INTERPRETATION

of

TAXING STATUTES

'विवेचन की सद्भावनाओं सहित'

Institute of Judicial Training and Research, U.P.
1/19, Vishwas Khand-1, Gomti Nagar
Lucknow-226016
(PANDIT GOVIND BALLABH PANT RESEARCH CELL)

Published by :
Institute of Judicial Training and Research U.P. Lko.

Printed at :
Shivam Arts, 211, 5th Lane, Nishatganj Lko. Ph. 79022

PREFACE

One of the most onerous tasks of a judge is to interpret the laws to be applied in the resolution of disputes. In doing this he has to have his antenna tuned to the legislative intent, has to have the foresight of a law-giver and has to do justice in the specific case before him. His decision on facts of a case lies buried; seen only by the parties concerned while his decision about the interpretation of law is frequently exhumed as a precedent, and continually scrutinized and examined critically by the judicial posterity. He cannot therefore afford slip ups.

Over a period of time certain principles have been evolved to guide the process of interpretation of laws but it is easier to understand the principles in abstract than to apply them to the living situations. Sometimes more than one principles appear to be the proper instruments but their application leads to diverse irreconcilable results. Then we have to have some principles guiding the choice of principles.

Laws have also been divided in different categories for differential interpretational treatment. One of the species is the Tax Laws, having some distinct interpretational tools.

It was this obfuscated scenario of interpretational instrumentalities which impelled the Institute to request Sri P.M. Bakshi to work on this subject with the object of delineating a clear path for the judicial functionaries who have to reach applicational clarity through this not so clear

wilderness of interpretational rules, so that they can deliver justice in accordance with law.

Having been associated with the Law Commission actively for almost three decades and being its member now, Sri Bakshi is thoroughly equipped in objective critical examination and rationalisation of laws. His juristic activities transcend the office of the Law Commission, as witnessed by numerous writings and prestigious lectures given by him. He has very ably analysed the principles and not only discussed the sources but has also illustrated their application in his inimitable lucid style.

This book is bound to be very useful for the persons engaged in the task of interpretation of the tax laws. We are grateful to Sri P.M. Bakshi for this.

Sri Pratyush Kumar, Assistant Director has worked hard in the publication of the book.

LUCKNOW, December, 1989

J.K. Mathur,
Director
Institute of Judicial
Training & Research
U.P., Lucknow.

C O N T E N T S

*** *** ***

CHAPTER ONE

INTRODUCTION

1.01 Importance

Interpretation of statutes is a specialised branch of legal studies. In this branch, the set of rules that regulate the interpretation of taxing enactments has been gradually acquiring practical importance. More reasons than one can be advanced in support of this proposition. In the first place, the spheres of human activities that are covered by taxes are now very wide. Gone are the days when land revenue and income tax were the two main taxes paid by the ordinary citizen. The State now taxes the holding of property, the transfer of property the derivation of income from the holding of property, the derivation of profits (capital gains) from its transfer and so on. As regards income, it may be taxed, not merely in the hands of its actual recipient, but as a "deemed income" of the recipient's spouse or parent. There are several such instances of legal fictions introduced in taxation law. Legal fictions, when sought to be employed, naturally create problems of interpretation. For, when an artificial concept is superimposed on reality, questions are bound to arise how much of reality is effectively wiped off by the artificial creation of the law - how much is the impact of the fiction upon the real world. The human mind can grasp reality with some effort. But an artificial rule creates much greater strain upon the mind. The problem becomes still more acute if the same provision (or group of provisions) happens to comprise more than one fiction.

1.02 Proliferation of words

There is another aspect to the matter. More statutes mean more words. More words mean more problems about the meaning of words. Contrary to what many

1.03 Points of interpretation

Thus, the number and length of taxing enactments must increase the number of points of interpretation of taxation law. In this manner, the subject of interpretation of taxing statutes can well become a "sub-speciality". For doing justice to this sub-speciality, one needs a study that focusses attention on it - of course, against the background of the general law of statutory interpretation. Such a study is not intended to be a commentary on each taxing enactment. That would be a mere collection of commentaries on all taxing enactments in India. Such a compilation may have other uses, but it would not bring out prominently the salient rules of interpretation of taxing statutes. This study is premised on a slightly different approach. The hypothesis is that judicial construction of taxing statutes, if properly analysed, is likely to yield some rules of interpretation. These rules may reassert, modify depart from or add to the rules of interpretation of statutes in general. Whatever be their precise effect vis-a-vis the general rules of statutory interpretation, they deserve a study, having regard to the increasing importance of taxing enactments in the modern era, as stated above.

1.04 Sources of rules

The question that naturally arises is this. From where is one to ascertain the rules of interpretation of taxing statutes? Or, to put it differently, what are the sources of rules of interpretation of taxing statutes? In answer to this query, one can say that broadly speaking, these sources are statutory and non-statutory. "Statutory" sources of interpretation are contained in the General Clauses Act and in the definition clauses in the particular Acts. Non-statutory sources comprise the large number of guidelines that emanate from the mass of case law on various points of interpretation. In practice the statutory sources play a very limited role and do not afford much guidance.

1.05 General Clauses Act

The General Clauses Act, for example, has very scanty provisions of particular relevance to taxing statutes. The only one is section 12, quoted below:-

> **"12. Duty to be taken pro-rata on enactments.** Where, by any enactment now in force or hereafter to be in force, any duty of customs or excise, or in the nature thereof, is leviable on any given quantity by weight or measure or value of any goods or merchandise, then a like duty is leviable according to the same rate on any greater or less quantity."

Even this provision is not adequate, for, it applies only to "enactments" - an expression which (if taken literally) may not cover statutory instruments. Incidentally, it may be mentioned that even the general provisions of the General Clauses Act may become inapplicable by reason of the context of a taxing enactment. Thus, while section 13 of the Act provides, *inter alia*, that the singular includes the plural, it has been held that the definition of "previous year" in section 2(11), Indian Income Tax Act, 1922 is not applicable for construing it as "previous years". The rule that the singular includes the plural was not attracted, as it was repugnant to the subject and context of the definition. There could be one previous year corresponding to the year of assessment. *Dhandhania Kedia & Co.* v. C.I.T., A.I.R. 1959 S.C. 219, 222.

1.06 Retrospective operation

As against this, the principle that an Act must not be given retrospective effect (in the absence of clear words) - a principle that finds reflection

in section 6, General Clauses Act - has been re-affirmed in the context of taxing enactments. *C.I.T. Bombay v. Scindia Steam Navigation Co. Ltd.*, A.I.R. 1961 S.C. 1633, 1646. When a surcharge on agricultural income tax was enforced from 1st September, 1957, it was held that it could not apply to the assessment year 1957-58, as it was not brought into force from the beginning of that year, i.e. from 1st April, 1957. *Karimtharuvi Tea Estate Ltd. v. State of Kerala*, A.I.R. 1966 S.C. 1385. Even if a taxing provision has been given retrospective effect, it will be subject to strict construction. *C.I.T. v. Onkarmal Meghraj*, A.I.R. 1973 S.C. 2585, 2587. Accordingly, such legislation will not be so construed as to authorise the income tax authorities to commence proceedings which, before the new Act came into force, had, by the expiry of the period then provided, already become barred. *S.S. Gadgil v. Lal & Co.*, A.I.R. 1965 S.C. 171, 177, para 13.

These are cases illustrative of the refinements that may possibly operate in regard to general statutory (or analogous) rules of interpretation when applied to taxing statutes.

1.07 Non-statutory rules

When one comes to non-statutory rules of interpretation, still more refinements may be encountered. Generally, courts have to choose between two competing approaches to statutory interpretation. On the one hand is the rule of "literal construction". To quote Mr. Justice Gajendragadkar, "The first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself." *Kanailal Sur v. Paramnedhisadhukhan*, A.I.R. 1957 S.C. 907, 910. Holmes put it pithily. "I do not care what their intention was. I only want to know what the words mean." Reid, Macdonald & Fordham, Cases etc. on Legislation, 2nd

ed. page 1005.

