REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5065 OF 2008
(Arising out of SLP (C) No. 4379 of 2007)

Commnr. of Income Tax-I, Ahmedabad ...Appellant

Versus

Gold Coin Health Food Pvt. Ltd. ...Respondent

(With C.A. No. 5066 /2008 @ SLP (C) No. 14785/2007)

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Expressing doubt about the correctness of the judgment rendered by a Division Bench of this Court in Virtual Soft Systems Ltd. V. Commissioner of Income Tax, Delhi (2007 (9)

SCC 665), a reference has been made by another Division Bench by order dated 7.4.2008 to a larger Bench. The question which was decided in Virtual's case (supra) was as to whether the penalty under Section 271 (1) (c) of the Income Tax Act, 1961 (in short the 'Act') can be levied if the returned income is a loss. This question has to be considered in the background of the amendment made by Finance Act, 2002 (in short 'Finance Act') w.e.f. 1.4.2003 in Explanation 4 to Section 271(1)(c)(iii) of the Act. In Virtual's case (supra) the department placed reliance on Notes on Clauses relating to the aforesaid amendment to submit that the amendment was clarificatory in nature and consequentially it was applicable retrospectively. This argument was rejected by this Court in para 52 of the judgment. The Division Bench while making reference was of the view that the true effect of the amendment was not considered, as it was prima facie of the view that merely because the amendment was stated to take effect from 1.4.2003 that cannot be a ground to hold that the same did have the retrospective effect.

3. Learned counsel for the appellant submitted that the true scope and ambit of the amendment has been lost sight of in Virtual Soft's case (supra). It is submitted that the purpose behind Section 271(1) (c) is to penalize the assessee for (a) concealing particulars of the income; and/or (b) furnishing inaccurate particulars of such income. Therefore, whether income returned was a profit or loss was really of no consequence. It is pointed out that prior to the amendment, Section 271(1) (c)(iii) read as follows:

> "(iii) In the cases referred to in Clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished."

4. It was submitted that bare reading of the provision made the position clear that it was not necessary that income tax must be payable by the assessee as sine qua non for imposition of penalty. The word 'any' made the position clear that the penalty was in addition to any tax which may be paid by the assessee. Therefore, even if no tax was payable, the

penalty was leviable. It is in that context submitted that even prior to the amendment it could not be read to mean that if no tax was payable by the assessee because of filing a return disclosing loss, the assessee is not liable to pay penalty even if the assessee concealed and/or furnished inaccurate particulars. Because some High Courts took the contradictory view, the Parliament clarified the position by changing the expression "any' by "if any". This was not a substantive amendment which created a penalty for the first time. The amendment by the Finance Act as specifically noted in the Notes on Clauses makes the position clear that the amendment was clarificatory in nature and would apply to all assessments even prior to assessment year 2003-04.

5. Per contra, learned counsel for the assessees submitted that the view expressed in Virtual's case (supra) lays down the correct principle in law. With reference to para 17 of the judgment, it is submitted that the position was rightly noted by various High Courts, more particularly, in Commissioner of Income Tax v. Prithipal Singh & Co. (1990 (183) ITR 69). It is

pointed out that the revenue's appeal before this Court was dismissed in Commissioner of Income Tax v. Prithipal Singh and Ors. (2001 (249) ITR 670). It is submitted that there is nothing in Section 271(1) (c) as amended by Finance Act to suggest that the amendment is retrospective. The amendment and the Explanation 4(a) carried out, enlarged the scope for levying penalty under Section 271(1) (c) and, therefore, does not operate retrospectively and is applicable only w.e.f. 1.4.2003. The relevant portion in the Finance Act relating to amendment reads as follows:

> "Section 271 of the Income Tax Act provides that the assessing Officer or the Commissioner (Appeals) shall levy penalty in cases of failure to comply with certain notices issued in the course of assessment proceedings and cases in which particulars of income have been concealed or inaccurate particulars furnished.
>
> It is proposed to amend the section to include a reference to the Commissioner as being an authority who can initiate any levy penalty under sub-section (1) of the said section. Similar reference is proposed to be made in Explanation 1 and Explanation 7 to the said sub-section.
>
> Amendment on similar lines is proposed to be made in Section 18 of the Wealth Tax Act.

> These amendments will take effect from Ist June, 2002.
>
> The existing provisions of clauses (ii) and (iii) of sub-section (1) of the said section provide for levy of the penalty specified therein in addition to any tax payable.
>
> It is proposed to amend the said clauses to clarify that the penalty specified in them can be levied even if no tax is payable on the total income assessed.
>
> The Bill further proposes to amend Explanation 4 which defines the expression 'the amount of tax sought to be evaded in different circumstances, to clarify that in cases where the income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or of converting the loss into income, the tax sought to be evaded shall be the tax that would have been chargeable on the amount of such income as if it were the total income.
>
> These amendments will take effect from Ist April, 2003."

