-term capital gains from investment made prior to 01.06.1998 by way of shares in any enterprise carrying on the business of developing, maintaining and operating any infrastructure facility, shall not be included in computing the total income and rightly held that the long term capital gains Investments made prior to 1.4.1998 is not eligible for exemption.

6. A perusal of the record goes to show that the respondent, during the financial year 2000-2001, sold the rights share purchased on 04-12-1996 numbering 26,80,000 to Hindustan Zinc Limited, Udaipur, for a consideration of Rs.40 crores. The date of sale was 03-11-2000. The respondent claimed that the cost of the shares was Rs.6,43,20,000/- at a value of Rs.24/- per share. The capital gain was Rs.31,56,80,000/-. After indexation, the long-term capital gain arrived at Rs.31,43,80,590/-. The respondent claimed to have invested the amount of sale

consideration in Konaseema EPS Oakwell Power Limited, an industrial undertaking, with an infrastructure facility for power generation and was also notified under sec. 10(23G) by Central Government. The respondent claimed that these long-term capital gains are exempted under sec. 10(23G). The AO relied on the Memorandum explaining the provisions in Finance Bill (No.2), 1996, 220 ITR 257 (Statutes), as well as Circular No.772, dated 23-12-1998 explaining the provisions, and rejected the contentions of the respondent for the following reasons:-

(1) The provisions allowing exemption in respect of income of long-term capital gains arising as sale of investments are effective from 01.04.997. Thus it is to be clearly noted that long term capital gains arising in respect of investments made before 01.04.1997 are not eligible for exemption u/s 10(23G) of the I.T.Act.

(2) At the time of introduction of the Section power generation projects are not brought into the ambit of Section 10(23G).

(3) The scope of exemption u/s 10(23G) was widened and long term capital gains in respect of investments made in power generation projection were also brought into the ambit of 10(23G) w.e.f. 01.04.1998.

(4) The cutoff date mentioned in respect of power generation project in that sub-section was 01.04.1993 i.e. for commencing the project but the investment should be made only after 01.04.1997 and then only

the assessee would be eligible for exemption u/s 10(23G).

7. The learned counsel for the appellant brought to the notice of this Court that Section 10(23G) how many times it was amended and also it is require to reproduce the same for the benefit of to settle the present case .

I Finance (No.2)Act, 1996 , introduced Sec .10(23G) which reads as follows:

“(23G) any income by way dividends, interest or long term capital gains of an infrastructure capital fund or an infrastructure capital company from investments made by way of shares of long-term finance in any enterprise carrying on the business of developing, maintaining and operating any infrastructure facility, which fulfils the conditions specified in sub-section (4A) of section 80-IA.

Explanation. For the purposes of this clause,

(a) "infrastructure capital company" means such company as has made investments by way of acquiring shares or providing long-term finance to an enterprise carrying on the business of developing, maintaining and operating infrastructure facility;

(b) “infrastructure capital fund” means such fund operating under a deed, registered under the provisions of the Registration Act, 1908(16) of 1908), established to raise monies by the trustees for investment by way of acquiring shares or providing long-term finance to an enterprise carrying on the business of developing, maintaining and operating infrastructure facility;

(c) "infrastructure facility shall have the meaning assigned to it in clause (ca) of sub-section (12) of section 80-1A.

II. Sec. 10(23G) was again amended by Finance Act, 1997, as follows:

"(e) in clause (23G),

(1) the words, brackets, figures and letters, "which fulfils the conditions specified in sub-section (4A) of section 80-IA" shall be omitted;

(ii) in the Explanation, for clause (c), the following clause shall be substituted, namely:--

(c) "infrastructure facility means

(1) a road, highway, bridge, airport, port, rail system or any other public facility of a similar nature as may be notified by the Board in this behalf in the Official Gazette; which fulfils the conditions specified in sub-section (4A) of section 80-IA;

(i) a water supply project, irrigation project, sanitation and sewerage system which fulfils the conditions specified in sub-section (4A) of section 80-IA;

(iii) a project for generation or generation and distribution of electricity or any other form of power where such project starts generating power on or after 1st day of April, 1993;

(iv) a project for providing telecommunication services on or after the 1st day of April, 1995;"

III. Again, vide Finance (No.2) Act, 1998, some more vital conditions were introduced in Sec.10(23G), which read as follows:

“(h) for clause (23G), the following clause shall be substituted, namely:

“(23G) any income by way of dividends, other than dividends referred to in section 115-O, interest or long term capital gains of an infrastructure capital company from investments made on or after the 1st day of June, 1998, by way of shares or long-term finance in any enterprise wholly engaged in the business of developing, maintaining and operating any infrastructure facility and which has been approved by the Central Government on an application made by it; in accordance with the rules made in this behalf and which satisfies the prescribed conditions.