An alternative theory of interpretation permits judges to seek the intention of the legislature from sources much more diffused. This lays emphasis, *inter alia*, on the purpose of the law. This is not a new theory. It was pithily put by Judge Learned Hand who observed that statutes "should be construed not as theorems of Euclid, but with imagination of purpose behind them. [*Lehigh Valley Coal Co.* v. *Yensavage*, (1915) 218 Fed. 547, 552, 553 referred to by Archibald Cox, "Judge Learned Hand and Interpretation of Statutes" 60 Harvard Law Rev. 370, 377, 378]. One can call it the "liberal" approach. It is not in every case that the literal theory and the liberal theory of interpretation yield a different conclusion for construing a statutory provision. However, many words have a penumbra a dim fringe." [*Commissioner* v. *Ickelheimer*, 132 F. 2d 660, 662, referred to by Archibald Cox]. Words, not being scientific symbols, have not a fixed and artificial content. In such situations, the choice between the literal or verbal approach and the liberal or purposive approach may become crucial. It is here that the law relating to taxing enactments comes into its own. The classical statement about strict construction of a taxing statute is that of Mr. Justice Rowlatt. "In a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." [*Cape Brandy Syndicate* v. *I.R.C.*, (1921) 1 K.B. 64, 71]. This observation of Mr. Justice Rowlatt has been approved more than once by the House of Lords and applied on numerous occasions in India. *Canadian Eagle Oil Co. Ltd.* v. *R.*, (1945) 2 All E.R. 499, 507 (H.L.). *Controller of Estate Duty* v. *Kantilal Trikamlal*, A.I.R. 1976 S.C. 1935, 1943; *Tarulata Syam* v. *C.I.T.*, A.I.R. 1977 S.C. 1802; *C.I.T.* v. *Arbuthnot & Co.*, A.I.R. 1973 S.C. 989, 995.

1.08 Enactments taxing commodities

Another rule of interpretation of taxing statutes is the rule that in statutes imposing a tax on commodities, the words used should be used in the way in which they are understood in the ordinary course of business. *Annapoorna Biscuit Manufacturing Co.* v. *Commissioner of Sales Tax*, A.I.R. 1981 S.C. 1656: (1981) 3 S.C.C. 542; *C.I.T. Bombay* v. *Mahindra and Mahindra Ltd.*, (1983) 4 S.C.C. 392. The rule is strikingly illustrated in a recent judgment of the Supreme Court under the U.P. Sales Tax Act, 1948, which held that ammonia paper and ferro paper do not fall within "paper other than handmade paper". *Commissioner of Sales Tax, U.P.* v. *Macneil and Barry Ltd., Kanpur*, A.I.R. 1986 S.C. 386.

1.09 Official interpretation

One of the unresolved problems in the law of interpretation relates to the relevance of official interpretation. Occasionally, the courts accept the official view. *Suneeta Ramchandra Koyalamudy* v. *State of Maharashtra*, A.I.R. 1986 S.C. 1552. Nevertheless it is submitted that official view can only be one material to be taken into account. It can not be binding.

CHAPTER TWO

INTERPRETATION OF STATUTES: GENERAL PRINCIPLES

2.01 The nature of statute law

Legislation, precedent and custom are the three principal sources of law in our legal system. Of these, legislation is the most potent, because it can create new law through an activity itself aimed at the making of new law. It is now acknowledged legal doctrine that when new law is to be *deliberately* brought into being, it can come only from statute. Subject to the glosses which courts are apt to put upon a statute, the law, when expressed in a statute, is what the legislature says it is. The common law (whether "found" or "made") is unwritten law announced by judges, and is made only when disputes are brought before judges. A statute (in modern times) is law established by the vote of an assembly in respect to a political demand and then formally inscribed. A "statute" (as the very etymology of the word informs us) is a thing set up, constructed or made to "stand". Statutes appear in specific written form, unlike the common law. Statutes have a certain textual rigidity. The common law has none. A rule based on common law is inevitably intertwined with the factual situation in which the rule was evolved, and can therefore be moulded according to facts by the process of "distinguishing", "explaining", "modifying" or even "overruling" past precedents. This is ordinarily not possible in statute law.

In this manner, statute law is a "superior" source of law, - superior, in the sense that statutes can override the common law or customary law, while common law or customary law cannot override statute law, except to the extent permitted by statute law itself.

2.02 Statutes not self-enforcing

At the same time, one must note that statutes are not self-enforcing, if not obeyed. Someone must go to court and enforce them or rely on them. When the court is approached in this manner, the court not only has to issue a judgment or an order; very often, it has also to determine what the legislation means. Individual action to enforce a statute results in "interpretation" of the statute. It is left to the courts to tell us what the statute means, and to enforce the legislative declaration as the judges understand it to mean. In this process, is born the "non-statutory" law of interpretation. The law of statutory interpretation, then, is itself common law: it consists of principles evolved through the centuries, in cases decided by the courts. It is true that some of the rules of interpretation are themselves given legislative shape in the Interpretation Act. But, by and large, they are judge-made rules.

2.03 The process of interpretation

In interpreting a statute, the court begins with the statute, but does not end there. The best of statutes do not apply with ease to every situation. The court must decide their meaning. Looking at the facts before it, the court listens to the words of the statute and strains itself to hear their meaning. There will usually be precedents to follow. If the particular statute before the court has not already been construed judicially, decisions on other similar statutes may offer precedents, or at least throw some light. Considering the object of the statute, and bearing in mind what is fair and beneficial in the particular case, the court announces that the legislature (i) actually intended this or that meaning, or (ii) must have intended this or that meaning. Once the decision is announced by one of the higher courts, it becomes a precedent, which itself will be followed

in future, because of the doctrine of *stare decisis*. This itself leads to two consequences. In the first place, whenever the particular question comes up before the courts again, they will follow the earlier decision as a precedent. Secondly, the fact that in the earlier precedent the court adopted a particular approach in regard to interpretation itself gives birth to a rule of statutory interpretation. Henceforth, the same approach will be shown when a similar situation subsequently arises, even though, on that subsequent occasion, the statute to be interpreted may be on a different topic altogether and the word to be construed may also not be the same as on the previous occasion. It is in this manner that (uncodified) rules of interpretation are born. The *concrete situation* (or a number of concrete situations) exhibiting judicial approach to a *particular* statute is made use of as a basis for formulating an abstract rule supposed to be applicable to *statutes* generally. Thus, the law of statutory interpretation is a body of general rules. But one should not forget that those rules were the result of the enforcement of particular statutes. Herein lies the scrength as well as the weakness of the uncodified law of interpretation. Its "rules" were themselves evolved in particular statutory situations. They are not inexorable commands.

2.04 Topics of interpretation

The field of statutory interpretation is a vast one. A convenient way of studying it would be to first devote attention to some of the general rules for determining legislative intent; secondly, to deal with the kinds of internal aids to be resorted to; thirdly, to discuss the external aids and finally, to turn to some of the (so called) "presumptions".

2.05 Rules for determining legislative intent

Three main rules compete in regard to determining legislative intent -

(a) the literal rule,

(b) the golden rule,

(c) the mischief rule.

(a) The literal rule lays emphasis upon the *letter* or the text of the statutes. If the words of the statute are clear, the court must give effect to them. Lord Reid said: "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament has used, not what Parliament meant, but the true meaning of what they said." *Black Clawson* v. *Papier Werke*, (1975) 1 All E.R. 810 (H.L.). See *New Piece Goods Bazaar Co. Ltd.* v. *C.I.T., Bombay*, A.I.R. 1950 S.C. 163, 168; *Kanailal Sur* v. *Paramnidhi Sadhukhan* A.I.R. 1957 S.C. 907, 910.

Thus, if Parliament intended to enact one proposition, but the words of the statute as enacted bear a different meaning, the courts must give effect to the contrary meaning. One reason why this rule became operative was that the court does not, as a rule, refer to the debates or other external legislative materials. *Davis* v. *Johnson*, (1978) 1 All E.R. 1132 (H.L.); *A.G.* v. *H.R.H. Prince Ernest Augustus of Hanover*, (1957) 1 All E.R. 49, 61 (H.L.); *Beswick* v. *Beswick*, (1967) 2 All E.R. 1197, 1202 (H.L.); *Hadmore Productions Ltd.* v. *Hamilton*, (1982) 1 All E.R. 1042, 1053 (H.L.).

In India, this rule has been generally followed,

though there have been occasional departures therefrom. *State of* T.C. v. *Bombay Company Ltd.*, A.I.R. 1952 S.C. 366, 369.

(b) Where, however, the literal meaning gives rise to obscurity, courts may depart from it under the "golden rule". In *Maunsel* v. *Olins*, (1975) 2 All E.R. 16, 18 (H.L.), Lord Reid described the "plain meaning" rule as the primary rule and the mischief rule as a secondary rule. As Baron Parke (later Lord Wensleydale) said:

> "It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used and to the grammatical construction unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further." *Becke* v. *Smith*, (1836) 150 E.R. 724.

It should be noted that the golden rule applies only if there is an ambiguity. Otherwise, the words have to be given their ordinary meaning. *Inland Revenue Commissioners* v. *Hinchy*, (1960) 1 All E.R. 505, 508, 512 (H.L.). The same approach prevails in India. *Mahalaxmi Mills* v. C.I.T., A.I.R. 1967 S.C. 266, 269, para 7; *Precision Steel and Engineering Works* v. *Premdeva*, A.I.R. 1982 S.C. 1518, 1526.

(c) The "mischief" rule (*Heydon case*, 1584) addresses itself to the following questions -

(i) What was the common law before the making of the Act?

(ii) What was the mischief and defect for which the common law did not provided?

(iii) What remedy Parliament has resolved and appointed "to cure the disease"?

(iv) The true reason of the remedy.

