

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL NO. 4 of 2006****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE JAYANT PATEL****and****HONOURABLE MR.JUSTICE S.H.VORA**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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DEPUTY COMMISSIONER OF INCOME TAX (ASSESSMENT)....Appellant(s)

Versus

SURAT ELECTRICITY COMPANY LIMITED....Opponent(s)

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Appearance:

MR SUDHIR M MEHTA, ADVOCATE for the Appellant(s) No. 1

MR BS SOPARKAR for MRS SWATI SOPARKAR, ADVOCATE for the Opponent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE JAYANT PATEL

and

HONOURABLE MR.JUSTICE S.H.VORA

Date : 07/01/2015

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE JAYANT PATEL)

1. Following question of law has been formulated in the present appeal at the time of admission of the appeal as under:-

“Whether on facts and in the circumstances of the case, and in law, Income Tax Appellate Tribunal is right in coming to the conclusion that the judgment of the Hon’ble Supreme Court of India, in the case of Associated Power Company Limited, reported in 218 ITR, 195 is not retrospective?”

2. The relevant facts are that on 15.11.1995, the return was filed by the respondent - Assessee for the assessment year of 1995-96, wherein the adjustment of Rs.28,40,247/- was claimed. On 28.11.1995, the Apex Court in the case of Associated Power Company Limited (supra) delivered the judgment, whereby it was held that the amount appropriated to the contingency reserve to meet with the possible exigencies is not a provision known as existing liability and, therefore, not deductible as business expenditure. 30.11.1995 though was the last date of filing return, no other revised return or otherwise was filed. The Notice under Section 143(1) was issued and thereafter vide intimation dated 30th September, 1996, the adjustment of the amount of Rs.28,40,247/- was not permitted. Consequently, the tax was made leviable but the additional tax of Rs.2,61,303/- was also made leviable.

3. The Assessee carried the matter in appeal before C.I.T. (Appeals) being Appeal No.CAS-II/293/96-97 which ultimately came to be dismissed. The matter was further carried in appeal by the Assessee before the Appellate Tribunal being I.T.A. No.381/Ahd/1999. The Tribunal found that the tax is leviable but the additional tax is not leviable. The Tribunal

relied upon the decision of the Apex Court in case of C.I.T. V/s. Hindustan Electro Graphites Ltd. reported in 243 ITR 48 and found that the Assessee had filed return of income which was correct as per law prevailing on the date of filing of return and as additional tax has the imprint of penalty, the Revenue cannot be heard to say that the levy of additional tax is automatic under Section 143(1)(a) of the Act and hence, partly allowed the appeal. Under the circumstances, the Revenue is in the present appeal.

4. We have heard Mr.Sudhir Mehta, learned counsel appearing for the appellant and Mr.B.S. Soparkar, learned counsel appearing for the respondent - Assessee.

5. We may record that there is no express finding by the Tribunal on the aspect of retrospective operation of the decision of the Apex Court in case of Associated Power Company Limited (supra) and however, as the question has been framed, we need to answer. In our view, the question should not detain us further since it is settled legal position that any judgment of the Apex Court interpreting a particular provision would have its applicability for the prospective effect unless it is expressly made retrospective in the said decision. The reference may be made to the decision of the Apex Court in case of Ashok Kumar Gupta and another V/s. State of U.P. and others reported in (1997)5 SCC 201, more particularly, observations made by the Apex Court in paragraph 54 as under:-

“54. It is settled principle right from Golak Nath ratio that prospective overruling is a part of the principles of constitutional canon of interpretation. Though Golak

Nath ratio of unamendability of fundamental rights under Article 368 of the Constitution was overruled in Kesavananda Bharati case the doctrine of prospective overruling was upheld and followed in several decisions. This Court negated the contention in Golak Nath case that prospective overruling amounts to judicial legislation. Explaining the Blackstonian theory of law, i.e., Judge discovers law and does not make law, and the efficacy of prospective overruling at p.808 placitum D to H, this Court by a Bench of eleven Judges had held that the doctrine of prospective overruling is a modern doctrine and is suitable for a fast-moving society. It does not do away with doctrine of stare decisis but confines it to past transactions. While in strict theory, it may be said that the doctrine involves the making of law, what a court really does is to declare the law but refuses to give retrospectivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds law and that it does make the law. It finds the law but restricts its operation to the future. It enables the courts to bring about a smooth transition by correcting the errors without disturbing the impact of those errors on past transactions.....”