Explanation, For the purposes of this clause,

- (a) “Infrastructure capital company” means such company as has made investments by way of acquiring shares or providing long-term finance to an enterprise wholly engaged in the business of developing, maintaining and operating infrastructure facility;*
- (b) “infrastructure capital fund” means such fund operating under a trust deed, registered under the provisions of the registration Act, 1908 (16 of 1908) established to raise monies by the trustees for investment by way of acquiring shares or providing long-term finance to an enterprise wholly engaged in the business of developing, maintaining and operating infrastructure facility.*
- (c) “infrastructure facility: means*
 - (i) a road, highway, bridge, airport, port, rail system, a water supply project, irrigation project, sanitation and sewerage system or any other public facility of a similar nature as may be notified by the Board in this behalf in the official Gazette and which fulfils the conditions specified in sub section (4A) of section 80-1A*

- (ii) a project for generation or generation and distribution of electricity or any other form of power where such project starts generating power on or after the 1st day of April, 1993,
- (iii) a project for providing telecommunication services in or after the 1st day of April, 1995;
- (iv) a project for housing which fulfils the conditions specified in sub section(4F) of section 80- IA;
- (d) "long -term finance" shall have the meaning assigned to it in clause(Viii) of sub-section (1) of section 36,

IV. Finance Act 1999 introduced the following further Explanation:

"Explanation 2.- For the removal of doubts, it is hereby declared that any income by way of dividends, interest or long-term capital gains of an infrastructure capital fund or an infrastructure capital company from investments made before the 1st day of June, 1998 by way of shares or long-term finance in any enterprise carrying on the business of developing, maintaining and operating any infrastructure facility shall not be included and the provisions of this clause as it stood immediately before its amendments by the Finance (No. 2) Act, 1998 (21 of 1998) shall apply to such income"

8. Learned counsel for the appellant submits that the investment date is important i.e. 04.12.1996. While dealing with the amendment, the Tribunal discussed with regard to investments, whether prospective Legislation or declaratory Legislation and, thus, has to be construed as retroactive. In this regard, the Tribunal has relied upon

the Full Bench of Supreme Court of India , in the case of

Shyam Sunder Vs. Ram Kumar¹ held has follows:

39. Lastly, it was contended on behalf of the appellants that the amending Act whereby new Section 15 of the Act has been substituted is declaratory and, therefore, has retroactive operation. Ordinarily when an enactment declares the previous law, it requires to be given retroactive effect. The function of a declaratory statute is to supply an omission or to explain a previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed, invariably has been held to be retrospective. Mere absence of use of the word "declaration" in an Act explaining what was the law before may not appear to be a declaratory Act but if the court finds an Act as declaratory or explanatory, it has to be construed as retrospective. Conversely where a statute uses the word "declaratory", the words so used may not be sufficient to hold that the statute is a declaratory Act as words may be used in order to bring into effect new law."

With regard to the same, G.P. Singh on Principles of Statutory Interpretation quoting Craies stated thus:

"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

¹ (2001)8 SCC 49

in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word "declared" as well as the word "enacted". But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form.

If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended".

9. Learned counsel for the appellant relied upon the judgment of the Supreme Court in the case of ***Commissioner of Customs (Import), Mumbai Vs. M/s Dilip Kumar and Company & Others²*** with regard to ***parameters of the exemptions*** .

10. Learned counsel for the appellant relied upon the judgment of the Supreme Court in the case of ***Principal Commissioner of Income-Tax and another V. Wipro***

² AIR 2018 SC 3606

Ltd.,³ wherein it is observed that mandatory of declaration for exemption .

11. Learned counsel for the appellant relied upon the judgment of the Supreme Court in the case of **Sree Sankaracharya University of Sanskrit & Others V. Dr. Manu & Another**⁴ in this the Hon'ble apex court observed that *explanation/clarification may not expand or alter the scope of the original provision.*

12. Learned counsel for the appellant submits that in view of the above observation, the Income Tax Tribunal wrongly considered the contentions of the respondent/assessee and allowed in part, which are against the principles laid down by the Income Tax Act and prayed to allow the appeal.

13. Per contra, learned counsel for the respondent submits that whatever the amounts the respondent seeks exemption, those amounts will not come under the total income. The Tribunal has rightly considered the

³ (2022)446 ITR 1 (SC)

⁴ 2023 LiveLaw (SC) 468

respondent's case and allowed the appeal in part, which needs no interference from this Court.