The office of the Judge is to make such construction as shall suppress the mischief and advance the remedy. *Heydon*, (1584) 3 Co. Rep. 7a: 76 E.R. 637. The approach has been applied in India where occasion demanded it. *Bengal Immunity Co. v. State of Bihar*, A.I.R. 1955 S.C. 661, 674; *Rani Chaudhury v. Suraj Jit Chowdhry*, A.I.R. 1982 S.C. 1397; *Kanailal Sur v. Paramnidhi*, A.I.R. 1957 S.C. 907.

2.06 Servants, not masters

The above rules are not "rules" in the ordinary sense of having binding force. "They are our servants, not our masters. They are aids to construction, presumptions or pointers." *Maunsell v. Olins*, (1975) 1 All E.R. 16 (H.L.).

2.07 Ambiguities

Ambiguities (and consequential need for interpretation) arise from several causes; first, because of the inherent elasticity of most words; secondly, because the passage of time might have made the original words inappropriate; thirdly, because many words have an indeterminate connotation (e.g. the expression "merchantable quality" in the Sales of Goods Act); and finally, because of bad drafting.

Illustration

Wiltshire v. Barrett, (1965) 2 All E.R. 271 (C.A.) illustrates a case of bad drafting. Section 6, Road Traffic Act, 1960 (which made drinking and driving

an offence) provided as under:-

> "A police constable may arrest without warrant a person committing an offence under this section."

D was arrested under the above section but was released without being charged. D brought an action for damages for the tort of false imprisonment, arguing that his release was proof that he had not been committing the offence. However, Lord Denning, M.R. read the word "apparently" into the section. "The constable is justified if the facts as they *appeared* to him at the time were such as to warrant him bringing the man before the court on the ground that he was unfit to drive through drink."

2.08 Internal aids to construction

Internal aids in resolving ambiguities in statutes consist of the following:

(a) Long title.

(b) Preamble.

(c) Context in which the words appear.

(d) Rule of *ejusdem generis*. [Where a statute uses specific words followed by general words, the general words (even if apparently unrestricted) will be interpreted as confined to objects or concepts of the same kind as the specific words].
Gregory v. *Fearn*, (1953) 2 All E.R. 559. Examples of Indian cases discussing the rule are - *Tribhuvan Prakash* v. *Union of India*, A.I.R. 1970 S.C. 540, 545; *U.P.S.E.B.* v. *Harishanker*, A.I.R. 1979 S.C. 65, 73.

2.09 External aids to construction

On the subject of external aids to statutory construction, the following require discussion:-

(a) Committee Reports.-

Reports of a Committee which formed the basis of an Act may not be looked into for construing the Act. But it may be looked at, for identifying the mischief which the Act was intended to remedy. *Black Clawson v. Papier Werke*, (1975) 1 All E.R. 810; *Davis v. Johnson*, (1978) 1 All E.R. 841 (C.A.); *Express Newspaper v. Union of India*, A.I.R. 1958 S.C. 578; *Union of India v. Harbhajan Singh*, A.I.R. 1972 S.C. 1061; *Santa Singh v. State of Punjab*, A.I.R. 1976 S.C. 2386 (Law Commission).

(b) Debates in Parliament.-

Debates in Parliament cannot be looked at, for construing the Act. *State of T.C. v. Bombay Co. Ltd.*, A.I.R. 1952 S.C. 366, 368, 369.

(c) International conventions or treaties.-

International conventions can be looked at, for construing the words of an Act implementing such convention or treaty. *R. v. Secretary of State for Home Department, Ex parte Bhajan Singh*, (1975) 2 All E.R. 1081 (C.A.).

(d) Statement of Objects and Reasons.-

Statement of objects and reasons annexed to a Bill as introduced in the Legislature can be looked into, to identify the mischief intended to be remedied, but not for interpretation. *State of W.B. v. Union of India*, A.I.R. 1963 S.C. 1241, 1247; *Organo Chemical Industries v. Union of India*, A.I.R. 1979 S.C. 1816.

2.10 Presumptions connected with statutory constructions

As a result of the mass of case law involving statutory interpretation, a number of "presumptions" have come to be recognised. These are tentative guidelines, and not absolute or binding rules. Most text book writers on statutory interpretation do not attempt to analyse their retionale or to classify them. But it may be convenient to make an attempt. It is suggested that some of these presumptions are based on considerations of justice and avoidance of hardship - e.g. the presumption that *mens rea* should be read into a criminal statute (because, otherwise, the consequences would be unjust). Some of them are based on established drafting practice (e.g. the presumption that a consolidating statute does not alter the pre-existing law). A few of the presumptions can be traced to (supposed) doctrines of constitutional law or to the desire to honour international obligations. A few arise because of the realisation that the draftsman may be (i) usually precise, but (ii) occasionally imprecise. Pursuing the above line of thinking, the principal presumptions can be grouped as under.

I. Presumptions intended to avoid hardship

(a) An Act is not given retrospective effect, unless expressly provided. *State of Kerala* v. *Philomina*, A.I.R. 1976 S.C. 2363.

(b) Vested rights are not to be interfered with. "No man's contractual rights are to be taken away on an ambiguity in a statute, nor is an employer to be penalised on an ambiguity." *Allen* v. *Thorn Electrical Industries*, (1967) 2 All E.R. 1137 (Lord Denning).

(c) Intention is required for criminal liability. *State of Bihar* v. *Bhagirath*, A.I.R. 1973 S.C. 2198;

Sweet v. *Parsley*, (1969) 1 All E.R. 347 (H.L.); *Century Spinning & Mfg. Co.* v. *State of Maharashtra*, A.I.R. 1972 S.C. 545.

(d) A penal statute is strictly construed. *Zimmerman* v. *Grossman*, (1971) 1 All E.R. 363 (C.A.); *State of A.P.* v. *Bathu Prakasa Rao*, A.I.R. 1976 S.C. 1845.

II. Presumptions based on drafting practice

(e) An earlier Act is not taken as repealed by implication by a later Act, unless the provisions of the later Act are inconsistent with, or repugnant to, an earlier one, so that the two cannot stand together, *Unnoda Persaud Mookerjee* v. *Kristo Coomar Moitra*, (1872) 19 W.R. 5 (P.C.); *Mun. Council, Palai* v. *T.J. Joseph*, A.I.R. 1963 S.C. 1561.

(f) The same word as used at various places in a statute has the same meaning. *Gartside* v. *I.R.C.*, (1968) 1 All E.R. 121 (H.L.); *Bangalore Water Supply* v. *A. Rajappa*, A.I.R. 1978 S.C. 548, 564, unless reasons to the contrary exist. *Anand Nivas* v. *Anandji Kalyanji*, A.I.R. 1965 S.C. 414, 424.

(g) Consolidating Acts do not alter the law. "Draftsmen of such Acts re-phrase the original statutory provisions which are to be consolidated, but are well aware that it is their duty not to make any substantial alteration of the existing law and there is a very strong presumption that they have not done so." *Maunsell* v. *Olins*, (1975) 1 All E.R. 16, 17, 19, 20 (H.L.); *Irrawady Flotilla Co.* v. *Bugwandas*, (1891) I.L.R. 18 Cal. 620, 627 to 629 (P.C.).

III. Presumptions based on the desire to honour international obligations

(h) Parliament will not pass a statute infringing an international obligation. *R.* v. *Secretary of State*

for Home Department, Ex parte Bhajan Singh, (1975) 2 All E.R. 1091.

IV. Presumptions based on constitutional law

(i) The sovereign is not bound by a statute unless there is an express provision to the contrary. *Bank Voor Handel* v. *Administrator of Hungarian Property,* (1954) 1 All E.R. 969 (H.L.). (In India, this presumption is now becoming very weak. *State of W.B.* v. *Corporation of Calcutta,* A.I.R. 1967 S.C. 997).

V. Presumptions linked with drafting precision/imprecision

(j) Rule of *ejusdem generis*: where a statute uses specific words followed by general words, the general words will be interpreted as being of the same kind as the specific words. *Gregory* v. *Fearn,* (1953) 2 All E.R. 559; *Tribhuvan Prakash* v. *Union of India,* A.I.R. 1970 S.C. 540.

(k) *Expressio unius est exclusio alterius* The specific mention of one (*unius*) excludes others (*alterius*). R. v. *Palfrey,* (1970) 2 All E.R. 12 (C.A.). However, "the logic of the proposition and the force of the proposition depends entirely on establishing that there is only a choice between two named persons or objects; in such a case, it can be said that if one of the two available is chosen, that is an exclusion of the other. But save in that special case, the maxim has no effect in logic or in law."

CHAPTER THREE

INTERPRETATION OF TAX LAWS: SOURCES OF RULES

3.01 Sources of rules

The sources of rules of interpretation of taxing statutes are, broadly speaking the same as the sources of rules of statutory interpretation in general. These may be (a) statutory or (b) non-statutory.