6. It would be of some relevance to take note of what this Court said in Virtual's case (supra). Pointing out one of the important tests at para 51 it was observed that even if the statute does contain a statement to the effect that the

amendment is clarificatory or declaratory, that is not the end of the matter. The Court has to analyse the nature of the amendment to come to a conclusion whether it is in reality a clarificatory or declaratory provision. Therefore, the date from which the amendment is made operative does not conclusively decide the question. The Court has to examine the scheme of the statute prior to the amendment and subsequent to the amendment to determine whether amendment is clarificatory or substantive.

7. In Reliance Jute and Industries Ltd. vs. Commissioner of Income Tax, West Bengal (1979 (120) ITR 921) it was observed by this Court that the law to be applied in income tax assessments is the law in force in the assessment year unless otherwise provided expressly or by necessary implication. Before proceeding further, it will be necessary to focus on the definition of the expression 'income' in the statute. Section 2 (24) defines 'income' which is an inclusive definition, and includes losses i.e. negative profit. The position has been elaborately dealt with by this Court in Commissioner of

Income Tax (Central), Delhi v. Harprasad & Co. P. Ltd. (1975 (99) ITR 118). This Court held with reference to the charging provisions of the statute that the expression 'income' should be understood to include losses. The expression 'profits and gains' refers to positive income whereas losses represent negative profit or in other words minus income. This aspect does not appear to have been noticed by the Bench in Virtual's case (supra). Reference to the order by this Court dismissing the revenue's Civil Appeal No.7961 of 1996 in Commissioner of Income Tax v. Prithipal Singh and Co. is also not very important because that was in relation to the assessment year 1970-71 when Explanation 4 to Section 271(1) ((c) was not in existence. The view of this Court in Harprasad's case (supra) leads to the irresistible conclusion that income also includes losses. Explanation 4 (a) as it stood during the period 1.4.1976 to 1.4.2003 has to be considered in the background.

8. It appears that what the Finance Act intended was to make the position explicit which otherwise was implied. The recommendations of the Wanchoo Committee pursuant to

which Explanation 4(a) was inserted w.e.f. 1.4.1976 needs to be noted. At para 2.74 it was noted as follows:

> "2.74 We are not unaware that linking concealment penalty to tax sought to be evaded can, at times, lead to anomalies. We would recommend that, in cases where the concealed income is to be, set off against losses incurred by an assessee under other heads of income or against losses brought forward from earlier years, and the total income thus, gets reduced to a figure smaller than the concealed income or even to a minus figure, the tax sought to be evaded should be calculated as if the concealed income were the total income."

9. Reference to the Department Circular No.204 dated 24.7.1976 reported in 1977 (110) ITR 21 (St.) has also substantial relevance. Same reads as follows:

> "New Explanation 4 defines `the amount of tax sought to be evaded'. According to the definition, this expression will ordinarily mean the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed. In a case, however, where on setting off the concealed income against any loss incurred by the

> assessee under other head of income or brought forward from earlier years, the' total income is reduced to a figure lower than the concealed income or even to a minus figure, `the tax sought to be evaded' will mean the tax chargeable on the concealed income as if it were the total income. Another exception to the general definition of the expression `tax sought to be evaded' given earlier is a case to which Explanation 3 applies. Here, the tax sought to be evaded will be the tax chargeable on the entire total income assessed."

10. A combined reading of the Committee's recommendations and the Circular makes the position clear that Explanation 4(a) to Section 271(1) (c) intended to levy the penalty not only in a case where after addition of concealed income, a loss returned, after assessment becomes positive income but also in a case where addition of concealed income reduces the returned loss and finally the assessed income is also a loss or a minus figure. Therefore, even during the period between 1.4.1976 to 1.4.2003 the position was that the penalty was leviable even in a case where addition of concealed income reduces the returned loss.

11. When the word "income" is read to include losses as held in Harprasad's case (supra) it becomes crystal clear that even in a case where on account of addition of concealed income the returned loss stands reduced and even if the final assessed income is a loss, still penalty was leviable thereon even during the period 1.4.1976 to 1.4.2003. Even in the Circular dated 24.7.1976, referred to above, the position was clarified by Central Bureau of Direct Taxes (in short 'CBDT'). It is stated that in a case where on setting of the concealed income against any loss incurred by the assessee under any other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even to a minus figure the penalty would be imposable because in such a case "the tax sought to be evaded" will be tax chargeable on concealed income as if it is "total income".

12. Law is well settled that the applicable provision would be the law as it existed on the date of the filing of the return. It is of relevance to note that when any loss is returned in any

return it need not necessarily be the loss of the concerned previous year. It may also include carried forward loss which is required to be set up against future income under Section 72 of the Act. Therefore, the applicable law on the date of filing of the return cannot be confined only to the losses of the previous accounting years.