14. Learned counsel for the respondent relied upon the judgment of the Supreme Court in the case of ***Securities and Exchange Board of India Vs. Rajkumar Nagpal and others***⁵ wherein it was held retroactive application following the principles of statutory interpretation by Hon'ble Justice G.P.Sing (14th Edn.,2016 at P.583)

100. In Vineeta Sharma v. Rakesh Sharma 22, this Court described the nature of prospective, retrospective, and retroactive laws (SCC p. 53, para 61)

15. Learned counsel for the respondent brought to the notice of this Court Circular No. 772-Income Tax Dated 23/12/1998 with regard to Finance (No.2) Act ,1998 Rationalizations of clause (23G) of section 10 in particularly clause 10.3 and 10.4

16. While passing the order the Tribunal observed that, the following facts and issues have not been disputed by the Revenue:

(a) That the gain in question is a long-term capital gain

⁵ (2023)8 SCC 274

(b) That the company, Andhra Pradesh Gas Power Corporation Ltd., is an infrastructure facility within the meaning of sub clause (H) of clause (b) of Explanation to Sec.10(23G), as Central Government had notified that undertaking as an infrastructure facility and as it had started generation of power after 1 April 1993.

(c) That the company falls within the definition of "Infrastructure Capital Company" envisaged in sec. 10(23G),

17. It is further observed by the Tribunal that section 10(23G) as it existed immediately before amendment by Finance (No.2) Act, 1998, clearly states that any income by way of long-term capital gain of an infrastructure capital fund is exempt under sec. 10(23G). That the capital gain in question is exempted from tax under section 10(23G) as per the provisions of the statute existing in 1997 read with Explanation 2 mandates that income by way of long-term capital gain of an infrastructure capital Company from investments made before 01.06.1998, by way of shares in any enterprise which is an infrastructure facility, shall not

be included in the total income i.e. it shall not form part of total income. Coming to the computation of book profits i.e. reduction of this long-term capital gain, which is exempted under sec.10(23G), from the book profits of the Company under the special provisions of sec.115JB, the Tribunal opined that the revenue authorities have committed an error, as the disallowance is in violation of sub-sec.(2) of sec.115JB, Explanation (ii), which reads as follows:

“The amount of income to which any of the provisions of Section 10 of Section 10A or Section 10B or Section 11 or Section 12 apply, if any such amount is credited to the profit and loss account.”

18. This court while gone through the judgments relied upon by both counsels.

In ***Commissioner of Customs (Import), Mumbai Vs. M/s Dilip Kumar and Company & Others*** (2nd supra) ***it is held as under :***

52. to sum up, we answer the reference holding as under:

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within

the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

The case on hand differs from the above observation in that, in the present case, there is no exemption notification associated with the amendment of section 10 (23G) of the Income Tax Act, which grants exemption rights as amended from time to time. One of the amendments under consideration involves the assesses seeking exemption infrastructure facility related to power generation. Accordingly, the above case law is not applicable to the present case.

In another case **Principal Commissioner of Income-Tax and another V. Wipro Ltd** the apex court observed that

“It cannot be said that one of the conditions would be mandatory and the other would be directory, where the words used for furnishing the declaration to the Assessing Officer and to be furnished before the due date of filing the original return of income under sub-section (1) of Section 139 are same/similar. It cannot be disputed that in a taxing statute the provisions are to be read as they are and they are to be literally construed, more particularly, in a case of exemption sought by an assessee.”

In the above case law, the Apex Court discussed the terms “mandatory” and “directory” in relation to furnishing the declaration to the Assessing Officer, which must be submitted before the due date for filing the original return

of income under section 139(1). However, in the present case, the question of the declaration does not arise due to the amendment, as the assessee is only seeking exemption. Therefore, the above case law is not applicable to the present case on this ground as well.

In another case law relied upon by the appellant is that in Sree Sankaracharya University of Sanskrit & Others V. Dr. Manu & Another (4th supra) with regard to explanation/clarification may not expand or alter the scope of the original provision is explained as follows :

iv) Merely because a provision described as a clarification/explanation, the Court is not bound by the said statement in the statute itself, but must proceed to analyse the nature of the amendment and then conclude whether it is really a clarificatory or declaratory provision or whether it is a substantive amendment which is intended to change the law and which would apply prospectively.

19. In the present case there is no expansion of explanation or clarification once these two things are clear

there is no question of alter the scope of provision. In the present case assessee seeking under the newly amended provision which was later incorporated in the section 10(23G) initially it was part of the section. The exemption relates to power generation under the long term capital gains, which include infrastructure facilities. In the said circumstances, if Assessment Officer exempted the assessee and no provision was altered. Hence, this is also not applicable to present case.