(a) statutory sources of rules of interpretation are to be found in -

(i) the General Clauses Act, 1897; and

(ii) definitions and provisions for interpretation provided in the particular Act.

(b) Non-statutory sources of statutory interpretation is represented by the great mass of case law that has, in the course of time, given birth to several principles.

3.02 Non-statutory sources

One should not, however, forget that the non-statutory rules of interpretation - the "common law" of interpretation - does not consist of rigid mathematical formula. Its "rules" are merely guidelines which may operate to start with, but which may have to be modified or even substantially reversed in a concrete case, where the enactment to be construed and its surroundings indicate a different intention. The reason is that the non-statutory rules of interpretation have been evolved principally on a

presumption of legislative intent. These presumptions themselves are based on some principle of justice. Unfortunately, what happens is that the original rationale of justice that gave rise to a presumption is forgotten in the course of time. What was initially intended to be a mere pointer hardens into a categorical rule. It acquires a sanctity and rigidity of its own, causing injustice and hardship in concrete cases. In this manner, what had its genesis in justice results ultimately in injustice. To avoid such anomalies, courts must constantly be on the guard against treating non-statutory guidelines of statutory interpretation as irrevocable mandates from the judiciary of the past to the judiciary of the present.

3.03 Constitutional considerations

Of course, where constitutional considerations are at issue, the position is different. For example, the Indian Constitution, in article 265, provides that no tax shall be levied or collected except by authority of law. This provision is supreme. If no authority of "law" can be established, no tax can be levied or collected. The expression "law" here, of course, means a valid law.

3.04 Administrative instructions

To students of statute law, tax law presents some peculiar features. In the first place, the network of statutes on taxation is vast, prolific, complex and technical. Secondly, statutes and statutory rules proper are supplemented by a host of non-statutory instructions in this sphere, known variously as departmental "circulars", Board "directions", administrative "instructions" and so on. These seek to "interpret" the statutory material. Barring cases where a specific power is given to some Board or other authority, the exact status of these instructions

has always remained a matter of ambiguity. The utmost that can be said is that while departmental instructions may be taken note of by the court, they cannot have a binding character in law. They are prepared in the halls of bureaucracy, without public discussion, without notice to affected interests and (though infrequently) without independent legal consultation. In any case, they cannot override the strict letter of the law to the prejudice of the citizen.

3.05 Doctrine of precedent

Non-statutory rules of interpretation - whether in the sphere of taxation or any other sphere - are derived from case law. Indian case law (for this purpose) embraces not only decisions of the higher judiciary, but also those of tribunals created under special enactments. At the Central level, such tribunals - to give some examples - have been created for Income tax, customs, excise and gold control and forfeiture of smuggled property. At the State level, they have been created for sales tax, in some States - to give only one important example. Decisions of most of these tribunals are now being reported regularly in official/unofficial series, and themselves constitute a source of law.

Administrative instructions cannot override statutory rules. *Gestetner Duplicators Private Ltd.* v. *C.I.T.*, (1979) I.T.R. 1; *Mannalal Jain* v. *State of Assam*, A.I.R. 1962 S.C. 386; *Raman & Raman* v. *State of Madras*, A.I.R. 1959 S.C. 694; *I.N. Saxena* v. *State of M.P.*, A.I.R. 1967 S.C. 1264. One reason for this position is that assessing authorities are quasi-judicial authorities and must act only on relevant material and for relevant reasons. *Orient Paper Mills Ltd.* v. *Union of India*, A.I.R. 1969 S.C. 48.

3.06 Statutory notifications or rules

Statutory rules cannot modify the parent Act. *Hindustan Petroleum Corporation Ltd.* v. *Collector of Central Excise*, (1986) 26 E.L.T. 578 (CEGAT Tribunal, West Regional Bench, Bombay).

Same principle applies to notifications. *Shiv Kumar Bajaj* v. *Addl. Commissioner of Commercial Taxes, West Bengal*, (1986) 63 S.T.C. 354.

SOME BASIC CONCEPTS

4.01 The concept of tax

"Tax" has been pithily described as a compulsory exaction of money for public purposes. This is a good description from the point of view of political science and economics. But there are some basic aspects of the process, which need to be mentioned.

4.02 Three stages of the process

The three stages in the imposition of tax have been described by Lord Dunedin in *Whitney* v. *Inland Revenue Commissioner*, (1926) A.C. 37 as under:-

> "Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is, the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has been already fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly comes the methods of recovery if the person taxed does not voluntarily pay."

4.03 Meaning of levy and collection

Article 265 of the Constitution of India lays down that no tax shall be levied or collected except by authority of law. According to the Madras ruling in *Rayalsema Constructions* v. *Dy. Commercial Tax Officer, Madras* (1959) 10 S.T.C. 345 (Mad.), "the words 'levy' and 'collection' are used in article

"265..... in a comprehensive manner and they are intended to include and envelope the entire process of taxation commencing from the taxing statutes to the taking away of the money from the pocket of the citizen. Article 265 enjoins that every stage in this entire process must be authorised by law". Hence the recovery of the outstanding tax should equally be authorised by law.

CHAPTER FIVE

CONSTITUTIONAL ASPECTS OF TAXATION

5.01 Federal scheme

Like any other laws, taxing enactments are subject to constitutional restrictions. At the outset, it may be mentioned that the federal scheme of distribution of legislative powers is relevant for taxation also.

5.02 Distribution of taxes

Under the Constitution, the following taxes are leviable by the Centre:

1. Taxes on income other than agricultural income.

2. Corporation tax.

3. Customs duties.

4. Excise duty except on alcoholic liquors and narcotics not contained in medical or toilet preparations.

5. Estate and succession duty, other than on agricultural land.

6. Taxes on capital value of assets except on agricultural land of individuals and companies.

7. Rates of stamp duties on financial documents.

8. Taxes other than stamp duties on transactions in stock exchange and future markets.

9. Taxes on sale or purchase of newspapers and

on advertisements therein.

10. Taxes on railway freights and fares.

11. Terminal taxes on goods or passengers carried by railways, sea or air.

12. Taxes on the sale or purchase of goods in the course of inter-State trade.

Taxes mentioned below are leviable by the States:

1. Land Revenue.

2. Taxes on the sale and purchase of goods except newspapers.

3. Taxes on agricultural income.

4. Taxes on land and buildings.

5. Succession and estate duties on agricultural land.

6. Excise duties on alcoholic liquors and narcotics.

7. Taxes on the entry of goods into a local area.

8. Taxes on mineral rights, subject to any limitations imposed by Parliament.

9. Taxes on the consumption and sale of electricity.

10. Taxes on vehicles, animals and boats.

11. Stamp duties (except those on financial documents).

12. Taxes on goods and passengers carried by road or inland waterways.

13. Taxes on luxuries, including entertainments, betting and gambling.

14. Tolls.

15. Taxes on professions, trades, calling and employment.

16. Capitation taxes.

17. Taxes on advertisements other than those contained in newspapers.

Residuary powers of taxation remain with the Union. The Union and State Governments have concurrent powers to fix the principles on which taxes on motor vehicles shall be levied on.

5.03 Inter-governmental immunity

(a) Property of the Union is exempt from taxation by the States.

(b) Property and income of the States are exempt from taxation by the Union. However, Parliament may pass legislation for taxation by the Union of any trading or business activities of a State which are not part of the ordinary functions of Government.

5.04 Heads of tax revenue: Union

Main heads of tax revenues of the Union Government are:

(a) taxes on income and expenditure;

(b) taxes on property and capital transactions;

(c) taxes on commodities and services.

(a) Taxes on income comprise personal income tax and tax on corporations. Tax on expenditure was introduced in 1957 and then abolished. It has recently been re-introduced for certain types of expenditure.

(b) Taxes on property and capital transactions comprise estate duty, wealth tax and gift tax, as also stamp duties and registration charges. Estate duty was introduced in 1953 and subsequently abolished. Recently, (though not as estate duty) duty on inherited wealth has been introduced, though not under the label of estate duty.

(c) Taxes on commodities and services (levied by the Union) mainly comprise excise and customs duties.

5.05 Heads of taxation: States

At the State level, again, main heads of tax revenues are -

(a) taxes on income;

(b) taxes on property and capital transaction;

(c) taxes on commodities and services.

(a) Taxes on income (as levied by the States) comprise agricultural income tax and professions tax.

(b) Taxes on property and capital transactions as levied by the States, comprise land revenue, urban immovable property tax, stamps and registration

charges.

(c) Taxes on commodities and services (as levied) by the States) mainly comprise sales tax, State excise duties, Motor Vehicles Tax and Entertainment tax and electricity duty. Sales tax itself includes general sales tax, Central sales tax, sales tax on motor spirit and purchase tax on sugarcane.

Some of the taxes which are levied by the States under the Constitution are formally authorised to be levied by the State legislature, but are delegated to local authorities.

Under the Constitution, States also get a share in certain taxes levied by the Centre. But the legislation on the subject would still be Central legislation.

