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

Reserved on: 22.11.2018

% ***Pronounced on:06.12.2018***

\+ **W.P.(C) 1109/2016**

BRAHM DATT ..... Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Rohit Jain, Mr. Vaibhav Kulkari, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME -TAX & ORS. ..... Respondents

Through: Mr. Ashok K. Manchanda, Sr. Standing Counsel for ITD with Mr. Aditya Kharoparia, Adv.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J.

1. The Petitioner, is aggrieved by a notice dated 24.03.2015 issued under section 148 of the Income Tax Act 1961 (hereafter "the Act") proposing to initiate reassessment proceedings for assessment year 1998-99. It is contended that the issue has been time barred and the respondents (hereafter "the Revenue") have no jurisdiction in the matter.

2. The petitioner is a senior citizen aged about 84 years. From Assessment Year (hereafter "AY") 1984-85 to AY 2003-04, he was a non-resident/not ordinarily resident of India. He was previously working and residing in foreign countries, viz; Jordan and Iraq and while so, he derived

income primarily from salary and professional receipts. For AY 1984-85 to 2003-04, the Petitioner filed income tax return(s) in India in the status of non-resident/not ordinarily resident, disclosing income liable to tax in India. His residential status was, undisputedly that of a 'non-resident' in some years and a 'not ordinarily resident' in remaining years. As a consequence, he was liable to tax in India on his Indian sources income, viz.(a) income accruing or arising or deemed to accrue or arise in India, and (b) income received or deemed to be received in India. From the year 2003 onwards, the Petitioner regularly filed his return of income as person resident in India vide Permanent Account Number ADNPD-9666-R.

3. Search and seizure operation under Section 132 was carried out in the case of the Petitioner. During the course of search, his statement was recorded on 27.09.2011 under Section 132(4) of the Act. In the statement, the Petitioner was, *inter-alia*, asked to clarify if he maintained foreign bank account(s). In response to the said query, he stated that though he did not maintain any foreign bank account in his individual capacity, he, however did settle an offshore trust when he was 'non-resident'. It is submitted that in the said statement recorded during the course of search as well as during the course of proceedings under section 153A read with Section 143(3)of the Act, the Petitioner repeatedly clarified that he did not maintain any account with foreign bank in his personal capacity, but had contributed an amount of approximately US$ 2-3 million at the time of settling of the Second Techna Trust, when he was a non-resident, out of his income earned from sources outside India.

4. The petitioner complains that despite such explanation, the revenue primarily relying upon his statement, issued the impugned notice dated 24.03.2015 under section 148 seeking to initiate reassessment proceedings for AY 1998-99, the year under consideration, on the suspicion that the

income of the Petitioner had escaped assessment. It is, at the outset, submitted that reopening of concluded assessment for AY 1998-99 by notice dated 24.03.2015 is barred by limitation prescribed under Section 149 of the Act. In this regard, Mr. Ajay Vohra, learned senior counsel urges that Section 147 of the Act empowers the AO to initiate reassessment proceedings, if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. Such power is, however, subject to the provision of sections 148 to 153 of the Act. Section 149 prescribes the limitation within which reassessment proceedings can be initiated under the Act. The petitioner submits that the said provision was substituted by Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989; it read thereafter as follows:

> *"149. (1) No notice under section 148 shall be issued for the relevant assessment year*
> *(a) in a case where an assessment under sub-section (3) of section 143 or section 147 has been made for such assessment year,—*
> *(i) if four years have elapsed from the end of the relevant assessment year, unless the case falls under sub-clause (ii)or sub-clause (iii) ;*
> *(ii) if four years, but not more than seven years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year;*
> *(iii) if seven years, but not more than ten years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to more than rupees one lakh or more for that year;*
> *(b) in any other case,—*
> *(i) if four years have elapsed from the end of the relevant assessment year, unless the case falls under sub-clause (ii)or sub-clause (iii);*
> *(ii) if four years, but not more than seven years, have elapsed from the end of the relevant assessment year, unless the income*

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

It is stated that the outer period of limitation for reopening under section 147 of the Act was prescribed to be ten years after the end of the relevant assessment year.

5. The petitioner next refers to the amendment to Section 149 by the Finance Act, 2001, with effect from 01.06.2001 further reducing the time for limitation to six years. Provisions of the said section, as amended are reproduced hereunder:

"149.Time limit for notice.
(1) No notice under section 148 shall be issued for the relevant assessment year, -
(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);
(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.
Explanation.-In determining income chargeable to tax which has escaped assessment for the purposes of this sub section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section..."