Useful reference may also be made to another decision of the Apex Court in case of Baburam V/s. C.C. Jacob and others reported in (1999)3 SCC 362, more particularly, observations made in paragraph 5 of the aforesaid decision which reads as under:-

“5. The prospective declaration of law is the device innovated by the Apex Court to avoid reopening of the settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of the prospective declaration of the law, it is deemed that all actions taken contrary to the declaration of the law prior to the date of declaration are validated. This is done in the larger public interest. Therefore, the subordinate forums which are legally bound to apply a declaration of law made by this Court are also duty bound to apply such dictum to cases which would arise in future only. In matters where decisions opposed to the said principles have been taken prior to such

declaration of law cannot be interfered with on the basis of such declaration of law.

Hence, the said question deserves to be answered in affirmative. Hence, answered accordingly.

6. However, the learned counsel appearing for both the sides are right on the contention that the Tribunal did not consider the aspects of retrospective or prospective operation of the decision of the Apex Court in case of Associated Power Company Limited (supra). It is submitted that the Tribunal, as per the observations made in paragraph 4.2 in the impugned judgment, by relying upon the decision in case of Hindustan Electro Graphites Ltd. (supra), found that when on the date of filing the return, the return was correctly filed as per the law prevailing on the date and the additional tax which has the imprint of penalty, could not be recovered. The learned counsel, therefore, submitted that the question may be re-framed or an another question may be framed by this Court as under:-

“Whether additional tax is leviable even if the liability to pay tax as per the decision of the Apex Court in case of Associated Power Company Limited, reported in 218 ITR, 195 accrued after filing of the return of Income Tax but before last date of filing of the Income Tax return?”

7. We may also record that we have heard the learned counsel appearing for both sides on the aforesaid question of law.

8. In case of Hindustan Electro Graphites Ltd. (supra), the question came up for consideration before the Apex Court as

to "whether the Tribunal was justified in deleting the additions made by the Assessing Officer under Section 143(1)(a) in view of the clear cut provisions of Sections 143(1)(a), 143(1A) and 234?" The facts of the said case were that the provisions of the Act were amended with the retrospective effect and the additional tax was made leviable of the Revenue. The Apex Court, by making reference to the decision of the Calcutta High Court in case of Modern Fibotex India Ltd. V/s. Deputy CIT reported in (1995)212 ITR 496 (Cal) as well as after considering the another decision of the Apex Court in case of Cement Marketing Co. of India Ltd. V/s. Assistant Commissioner of Sales Tax reported in (1980)124 ITR 15(SC), observed thus in concluding paragraph:-

"The Assessee could not have suffered additional tax but for Finance Act of 1990. After he had filed his return of income, which was correct as per the law on the date of filing of return, it was thereafter that the cash compensatory support also came within the sway of Section 28. When additional tax has the imprint of penalty, the Revenue cannot be heard to say that the levy of additional tax is automatic under Section 143(1A) of the Act. If additional tax could be levied in such circumstances, it will be punishing the Assessee for no fault of his. That cannot ever be the legislative intent. It shocks the very conscience if in the circumstances Section 143(1A) could be invoked to levy additional tax."

Ultimately, the decision of the Calcutta High Court was upheld. Hence, our answer to the question is to be in negative.

9. Under the circumstances, the appeal is meritless. Hence, dismissed with no order as to costs.

(JAYANT PATEL, J.)

(S.H.VORA, J.)

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