5.06 Challenges to taxation law

The Constitution and the general principles of law lay down certain limits as to the *matters* on which, or the *manner* in which, the taxing power may be exercised. It is desirable to narrate briefly the legal limits of the power to tax, and the scope of legal challenges to its exercise.

5.07 Constitutional mandate

Article 265 of the Indian Constitution provides that no tax shall be levied or collected except by authority of law. This postulates three requirements:

(i) There must be a law authorising the tax.

(ii) It must be a valid law. *Poona Municipality* v. *Duttatraya*, A.I.R. 1965 S.C. 555; *Chhotabhai* v. *Union of India*, A.I.R. 1952 Nag. 139, 144.

(iii) The levy or collection of the tax must be in conformity with the authority conferred by the law. *State of Mysore v. Cawasji*, (1970) 3 S.C.C. 710, 715.

It is well established that "law" does not include an executive order. *Bimal v. State of M.P.*, A.I.R. 1971 S.C. 517, 520. In fact, the very object of provisions like article 265 is to guarantee that there shall be no taxation without representation. Hence, "law" means enacted law in this context. *Ram Krishna v. State of Bihar*, A.I.R. 1963 S.C. 166.

5.07A Constitutional limitations

Limitations on the taxing power, as arising under the Constitution, can be classified into the following four categories:-

(1) Limitations arising from fundamental rights (Part 3 of the Constitution).

(2) Limitations arising from constitutional provisions relating to freedom of trade, commerce or intercourse (articles 301 to 307, Part 13).

(3) Limitations relating to inter-Governmental immunities.

(4) Limitations relating to specific kinds of taxes.

5.08 Fundamental rights

Under category (1) above, one may note that a taxing law must not infringe fundamental rights. *Ganga Sugar Corporation v. State of U.P.*, A.I.R. 1980 S.C. 286, paragraphs 42-46. Of particular relevance

in this context are the following propositions.

(i) A taxing statute which violates equality by undue discrimination is void under article 14. *Kunnothat v. State of Kerala*, A.I.R. 1961 S.C. 552; *State of Kerala v. Kutty*, A.I.R. 1969 S.C. 378; *Khandige v. Agricultural I.T.O.*, A.I.R. 1963 S.C. 591, 594; *N.M.C.S. Mills v. Municipal Corporation*, (1967) 2 S.C.R. 679, 693.

(ii) A taxing statute which imposes an unreasonable restriction (or even a reasonable restriction but not for the specified purpose) on the six freedoms guaranteed by article 19 of the Constitution, would be void. These are the right -

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) to practise any profession or to carry on any occupation, trade or business.

5.09 Fundamental rights how violated

It should be mentioned that fundamental rights may, in a conceivable case, be infringed by a taxing statute. Thus, a tax imposed upon the press, deliberately calculated to limit the circulation of information, would be unconstitutional (*Express Newspapers v. Union of India*, A.I.R. 1958 S.C. 578.

of fundamental rights. *Atiabari Tea Co. v. State of Assam*, A.I.R. 1961 S.C. 232, 247. The interpretation of articles 301-307 in the context of taxing statutes cannot be said to have settled down. There is a string of decisions according to which "compensatory" taxes (taxes imposed for the use of facilities like maintenance of roads, bridges etc.) are permissible. *Atiabari Tea Co. v. State of Assam*, A.I.R. 1961 S.C. 232, as explained in *Automobile Transport v. State of Rajasthan*, A.I.R. 1962 S.C. 1405, 1418; *Krishnan v. State of T.N.*, A.I.R. 1975 S.C. 583, 587. It is also true that if a tax imposed by a State does not interfere with the freedom of trade and commerce, it is valid - e.g. sales tax. *Hansraj v. State of Bihar*, (1971) 1 S.C.C. 59, 64; *Andhra Sugars v. State of A.P.*, (1968) 1 S.C.J. 694; *Venkataraman v. State of Madras*, (1969) 2 S.C.C. 299. At the same time, taxes which have a direct and immediate impact by restricting trade or commerce may offend the provisions of article 301, which provides as under:-

> "Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

State of Kerala v. Abdul Kadir, (1969) 2 S.C.C. 363. It follows that a tax which is excessive and prohibitive, thus impeding the free flow of trade and commerce, would be unconstitutional. *Kalyani Stores v. State*, (1966) 1 S.C.R. 865, 867, 874. In any case, no State can levy a tax which is discriminatory between State and State. Article 304(a) of the Constitution provides that the Legislature of a State may by law impose, on goods imported from other States or the Union territories, any tax to which similar goods *manufactured or produced in the State are subject*, so, however, as not to discriminate between goods so imported and goods so manufactured or produced. Thus, it would be a straightaway violation of this

provision if a State, while taxing goods produced in another State, does not tax similar goods produced in the State. *State of Rajasthan* v. *Mangi Lal*, (1969) 2 S.C.C. 710. If goods of the particular type are not at all produced within the State, and the State seeks to impose tax on goods (e.g. foreign liquor, brought from outside the State), the law would be definitely void. *Kalyani Stores* v. *State of Orissa*, A.I.R. 1966 S.C. 1686, 1691.

Notice may also be taken of article 304(b) of the Constitution, which has been held applicable in principle to taxing laws. *Khyerbari Tea Co.* v. *State of Assam*, A.I.R. 1964 S.C. 925, 937, 942. Article 304(b) reads as under:-

> "Notwithstanding anything in article 301 or 303, the Legislature of a State may by law
>
> ....
>
> (b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:
>
> Provided that no Bill or amendment for the purpose of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

Here again, while compensatory taxes are regarded as reasonable (*Kalyani Stores* v. *State of Orissa*, A.I.R. 1966 S.C. 1686, 1691) and while retrospectivity itself is not unreasonable (*Ram Krishna* v. *State of Bihar*, A.I.R. 1963 S.C. 1667, 1675, 1676; *Abdul Kadir* v. *State of Kerala*, A.I.R. 1976 S.C. 182, para 19), it is important to point out that

there is a possibility of judicial review even of a taxing statute. *Khyerbari Tea Co.* v. *State of Assam*, A.I.R. 1964 S.C. 925.

5.12 Inter-governmental immunities

With reference to category (3) above, it is proper to mention that a State legislature or any authority within the State cannot tax the property of the Union (article 285) and the Union cannot tax the property and income of a State (article 289).

5.13 Specific taxes

Finally, as regards category (4) above, the Constitution imposes prohibitions or restrictions on imposition of certain taxes. These are contained in articles 276, 286 and 287 of the Constitution.

CHAPTER SIX

STATE V. TAX PAYER: EVASION AND AVOIDANCE

6.01 Debate

For some time past, a debate has been going on in legal and official circles as to the propriety of devices which reduce tax liability. Confusion has unfortunately been created because two different situations are mixed together. Besides this, some well-known and well-established principles of interpretation of taxing statutes are suddenly being placed in a risk of being forgotten. It is proposed to analyse how the confusion has arisen and also to re-iterate the well-settled principles of interpretation.

6.02 Source of confusion: Evasion and Avoidance

It is elementary, that if one's basic concepts are not clear, confusion is bound to arise. Language is a good means of expressing one's thoughts, but one should not forget that thoughts can be conveyed accurately, only if the words used are chosen with care. Two English words - "evade" and "avoid" - are often mixed up. If a particular transaction is *taxable*, then giving it another name and entering into a sham transaction to defraud the law is "evasion". In contrast, if a particular situation is *outside the law*, then there is nothing illegal in bringing one's case within that situation. This is not "evasion", but "avoidance" of tax. It is well settled that a citizen is entitled so to arrange his affairs as to avoid tax liability. "If you are not within it (an Act of Parliament,) you have a right to avoid it to keep out of prohibition." [Lord Cranworth, L.C.in *Edward*

v. *Hall*, (1855) 2 W. Ch. 82, 84]. It is not as if this is an esoteric rule of Western jurisprudence. Times out of number, Indian courts have applied it. As Mr. Justice Subba Rao said in a very pithy dictum in the Supreme Court: "Tax can be evaded by breaking the law or avoided in terms of the law." *Punjab Distilling Industries* v. *C.I.T.*, A.I.R. 1965 S.C. 1862, 1866 (Subba Rao, J.). The citizen, it was held in 1968, is free to arrange his business so that he is able to avoid a law and its evil consequences, so long as he does not break that or any other law. *Ghatge and Patil Concerns Employees' Union* v. *Ghatge and Patil Transports*, A.I.R. 1966 S.C. 503. A genuine transaction not prohibited by law is not an attempt to evade tax, but is only "a legal device to reduce tax liability", to which every tax payer is entitled. *C.I.T.* v. *Sivakasi Match Exporting Co.*, A.I.R. 1984 S.C. 1813, 1817, para 7.