6. The learned senior counsel submits that reassessment proceedings under section 147 of the Act could have been initiated within six years from the end of the relevant assessment year viz. for the AY 1998-99, the year under consideration, limitation for reopening assessment under Section 147 of the Act expired on 31.03.2005. It is submitted that consequently, when the petitioner received the reassessment notice dated 24.03.2015 and

subsequent notices/letters, the petitioner by letters/ objections dated 06.04.2015, 03.06.2015 and 24.08.2015 submitted before the revenue that the present reassessment proceedings are, *inter alia*, barred by limitation prescribed in Section 149 of the Act. The respondent revenue, however rejected this contention through the AO's order dated 25.01.2016 and did not agree with the petitioner's argument with respect to the bar of limitation in regard to the period within which reassessment proceedings could be initiated and instead expressed the view that the proceedings were initiated within the extended period of 16 years from the end of the relevant assessment year by relying on Section 149 (1) (c), introduced by the Finance Act, 2012, with effect from 01.07.2012.

7. It is argued by Mr. Vohra that once proceedings for assessment year 1998-99 attained finality on expiration of the period of limitation for reopening assessment for the assessment year expired on 31.03.2005, such concluded proceedings could not be reopened by merely taking resort to the subsequent amendment in law. In other words, the subsequent amendment cannot seek to enhance or extend limitation for reopening assessment for those assessment years in respect of which limitation had already expired/ lapsed before the date the amendment became effective.

8. Mr. Vohra relies on the decision of the Supreme Court, in *K.M. Sharma vs. Income Tax Officer*254ITR 772(SC) as well as *S.S. Gadgil v Lal & Co.* [1964] 53 ITR 231 and lastly the decision in *C.B. Richards Ellis Moritius Ltd. v Additional Director Income Tax* 208 Taxmann 322 to say that once the period of limitation ends, by virtue of the provisions of the Act, it is not open to the revenue, to revisit such issues that are final. It was submitted that the law of limitation confers certainty and finality to legal proceedings and seeks to avoid exposure to risk of litigation to litigant for indefinite period on future unforeseen events. Therefore, matters that attain

finality under existing law due to bar of limitation cannot be reopened for revival unless the amended provision is clearly given retrospective operation so as to allow upsetting of proceedings, which had already been concluded and attained finality. It was highlighted that in this case, the provisions of the 2012 amendment are expressly prospective and cannot be used to re-open those matters that attain finality. It was also contended that the petitioner's status as a person not residing in India has not been disputed and rather, is accepted by the revenue.

9. The revenue resists the petition and refers to its arguments in the counter affidavit. Its counsel, Mr. Ashok Manchanda, submits that in this case, the AO issued notice under Section 148 after recording the reasons to believe, in writing, as the amount of ₹12,54,60,000/- used for settling a trust had escaped assessment for AY 1998-99 and in line with the provisions of Income Tax Act 1961, the AO had the valid reasons to believe in support of the decision to reopen the assessment under Section 148. It is stated that the assessee petitioner made a general and vague statement that during the period from AY 1984-85 to AY 2003-04 he was either Non-resident or Not Ordinarily Resident in India. No specific statement, averment or evidence was given as regards the status of the assessee for the AY 1998-99 having filed a return of income for the AY 1998-99 which is the subject matter of this petition. The Petitioner's claim is not only wrong, but false as well. In spite of specifically being asked during the statement recorded on oath under Section 132(4) on 27.09.2011, the petitioner never produced any evidence of either he having been Non-resident or of having earned the relevant income outside India.

10. It is highlighted that though the assessee stated that he did not have any foreign bank account in his personal capacity yet, he was having financial interest in Second Techna Trust. He has undeniably contributed

approximately US$ 2-3 million and no evidence of sources was furnished by him; he stated that the income was earned from sources outside India. But no evidence was furnished by the assessee. The assessee could have produced the returns of income filed outside India where such amount had been shown or the assessee could have produced the Bank statements from where the said money had been withdrawn or certain cheque having been issued by him. On the basis of facts, the revenue contends that the petitioner cannot be treated as one not residing in India within the meaning of the Act; as he did not disclose the asset during the relevant time, the reassessment notice is valid.