13. In Commissioner of Wealth Tax, Punjab, J & K, Chandigarh, Patiala v. Yuvraj Amrinder Singh and Ors. (1985 (4) SCC 609) the relevance of Notes on Clauses was highlighted. Para 15 reads as follows:

> **"15.** The proviso to sub-clause (*vi*) has been reproduced above. It has the effect of cutting down the exemption contained in the sub-clause to some extent. It commences with the words "Provided that in the case of a policy of insurance the *premium or other payment whereon is payable during a period of less than* 10 *years*" and the argument is that the italicized words suggest that the expression "any policy of insurance" in the main sub-clause must mean a policy based on human life and that too where periodical premia are payable and as such annuity on life which consists of lump sum investment followed by deferred annual or monthly payments is

excluded. It is impossible to read the italicized words in the proviso in this manner which has the effect of unduly narrowing down the expression "any policy of insurance" used in the main sub-clause, which as indicated earlier, is of very wide import covering all types of insurance policies like life, marine, fire, etc. In the first place the main provision [sub-clause (*vi*)] was enacted in 1957 and continued to operate for 17/18 years till March 31, 1975 without any qualification and as such it will be absurd to attribute to the Legislature, because of the insertion of the proviso (containing the italicized words) in 1975, an intention of having used the wide expression "any policy of insurance" throughout all this period in a narrow sense as suggested. Secondly, if the main provision and the proviso are read together the italicised words do not suggest that any narrow construction, much less as urged, was intended and to say so would be missing the real object or purpose of the proviso. In our view the proper way to read the proviso would be to treat the main provision as creating or granting an exemption and the proviso carving out something from the exemption. The main provision creates an exemption in respect of the assessee's "right or interest in any policy of insurance" and the proviso seeks to cut down that exemption to a limited extent, namely whenever there is a policy of insurance in respect whereof periodical premia are payable for a duration of less than 10 years, then in such a case a proportionate exemption specified therein will be available to the assessee irrespective of what type of policy it is; the proviso has no other effect. That such was the object or purpose of inserting the proviso will be clear if

> regard is had to relevant part of Notes on clauses accompanying the Bill and the relevant portion of the speech of the Finance Minister while introducing the Bill. We were taken through the relevant portions of Notes and clauses [vide 93 ITR 125 (Statutes)] and the speech of the Hon'ble Finance Minister while introducing the Bill [vide 93 ITR 74 (Statutes)] and in our view far from supporting the contention of counsel for the Revenue these lend support to the view which we have just expressed. The relevant portion of "Notes on clauses" states that, "under this amendment (the insertion of proviso) the value of the taxpayer's right or interest in a policy of insurance will be exempt from tax only if the premia are payable over a period of ten years or more. In cases where premia are payable over a period of less than ten years, only a proportionate amount of the value of the taxpayer's right or interest in the policy of insurance will be exempt from wealth tax". The Finance Minister's speech, though strictly not relevant as an aid to construction, substantially reiterates what has been stated in the "Notes on clauses" accompanying the Bill. On this account, therefore, there is no warrant to put a narrow construction on the expression "any policy of insurance" occurring in sub-clause (*vi*) of Section 5(1)."

14. As noted by this Court in Commissioner of Income Tax, Bombay and Ors. v. Podar Cement Pvt. Ltd. and Ors. (1997 (5) SCC 482) the circumstances under which the amendment

was brought in existence and the consequences of the amendment will have to be taken care of while deciding the issue as to whether the amendment was clarificatory or substantive in nature and, whether it will have retrospective effect or it was not so.

15. In Principles of Statutory Interpretation, 11th Edn. 2008, Justice G.P. Singh has stated the position regarding retrospective operation of statutes as follows:

> "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 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 Corm. 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' or 'shall be deemed never to have included'' 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 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 when the constitution came into force, the amending Act also will be part of the existing law."

16. In Zile Singh v. State of Haryana and Ors. (2004 (8) SCC 1), it was observed as follows:

> **"13.** It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary

implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only — "*nova constitutio futuris formam imponere debet non praeteritis*" — a new law ought to regulate what is to follow, not the past. (See *Principles of Statutory Interpretation* by Justice G.P. Singh, 9th Edn., 2004 at p. 438.) It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (*ibid.*, p. 440).

14. The presumption against retrospective operation is not applicable to declaratory statutes.... 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 retrospectively. 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.... An amending Act may be purely declaratory 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 (*ibid.*, pp. 468-69).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (*Statute Law*, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (*i*) general scope and purview of the statute; (*ii*) the remedy sought to be applied; (*iii*) the former state of the law; and (*iv*) what it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p.392)"

17. Above being the position, the inevitable conclusion is that Explanation 4 to Section 271(1)(c) is clarificatory and not

substantive. The view expressed to the contrary in Virtual's case (supra) is not correct.

18. So far as the appeal relating to SLP (C) No.4379 of 2007 is concerned, it is to be noted that learned Solicitor General has stated that even if the Department succeeds ultimately before this Bench, they would not demand penalty from the assessee in that case. Similar is the position in Civil Appeal relating to SLP(C) No.14785 of 2007.

19. The appeals are disposed of.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.
(P. SATHASIVAM)

.....J.
(AFTAB ALAM)

New Delhi,
August 18, 2008