6.03 Tax avoidance and tax evasion

Traditionally, "tax avoidance" and "tax evasion" have been kept distinct from each other. Where a citizen enters into a genuine transaction permitted by law, there is nothing illegal if the object or effect of the transaction is to *avoid* (or reduce) tax liability. This is tax avoidance and is neither illegal nor immoral. On the other hand, if a transaction not genuine is entered into to defeat tax law - generally through false statements or fictitious documents or entries, then tax is evaded and the taxing authorities can go behind it. In the former case, nothing fraudulent is done. In the latter case, fraud is present, because the object is to prevent discovery and detection of tax liability. Until recently, this distinction was accepted in India. However, in *McDowell & Co. Ltd.* v. *Commercial Tax Officer*, (1985) 154 I.T.R. 148, (1985) 5 E.C.C. 259, the Supreme Court (Mr. Justice Chinnappa Reddy) has made certain observations which, with great

respect, blur the above distinction. The observations are as under:-

> "It is upto the court to take stock to determine the nature of the new and sophisticated legal devices to *avoid* tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of emerging techniques of interpretation ..... to expose the devices for what they really are and to refuse to give judicial benediction."

It is respectfully submitted that failure to maintain the distinction between "avoidance" and "evasion" is bound to create confusion, to obliterate the dividing lines of rules of the law on various matters and to impair the very fabric of the law. The highest authorities have always recognised that the citizen is entitled to arrange his affairs as far as he can do so within the law and that he may legitimately claim the advantage of any express terms or of any omission in his favour. *Kelvinator* v. *Haryana*, A.I.R. 1973 S.C. 2526, 2534.

There is another aspect of interpretation of taxing statutes, which is linked with the above topic that is the rule of literal construction.

6.04 Literal construction: a well-settled principle

For understanding the classical theory of literal construction of taxing statutes, it is enough to quote from four judicial pronouncements.

(i) Rowlatt, J.: "In a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about

a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." *Cape Brandy Syndicate* v. *I.R.C.*, (1921) 1 K.B. 64, 71 (Rowlatt, J.), quoted with approval in *Canadian Eagle Oil Co.* v. *R.*, (1954) 2 All E.R. 499, 507 (H.L.).

(ii) Lord Cairns: "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." *Partington* v. *A.G.*, (1869) L.R. 4 H.L. 100, 122 (Lord Cairns) quoted in numerous cases, including *J.K. Steel* v. *Union of India*, A.I.R. 1970 S.C. 1173, 1182; *C.I.T.* v. *M & G Stores*, A.I.R. 1970 S.C. 1173, 1182; *Ranson (Inspector of Taxes)* v. *Higgs*, (1974) 3 All E.R. 949, 970 (H.L.)

(iii) Lord Tomlin: "It is said that in revenue cases there is a doctrine that the court may ignore the legal position and regard what is called 'the substance of the matter'. This supposed doctrine seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting the uncertain and crooked cord of discretion for the golden and straight mete wand of the law. *I.R.C.* v. *Duke of Westminster*, (1936) A.C. 1, 19, 24 (H.L.) (Lord Tomlin) quoted in *C.I.T. Gujarat* v. *B.M. Kharwar*, A.I.R. 1969 S.C. 812; *C.I.T. Calcutta* v. *Arbuthnt & Co.*, A.I.R. 1973 S.C. 989, 995; *Commissioner of Customs* v. *Top Ten Promotions*, (1969) 3 All E.R. 39, 90 (H.L.).

(iv) Lord Reid: "The words of a taxing Act must never be stretched against a tax payer. There is a very good reason for that rule. So long as one adheres to the natural meaning for the charging words, the law is certain, or at least as certain as it is possible to make it, but if courts are to give to charging words what is sometimes called a liberal construction, who can say just how far this will go? It is much better that evasion should be met by amending legislation." *W.M. Cary and Sons Ltd.* v. *I.R.C.*, (1965) 1 All E.R. 917, 921 (H.L.).

6.05 Indian cases

Some persons think that the principle that a taxing statute should be given a literal construction is a conservative English principle, not applicable in India. This is a total misconception. As will be apparent from some of the Indian rulings already mentioned above, there are numerous judgments of the Supreme Court of India applying the above principle. N.H. Bhagwati, J. said: "In construing fiscal statutes and in determining the liability of a subject, one must have regard to the strict letter of the law. If the revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter." *A.V. Fernandez* v. *State of Kerala*, A.I.R. 1957 S.C. 657, 661.

Above dicta of N.H. Bhagwati, J. have been followed, *inter alia*, in *C.I.T. Gujarat* v. *Vadilal Lallubhai*. A.I.R. 1973 S.C. 1016, 1019; *Diwan Brothers* v. *Central Bank, Bombay*, A.I.R. 1976 S.C. 1503, 1508; *McDowell & Co* v. *C.I.T.* A.I.R. 1977 S.C. 1459, 1465.

6.06 The constitutional aspect

It should further be pointed out that in India, taxation has a constitutional dimension. The Constitution, in article 265, provides that no tax shall be levied or collected except by authority of law. Taxation by the executive is forbidden if done by administrative instructions. *Harivansh Lal Mehra v. State of Maharashtra*, (1971) 2 S.C.C. 54, 56: A.I.R. 1971 S.C. 1130, 1131. Even a customary levy on all goods brought into or taken out of the village would violate article 265 of the Constitution. *Guruswami Nadar v. Ezhumalai Panchayat*, A.I.R. 1968 Mad. 271. In fact, even the State Legislature is incompetent to levy a tax on goods taken out of a local area. On the principle that a tax cannot be levied if not clearly authorised by law, the Supreme Court has held that if the sales tax law omits to mention the point at which declared goods are taxable, tax cannot be levied. *Govind Saran Ganga Saran v. Sales Tax Commissioner*, A.I.R. 1985 S.C. 1043, 1044.

CHAPTER SEVEN

AMBIGUITIES, DOUBLE TAXATION AND INTENTION TO TAX

7.01 Ambiguities in taxing statutes

It follows from the rule of literal construction that ambiguities in taxing statutes have to be construed in favour of the citizen. *Express Mills v. Municipal Committee, Wardha*, A.I.R. 1958 S.C. 341, 344; *Collector, E.D. v. R. Kanakasabai*, A.I.R. 1973 S.C. 1214, 1218; *C.I.T. v. N.H. Tea Co.*, A.I.R. 1973 S.C. 2524, 2526; *Diwan Brothers v. Central Bank, Bombay*, A.I.R. 1976 S.C. 1503, 1508. The "substance of the matter" cannot be gone into, if the transaction is outside the purview of the language of the taxing enactment. *Gujarat State Financial Corporation v. Nalson Mfg.Co. Private Ltd.*, A.I.R. 1978 S.C. 1765, 1769.

7.02 Court Fees Act

In the case of a court fees Act, there is an additional consideration. Court fee means tax on access to justice. Hence, the benefit of doubt must go to the citizen. *Lakshmi Ammal v. K.M. Madhava Krishnan*, A.I.R. 1978 S.C. 1607.

7.03 Double taxation when intended

Double taxation of the same income is not void, provided the intention is clear and the provision is express. *Jain Brothers v. Union of India*, A.I.R. 1970 S.C. 778, 782. But courts lean against it. Where on one construction, the words of an Act result in double taxation of the same income, the courts avoid

it by adopting another construction, if another construction is reasonably open. I.R.C. v. F.S. *Securities Ltd.*, (1964) 2 All E.R. 691, 695 (H.L.). In *I.R.C. v. F.S. Securities Ltd.*, (1964) 2 All E.R. 691, 699, Lord Radcliffe said: "Double taxation, in itself, however, is not something which it is beyond the power of the legislature to provide for, when constructing its tax scheme. It is rather that, given that a situation would really involve double taxation, it is so unlikely that there would have been an intention to penalise particular forms of income in this way that the law approaches the interpretation of the complicated structure of the Code with a strong bias against achieving such a result."

7.04 Heads of tax mutually exclusive

On the principle that double taxation of the same income is generally not intended, courts construe the several heads of income mentioned in the Income Tax Act as mutually exclusive. *U.Co. Bank v. C.I.T., West Bengal*, A.I.R. 1957 S.C. 918; *Nalinikant Ambalal Mody v. C.I.T., Bombay*, A.I.R. 1967 S.C. 193. Similarly, if income is liable to be included on accrual basis, it is not open to the taxing authority to tax it on the basis of receipt. *Laxmipat v. C.I.T.*, A.I.R. 1969 S.C. 501, 503.

Illustrations

(i) The Duke of Westminster executed a deed in favour of his employees, promising to pay a weekly sum for 7 years in consideration of past services. The deed provided that the payments were to be "without prejudice to such remuneration as the annuitant will become entitled to, in respect of such services (if any) as the annuitant may hereafter render." The payments were to be made during the joint lives of the Duke and the employee concerned. The

Duke contended that he was entitled to deduct the payments from his total income for purpose of surtax. Revenue contended that the payments were made as remuneration for services and could not be so deducted. The House of Lords allowed the Duke's claim, as the transaction was genuine. *I.R.C.* v. *Duke of Westminster*, (1935) All E.R. Rep. 259 (H.L.).