20. Learned counsel for the respondent relied upon case of **Securities and Exchange Board of India Vs. Rajkumar Nagpal and others** (5th supra) in this case

4. "99. We are of the opinion that the SEBI Circular has retroactive application. In Principles of Statutory Interpretation by Justice G.P. Singh (14th Edn., 2016 at p. 583), it is stated that:

"The rule against retrospective construction is not applicable to a statute merely because "a part of the requisites for its action is drawn from a time antecedent to its passing". If that were not so, every statute will be presumed to apply only to persons born and things which come into existence after its operation and the rule may well result in virtual nullification of most of the statutes."

5. "61. The prospective statute operates from the date of its enactment conferring new rights. The retrospective statute operates backwards and takes away or impairs vested rights acquired under existing laws. A retroactive statute is the one that does not operate retrospectively. It operates in futuro. However, its operation is based upon the character or status that arose earlier. Characteristic or event which happened in the past or requisites which had been drawn from antecedent events."

101. The terms "retrospective" and "retroactive" are often used interchangeably. However, their meanings are distinct. This Court succinctly appreciated the difference between these concepts in *State Bank's Staff Union (Madras Circle) v. Union of India*.

"Retroactivity" is a term often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called "true retroactivity", consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. The second concept, which will be referred to as "quasi-retroactivity", occurs when a new rule of law is applied to an act or transaction in the process of completion.... The foundation of these concepts is the distinction between completed and pending transactions...."
[T.C. Hartley, *The Foundations of European Community Law* 129 (1981).]

102. Many decisions of this Court define "retroactivity" to mean laws which destroy or impair vested rights. In real terms, this is the definition of "retrospectivity" or "true retroactivity". "Quasi-retroactivity" or simply "retroactivity" on the other hand is a law which is applicable to an act or transaction that is still

underway. Such an act or transaction has not been completed and is in the process of completion. Retroactive laws also apply where the status or character of a thing or situation arose prior to the passage of the law. Merely because a law operates on certain circumstances which are antecedent to its passing does not mean that it is retrospective.

The main issue involved in the above - discussed case is that the retroactive laws also apply where the status or character of a thing or situation arose prior to the passage of the law. In the present case, appellant raised the objection with regard to exemption, stating that the provision itself was not exist for those previous years, so, the question of allowing exemption under sec. 10(23G)prior to 1.4.1997 does not arise. The contention of the appellant counsel is incorrect. Subsequently after amendment the Central Board of direct Taxes have clarified by way of press release that the exemptions available under the provisions of section 10 (23G) ,prior to its amendment by the Act, will continue to govern the investments made prior to 1.6.1998.

21. At this juncture, it is very essential to refer the clause 10.3 of circular NO.772- Income Tax, Dated 23.12.1998 is as follows:

10.3 The amended provisions would apply only in respect of investment made on or after 1-6-1998 . Doubts had been expressed in different quarters about the continuance of exemption available under section 10 (23G) in respect of investments made prior to 1-6-1998 for assessment year 1999-2000 and onwards. The Central Board of Direct Taxes have clarified by way of a press release that the exemption available under the provisions of section 10 (23G). Prior to its amendment by the Act, will continue to govern the investments made prior to 1-6-1998. The Rules and Forms ;in this regard have since been notified vide Notification No.S.O.897(E) dated 12th October,1998.

22. When doubts arise about whether long-term capital gains exempt under section 10(23G) are available, the CBDT has clarified the issue through a press release, resolving the matter. Therefore, the question of exemption under section 10(23G) is no longer a concern, as correctly observed by the Income Tax Appellate Tribunal.

23. An infrastructure facility is created by purchasing shares, but this will not be considered income. It is solely for the creation of infrastructure facilities. Once the shares are purchased on February 4, 1996, they are classified as

a creation of an infrastructure facility, not as income. In the present case, as per Explanation 2, prior to its amendment, the capital expenditure for purchasing shares falls under the category of infrastructure facilities and shall not be included in total income. This is because merely purchasing shares does not contribute to the income of the respondent/assessee. Since it does not count as income, no amount needs to be paid in taxes.

24. For all the reasons stated above, we firmly believe that the question of law framed by the Court while admitting the appeal should be decided in the negative. Therefore, the appeal is dismissed, thereby confirming the impugned order of the Tribunal. There will be no order as to costs.

Pending miscellaneous applications, if any, shall stand closed.

SUJOY PAUL,J

NAMAVARAPU RAJESHWAR RAO,J

Date: 15.10.2024

Bdr.