11. It is submitted that the intent and purpose behind the 2012 amendment of the Act was to empower the revenue to reopen assessments beyond a particular period: in this case, by 16 years, if it is revealed that the assessee held asset abroad. Given this relevant condition, the assessee could not complain that as regards matters that had not been disclosed, reassessment proceedings were validly instituted.

12. The relevant provisions of section 149 of the Act are reproduced below:

> *"149.Time limit for notice.*
> *(1) No notice under section 148 shall be issued for the relevant assessment year, -*
> *(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);*
> *(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.*
> *(c) if four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment…"*

13. In *KM Sharma's case* (supra) the assessee's land was acquired under the Land Acquisition Act, 1894 and an award was passed in 1967 granting compensation in favour of the assessee. Thereafter, the Additional District Judge by judgment dated 20.05.1980 held the assessee to be entitled to 1/32th share of the compensation and the assessee was granted total compensation of ₹1,18,810 in the year 1981. Subsequently, by another judgment dated 31.07.1991, the assessee was awarded sum of ₹1,10,20,624, which was received by it between 15.10.1992 and 25.05.1993. The said amount comprised of principal compensation as well as interest up to 18.05.1992. As land acquired was agricultural land, principal amount was not chargeable to tax; however, interest amounting to ₹76,84,829 was chargeable on year to year basis. The assessee claimed that proceedings till assessment year 1982-83 had already attained finality and therefore, filed letter requesting the assessing officer to initiate proceedings for subsequent assessment years for bringing to tax interest component relatable to the said assessment years. The assessee was, however, issued notices under section148 of the Act for fifteen assessment years, viz., assessment years 1968-69 to 1971-72 and assessment years 1981-82 to 1992-93 which were challenged on the ground of limitation. This court declined to exercise jurisdiction; on appeal, the Supreme Court held that the provision regulating period of limitation ought to receive strict construction. The Supreme Court held that the law of limitation was intended to give certainty and finality to legal proceedings and therefore, proceedings, which had attained finality under the existing law due to bar of limitation, could not be held to be open for revival unless the amended provision was clearly given retrospective operation so as to allow upsetting of proceedings, which had already been

completed and attained finality. The observations of the Supreme Court are reproduced hereunder:

> *"10. The main question that has been raised on behalf of the learned counsels appearing for the parties is whether the provisions of sub-section (1) of section 150 as amended can be availed for reopening assessments, which have attained finality and could not be reopened due to bar of limitation, that was attracted at the relevant time to the proposed reassessment proceedings under the provisions of section149.*
> *11. The submission made on behalf of the appellant is that neither the provisions of sub-section (1) nor sub-section (2) can be read as giving more than intended operation to the said provision. The provisions, it is argued, do not permit the authorities to reopen assessments, which have become final and reassessment of which had become barred by time before 1.4.1989 when section 150(1) was amended Reliance is placed on the decision in S.S. Gadgil v. Lal & Co. [1964] 53 ITR 231.*
> *12. The learned counsel appearing on behalf of the department has made an effort to persuade this Court to accept his construction of the provisions of section 150(1)and (2). It is argued that it is for the specific purpose of assessing income, which might accrue on the basis of any decision of any Court in any proceeding in any other law, that the provision has been amended to lift bar of limitation for reassessment.*
> *13. Fiscal statute, more particularly a provision such as the present one regulating period of limitation must receive strict construction. The law of limitation is intended to give certainty and finality to legal proceedings and to avoid exposure to risk of litigation to litigant for indefinite period on future unforeseen events. Proceedings, which have attained finality under existing law due to bar of limitation cannot be held to be open for revival unless the amended provision is clearly given retrospective operation so as to allow upsetting of proceedings, which had already been concluded and attained finality. The amendment to subsection (1) of section 150 is not expressed to be retrospective and, therefore, has to be held as only prospective. The amendment made to sub-section (1) of section 150 which intends to lift embargo of period of limitation under section 149 to enable authorities to reopen assessments not only on the basis of orders passed in proceedings under the Act but also on order of*

a Court in any proceedings under any law, has to be applied prospectively on or after 1.4.1989 when the said amendment was introduced to sub-section (1). The provision in sub-section (1), therefore, can have only prospective operation to assessments, which have not become final due to expiry of period of limitation prescribed for assessment under section 149.
14. To hold that the amendment to sub-section (1) would enable the authorities to reopen assessments, which had already attained finality due to bar of limitation prescribed under section 149 as applicable prior to 1.4. 1989, would amount to give sub section (1) a retrospective operation which is neither expressly nor impliedly intended by the amended sub-section.