(ii) A charge leviable when machinery or plant is "sold" over its written down value cannot be levied if the machinery is compulsorily acquired, even if the compensation exceeds the written down value. *Kirkness* v. *John Hudson & Co.*, (1955) 2 All E.R. 345 (H.L.).

(iii) The East Punjab Sales Tax Act, 1948 (as then in force) did not provide any machinery for assessing a firm which had been dissolved by the time the assessment proceeding commenced. It was held that this lacuna could not be supplied by interpretation. *State of Punjab* v. *Jullundur Vegetables Syndicate*, A.I.R. 1966 S.C. 1295, *M/s. Murarilal Mahabirprasad* v. *B.R. Vad*, A.I.R. 1976 S.C. 313.

(iv) Section 16(3)(a)(iii), Indian Income Tax Act, 1922 provided that in computing the total income of the husband, so much of the income of the wife as arises from "assets transferred to the wife by the husband otherwise than for adequate consideration" shall be included in the husband's total income. It was held that for applying the above provision, the husband-wife relationship must exist (i) at the time when income accrues to the wife and (ii) also at the time when the transfer of assets is made. Pre-marriage transfer of assets is not within the section, even if the income arises after marriage. The provision "creates an artificial income and must be strictly construed". *Philip John Plasket Thomas* v. *C.I.T.*, A.I.R. 1964 S.C. 587, 590; *C.I.T.* v. *Keshavlal*, A.I.R. 1965 S.C. 866, 867, para 9.

(v) A provision extending, to newly included areas in a municipality, "rules, bye-laws, orders, directions and powers" does not cover a *notification* imposing a tax. *State of Maharashtra* v. *Misri Lal*, A.I.R. 1964 S.C. 457.

(vi) In the Bombay Court Fees Act, 1959, Schedule 1, Article 1, the words "value of subject matter in dispute in appeal" (on which court fee is computed) do not include the amount of interest *pendente lite* awarded by the decree under appeal. *State of Maharashtra* v. *Misri Lal*, A.I.R. 1964 S.C. 457.

(vii) Section 2(g), Expenditure Tax Act, 1957 defines "dependent" as meaning an individual's spouse or minor children and as including any person wholly or mainly dependent on the assessee for support and maintenance. It was held that spouse and minor children would be "dependents" even if they had their separate income and were not economically dependent. *Azamjha* v. *Expenditure Tax Officer, Hyderabad*, A.I.R. 1972 S.C. 2319.

7.05 Clear intention to tax

At the same time, if the intention to tax is clear, then liability must be enforced. *C.W.T. Bihar* v. *Kripa Shanker*, A.I.R. 1971 S.C. 2463, 2466. Thus, joint operation of different enactments may result in levy of tax on same transaction in different aspects. *Mathuraprasad & Sons* v. *State of Punjab*, A.I.R. 1962 S.C. 745 (e.g. excise duty payable as manufacturer and sales tax payable as seller).

In determining the intention, courts have to bear in mind that every taxing statute has a fiscal philosophy, a "feel" of which is necessary to gather the intent of the different clauses. *Controller,*

Estate Duty v. *Kantilal Trikamlal*, A.I.R. 1976 S.C. 1935, 1938.

Illustration

Section 11, Madras Commercial Crops Act, 1933 empowered the Market Committee to levy fees on the notified crops "bought and sold". These words could have one of three possible meanings -

(i) duality of transactions, i.e. same person buying goods and selling identical goods;

(ii) disjunctive sense, i.e. a person either buying or selling goods;

(iii) a transaction of purchase, which includes corresponding sale.

The third meaning was accepted. The legislature had principally in mind the producer, who should have a proper market where he can bring his goods for sale and where he can secure a fair deal and a fair price. *Krishna Coconut Co.* v. *East Godavari Coconut & Tobacco Market Committee*, A.I.R. 1967 S.C. 973.

7.06 Reason and logic

Reason and logic have no place in construing a taxing Act, if the language is clear. *Commissioners of Customs* v. *Top Ten Promotions*, (1969) 3 All E.R. 39, 90, 95 (H.L.). Legislature may anticipate (and tax) devices not prevalent at the time of enactment. But there is "no presumption that the plug exactly fit the hole" (Ibid). And potentially unjust results may be avoided by lamited construction of apparently general words. *Vestey* v. *I.R.C.*, (1979) 3 All E.R. 976 (H.L.).

7.07 Exemption

A person claiming the benefit of exemption has to establish it. *C.I.T. v. Ramkrishna Das*, A.I.R. 1959 S.C. 239, 242 (reviews case law); *Kedarnath Jute Mfg. Co. Ltd. v. Commercial Tax Officer, Shyam Bazar*, A.I.R. 1960 S.C. 12; *Controller of Estate Duty v. V. Venugopal Varma Rajah*, A.I.R. 1977 S.C. 120, 125; *Kedarnath Mfg. Co. v. C.I.C.*, A.I.R. 1966 S.C. 1214. However, there is a shade of view that exemptions should be liberally construed. *Armitage v. Wilkinson*, (1878) 3 A.C. 355, 369, 370 (PC); *Burt v. Commissioner of Taxation*, (1912) 15 C.L.R. 469, 481; *Hansraj v. H.H. Dave*, A.I.R. 1970 S.C. 755, 759. According to a third view, exemptions which lift restriction or taxability imposed by an enactment are subject to strict construction. *Akot Mun. v. Manilal Manekji*, A.I.R. 1967 S.C. 1201, 1204.

7.08 Machinery provisions

Machinery provisions in taxing statutes are not subject to strict construction. They are to be so construed as to make the machinery workable and to effectuate the charging section. *N.B. Sanjana v. Elphinstone Spinning & Weaving Mills*, A.I.R. 1971 S.C. 2039, 2047; *Gursahai v. C.I.T.*, A.I.R. 1963 S.C. 1062.

Illustration

In the Rajasthan Sales Tax Act, the words "on the basis of return" were construed to mean "on the basis of true and proper return". *A.C.C. v. C.T.O.*, A.I.R. 1981 S.C. 1887.

CHAPTER EIGHT

RETROSPECTIVE EFFECT AND FINALITY CLAUSE

8.01 Retrospective operation

Unless express words or necessary implication indicate to the contrary, a taxing statute will not be given retrospective operation. Halsbury 3rd Ed., Vol. 36, page 425. However, income tax levied on the basis of the income of previous year is not really "retrospective". *Union of India* v. *Madan Gopal*, A.I.R. 1954 S.C. 158. A provision which opens up a liability which has become barred by lapse of time is strictly construed. *Banarasidas* v. *C.I.T.*, A.I.R. 1964 S.C. 1742, 1744; *Chokalingam* v. *C.I.T.*, A.I.R. 1963 S.C. 1456, 1458; *Reliance Jute and Industries Ltd.* v. *C.I.T.*, A.I.R. 1980 S.C. 251, 252. These rulings proceed on the assumption that power to open an assessment is not a matter of procedure. *State of T.N.* v. *Star Tobacco Co.*, A.I.R. 1973 S.C. 1387.

The liability to pay income tax is computed as per law in force at the beginning of the assessment year (1st April). Change in liability after that date during the currency of the assessment year does not apply to the assessment for that year unless specifically made retrospective. *C.I.T. Bombay* v. *Scindia Steam Navigation Co. Ltd.*, A.I.R. 1961 S.C. 1633, 1646. Same principle applies to agricultural income tax. *Karimtharuvi Tea Estates Ltd.* v. *State of Kerala*, A.I.R. 1966 S.C. 1385.

8.02 Finality clauses

Statutory clauses which confer "finality" on an administrative decision under the statute or oust the jurisdiction of courts in respect of a decisior

taken under the statute, or provide that no suit or other proceeding shall lie in respect of "any act done or purporting to be done" under the statute have created a lot of problems. These problems have arisen in the context of taxing enactments, as well as other enactments. The views of the judiciary on the subject have been fluctuating. As the case law stands at present, it is impossible to state with reasonable confidence the position on the subject. Some of the important rulings of the Supreme Court on the subject are the following:-

(1) *Radhakishan* v. *Ludhiana Municipality*, A.I.R. 1963 S.C. 1547.

(2) *Union of India* v. *Tarachand Gupta*, A.I.R. 1971 S.C. 1558, view differing from *Union of India* v. *Narshimalu*, (1969) 2 S.C.C. 658.

(3) *State of Kerala* v. *Ramaswami Iyer & Sons*, A.I.R. 1966 S.C. 1738.

(4) *Dhulabhai* v. *State of M.P.*, A.I.R. 1969 S.C. 78.

(5) *Surajmal Bansidhar* v. *Municipal Board, Ganganagar*, A.I.R. 1977 S.C. 246.

(6) *Bata Shoe Co.* v. *Jabalpur Municipality*, A.I.R. 1977 S.C. 955.

(7) *Munshi Ram* v. *Municipal Court*, A.I.R. 1979 S.C. 1250.