15. On behalf of the assessee before the High Court and in this Court reliance has been placed on the provisions contained in sub-section (2) of section 150. It is submitted that the provision contained in sub-section (2) of section150 is in the nature of clarification or Explanation to sub section(1).Sub-section (2) makes it clear that the embargo of period of limitation lifted under sub section (1) for proposed reassessments based on order in proceedings under appeal, reference or revision, as the case may be, would not apply to assessments which have attained finality due to bar of limitation applicable at the relevant time.

6. The High Court rejected the above contention of the assessee on the ground that on the amendment introduced with effect from 1.4.1989 in sub-section (1), which enables reopening of assessment based on any Order of 'Court in any proceedings in any law', there is no corresponding amendment made in sub-section (2) of Section 150 to bar reassessment based on Order of Court passed in any proceedings in any law in cases where prescribed period of litigation for reassessment had already expired.

17. We do not find the above reasoning of the High Court is sound. The plain language of sub-section (2) of Section 150 clearly restricts application of sub-section (1) to enable the Authority to reopen assessments which have not already become final on the expiry of prescribed period of limitation under Section 149. As is sought to be done by the High Court, sub-section (2) of Section 150 cannot be held applicable only to reassessments based on Orders 'in proceedings under the Act'

and not to Orders of Court 'in proceedings under any other law'. Such an interpretation would make the whole provision under Section 150 discriminatory in its application to assessments sought to be reopened on the basis of Orders under the IT Act and other assessments proposed to be reopened on the basis of Orders under any other law. Interpretation, which creates such unjust and discriminatory situation, has to be avoided. We do not find that sub-section (2) of section 150 has that result. Sub-section (2) intends to insulate all proceedings of assessments, which have attained finality due to the then existing bar of limitation. To achieve the desired result it was not necessary to make any amendment in sub-section (2) corresponding to sub-section (1), as is the reasoning adopted by the High Court.

18. Sub-section (2) aims at putting embargo on reopening assessments, which have attained finality on expiry of prescribed period of limitation. Sub-section (2) in putting such embargo refers to whole of sub-section (1) meaning thereby to insulate all assessments, which have become final and may have been found liable to reassessments or re-computation either on the basis of Orders in proceedings under the Act or Orders of Courts passed under any other law. The High Court, therefore, was in error in not reading whole of amended sub-section (1) into sub-section (2) and coming to the conclusion that reassessment proposed on the basis of order of Court in proceedings under Land Acquisition Act could be commenced even though the original assessments for the relevant years in question have attained finality on expiry of period of limitation under Section 149 of the Act. On a combined reading of sub-section (1) as amended with effect from 1.4.1989 and sub-section (2) of Section 150 as it stands, in our view, a fair and just interpretation would be that the Authority under the Act has been empowered only to reopen assessments, which have not already been closed and attained finality due to the operation of the bar of limitation under Section 149.

19. This Court took similar view in the case of S.S. Gadgil (supra) in somewhat comparable situation arising from the retrospective operation given to Section 34(I) of Income Tax Act, 1922 as amended with retrospective effect from 1.4.1956 by the Finance Act of 1956. In the case of S.S. Gadgil (supra)

admittedly under clause (iii) of the proviso to Section 34(I) of the Indian Income Tax Act, 1922, as it then stood, a notice of assessment or reassessment could not be issued against a person deemed to be an agent of a non-resident under Section 43, after the expiry of one year from the end of the year of assessment. The Section was amended by Section 18 of the Finance Act, 1956, extending this period of limitation to two years from the end of the assessment year. The amended was given retrospective effect from April 1, 1956. On March 12, 1957, the Income Tax Officer issued a notice calling upon the assessee to show cause why, in respect of the assessment year 1954-55, the assessee should not be treated as an agent under Section 43 in respect of certain non-residents. The case of the assessee, inter alia, was that the proposed action was barred by limitation as right to commence proceedings of assessment against the assessee as an agent of non-resident for the assessment year 1954-55 ended on 31.3.1956, under the Act before it was amended in 1956. This Court in the case of S.S. Gadgil (supra) accepted the contention of the assessee and held as under:

> *". The legislature has given to section 18 of the Finance Act, 1956, only a limited retrospective operation, i.e., up to April 1, 1956, only. That provision must be read subject to the rule that in the absence of an express provision or clear implication, the legislature does not intend to attribute to the amending provision a greater retrospectivity than is expressly mentioned, nor to authorise the Income-tax Officer to commence proceedings which before the new Act came into force had by the expiry of the period provided become barred."*
>
> *20. On a proper construction of the provisions of Section 150 (1) and the effect of its operation from 1.4.1989, we are clearly of the opinion that the provisions cannot be given retrospective effect prior to 1.4.1989 for assessments which have already become final due to bar of limitation prior to 1.4.1989. Taxing provision imposing a liability is governed by normal presumption that it is not retrospective and settled principle of law is that the law to be applied is that which is in force in the assessment year unless otherwise provided expressly or by necessary implication. Even a procedural provision cannot in the*

> *absence of clear contrary intendment expressed therein be given greater retrospectivity than is expressly mentioned so as to enable the Authorities to affect finality of tax assessments or to open up liabilities, which have become barred by lapse of time. Our conclusion, therefore, is that sub-section (1) of Section 150, as amended with effect from 1.4.1989, does not enable the Authorities to reopen assessments, which have become final due to bar of limitation prior to 1.4.1989 and this position is applicable equally to reassessments proposed on the basis of Orders passed under the Act or under any other law."*

14. The *ratio* of *K.M Sharma* and *S.S. Gadgil,* in the opinion of this court covers the facts of this case. Reassessment for 1998-99 could not be reopened beyond 31.03.2005 in terms of provisions of Section 149 of the Act as applicable at the relevant time. The petitioner's return for assessment year 1998-99 became barred by limitation on 31.03.2005. The question of revival of the period of limitation for reopening assessment for AY 1998-99 by taking recourse to the subsequent amendment made in Section 149 of the Act in the year 2012, i.e., more than 8 years after expiration of limitation on 31.03.2005, has been dealt with by the Supreme Court in *K.M. Sharma (*supra).

15. The AO has conceded in the order rejecting the petitioner's objection that *"It is also found that the assessee was a non-resident as contended by him, in the AY 1998-99."* In the circumstances, there can be no question about the applicability of the then existing provision- Section 149 (b), which stated that the normal time limit for reopening assessment was four years, "*but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year."*

16. It has been said that *"the government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's affairs on the basis of this knowledge"* (Ref. FA Hayek, *"Road to Serfdom"*, 1944). In this case, the interpretation proposed by the revenue has the potential of arming its authorities to re-open settled matters, in respect of issues where the citizen could genuinely be sanguine and had no obligation of the kind which the Revenue seeks to impose by the present amendment. All the more significant, is the fact that absent a clear indication, every statute is presumed to be prospective. The revenue had sought to contend that the amendment (to Section 149) is merely *procedural* and no one has a vested right to procedure; and that procedural amendments can be given effect any time, even in ongoing proceedings.

17. This court is of the opinion that there is no merit in the revenue's contention. In *Sri Prithvi Cotton Mills Vs Broach Borough Municipality,* AIR 1970 SC 192, examined the validity of the retrospective amendment of a statute in light of Article 19(1)(g) of the Constitution of India, i.e. a fundamental right to practice any profession, or to carry on any occupation, trade or business. The court said:

> *"In testing whether a retrospective imposition of a tax operates so harshly as to violate fundamental rights under article 19(1)(g), the factors considered relevant include the context in which retroactivity was contemplated such as whether the law is one of validation of taxing statute struck-down by courts for certain defects; the period of such retroactivity, and the decree and extent of any unforeseen or unforeseeable financial burden imposed for the past period etc."*

18. In *Govinddas v Income Tax Officer* AIR 1977 SC 552the Supreme Court held that Section 171 (6) of the Income Tax Act was prospective and

inapplicable for any assessment year prior to 1st April, 1962, the date on which the Act came into force and observed that:

> *"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 construed as prospective only."*

In *Commissioner of Income Tax v Scindia Steam Navigation Co. Ltd* AIR 1961 SC 1633, it was 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 upsetting the position and imposing tax liability after that date, even if made during the currency of the assessment year, unless specifically made retrospective, does not apply to the assessment for that year. These principles were reiterated in *Commissioner of Income Tax v Vatika Township (P) Ltd* [2014] 367 ITR 466.

19. In view of the above discussion, it is held that the petition has to succeed; the impugned reassessment notice and all consequent proceedings are hereby quashed and set aside. The writ petition is allowed; however without order on costs.

S. RAVINDRA BHAT
(JUDGE)

PRATEEK JALAN
(JUDGE)

DECEMBER 06, 2018