(8) *Rajendra Prakash* v. *Gyan Chandra*, A.I.R. 1980 S.C. 1206, 1214.

(9) *State of M.P.*. v. *Sunderlal*, A.I.R. 1976 M.P. 175.

(10) *State of U.P.* v. *Kaluwa*, (1977) S.T.C. 79 (All.).

(11) *Mirchumal* v. *Union of India*, A.I.R. 1974 Guj. 174.

(12) *Riaz Ahmad* v. *Union of India*, A.I.R. 1974 Del. 151.

(13) *Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 2 W.L.R. 163 (H.L.) as explained in *O'Reilly* v. *Mackman*, (1982) 3 All E.R. 1124, 1129 (H.L.) and *H.M. Trivedi* v. *Raju*, A.I.R. 1973 S.C. 2602.

(14) *Bhupendra Singh* v. *Smt. Gopal Kunwar Uma Nath*, A.I.R. 1970 M.P. 91, 95, 98.

8.03 Propositions

Detailed discussion of the subject of finality clauses belongs to administrative law. But a summary given in a Madhya Pradesh case - *Bhupendra Singh* v. *G.K. Umath*, A.I.R. 1970 M.P. 91, 98 - can be conveniently quoted:-

> "(1) An exclusionary clause using the formula 'An order of the tribunal under this Act shall not be called in question in any court' is ineffective to prevent the calling in question of an order of the tribunal, if the order is really not an order under the Act, but a nullity.
>
> (2) Cases of nullity may arise when there is lack of jurisdiction at the stage of commencement of enquiry, e.g. when -
>
> (a) authority is assumed under an *ultra vires* statute;
>
> (b) the tribunal is not properly constituted or is disqualified to act;

"(c) the subject-matter or the parties are such over which the tribunal has no authority to inquire: and

(d) there is want of essential preliminaries prescribed by the law for commencement of the inquiry.

(3) Cases of nullity may also arise during the course or at the conclusion of the inquiry. These cases are also cases of want of jurisdiction, if the word "jurisdiction" is understood in a wide sense. Some examples of these cases are:

(a) when the tribunal has wrongly determined a jurisdictional question of fact or law:

(b) when it has failed to follow the fundamental principles of judicial procedure, e.g. has passed the order without giving an opportunity of hearing to the party affected:

(c) when it has violated the fundamental provisions of the Act, e.g. when it fails to take into account matters which it is required to take into account or when it takes into account extraneous and irrelevant matters:

(d) when it has acted in bad faith: and

(e) when it grants a relief or makes an order which it has no authority to grant or make."

Bhupendra Singh v. *G.K. Umath*, A.I.R. 1970 M.P. 91, 98.

Nullity may also arise when the tribunal, by misapplication of the law has asked itself the wrong question. *O'Reilly* v. *Mackman* (1982) 3 All E.R. 1124, 1129 (H.L.).

CHAPTER NINE

PERSONS AND INCOME TAXABLE

9.01 Accrual of income

For tax purposes, accrual of income depends on the system of accounting adopted by the assessee. Hypothetical income is not income. *State Bank of India* v. *C.I.T.*, (1986) I.T.R. 102, 117 (SC).

An assessee followed the "mercantile" system of accounting by making entries on "accrual" basis. In the course of its banking business, it charged interest on advances considered doubtful of recovery ('sticky advances'), by debiting the concerned parties. However, the assessee did not carry this to its "profit and loss account". The amount was carried to a separate "interest suspense" account. In its returns, the assessee disclosed the interest amounts mentioned above, but claimed that they were not taxable for the concerned years, as they were not "real income" of the assessee. The Tribunal and the High Court rejected the contention, on the ground that under the mercantile system (which the assessee was following), such interest accrued at the end of the accounting year and the assessee itself had shown the interest amount in its accounts. Reversing this decision, the Supreme Court held that the approach of the lower courts was "legalistic", and was not correct. "Any hypothetical income which may have theoretically accrued but has not truly resulted or materialised in the concerned accounting year cannot be brought to charge, simply because (the) assessee has been regularly employing the mercantile system of accounting and makes entries in his books in regard to such hypothetical income". *State Bank of India* v. *C.I.T.* (1986) I.T.R. 102, 117 (SC).

9.02 "Person"

Expression "person" in the Income Tax Act, 1961 includes a company. But a company cannot be imprisoned under section 276B, Income Tax Act, 1961. The provisions have to be construed so as to avoid absurdity. *Adding Machines (India)* v. *State*, (1987) 3 Comp. L.J. 240 (Cal.), following *D.C. Goel* v. *B.L. Verma*, (1974) 93 I.T.R. 63 (Delhi) and dissenting from *Rayala Corpn.* v. *V.M. Muthuramalingam*, (1981) I.T.R. 675 (Mad.) and *Laxmi Rattan Cotton Mills* v. *S.K. Bhatnagar*, (1975) Cr.L.J. 1881 (All.).

9.03 Professions tax, the constitution

One of the comparatively obscure topics of taxation law relates to the tax on professions, which is the subject matter of the recent Constitution (60th) Amendment Bill, although, theoretically, it has a great appeal. The amendment seeks to achieve the substitution of the sum of two thousand five hundred rupees in place of the existing sum of two hundred and fifty rupees per annum, mentioned in article 276(2) of the Constitution. That article, while permitting State Legislatures to levy a tax in respect of professions, trades, callings and employments "for the benefit of the State" or of a local authority, provides that the total amount payable in respect of any one person to the State or to any local authority in the State by way of taxes on professions, trades, callings and employments, shall not exceed two hundred and fifty rupees - a sum which is now proposed to be enhanced. Under the Constitution, Seventh Schedule, State List, entry 60, "taxes on professions, trades, callings and employments" can be levied by the State Legislature. In order to obviate any doubts as to whether such a tax would become invalid because it would amount to a tax on income (which is a Central subject), the Constitution has inserted the above clarification, subject to the

prescribed maximum

9.04 A source of revenue

From the point of view of economics and law, professions tax has some interesting aspects. A tax on trades or professions has been one of the oldest means of revenue. In *Sushil Chandra* v. *State of U.P.*, A.I.R. 1969 All. 317, 328, Mr. Justice M.H. Beg observed that the tax belonged to a period when the modern system of income tax had not been developed. He stated that the tax had been levied by some municipalities as early as the latter half of the 18th century with the sanction of the local Government.

9.05 Government of India Act and the Constitution

In India, many local authorities, particularly in the urban areas, had been levying the professions tax. When the Government of India Act, 1935 came to be enacted, formally introducing the federal principle, it became necessary to examine how far this practice should be allowed to continue. Originally, no limitation seems to have been placed on the amount which could be levied by a local authority, but on 31st January, 1940, section 142A was inserted in the Government of India Act with effect from 1st April, 1939, laying down that the maximum amount to be levied as professions tax would be fifty rupees per annum from any one person. Power was given to the federal legislature to validate existing levies in excess of rupees fifty and in exercise of this power, the Central Legislature enacted the Professions Tax Limitation Act, 1941, which exempted the levy imposed under certain enactments, such as the Calcutta Municipalities Act, 1922, the Central Provinces Municipalities Act, 1922 and the U.P. Municipalities Act, 1916. See the history of the position as traced

in *B.M. Lakhani* v. *Malkapur Municipality*, A.I.R. 1970 S.C. 1002: (1970) 2 S.C.C. 267. When the Constitution was enacted, article 276, while continuing the authority of the State Legislature to levy the professions tax for the benefit of a State or a local authority within the State, fixed the figure at rupees two hundred and fifty per annum as the maximum. The legislative practice for a State is to authorise a local authority constituted under the relevant State law to levy this tax. Thus, in effect, the Constitution authorises the State Legislature, and the State Legislature in its turn, delegates the taxing power to the local authorities.

There have been several interesting points illustrating the operation of legislation concerned with this tax, which, of course, include the by-laws made by the local authorities.

9.06 Tax on "circumstances and property" in U.P.

As to the general nature of the tax, a question arose in *Ram Narayan* v. *State of U.P.*, A.I.R. 1957 S.C. 18, 23, whether the "Circumstances and property tax" levied under the U.P. Municipalities Act was valid. The court answered the question in the affirmative, holding that the word "circumstances" meant a man's financial position, his status as a whole, depending, among other things, on his income from trade or business. Circumstances and property tax cannot be equated with income tax and is not covered by Union list entry 82. It is essentially a tax on status or financial position combined with a tax on property and is fundamentally distinct from income tax. It is true that in the majority of cases, the assessment of this tax depends on the amount of income earned by the assessee from various sources (i.e., his profession, business or property); but that will not make it an income tax. It is not essential that there should be income before such

a tax can be levied; and it is purely as a matter of convenience that income is adopted as the yardstick for the assessment of the tax. *Zila Parishad, Muzaffarnagar* v. *Jugal Kishore Ram Swarup*, A.I.R. 1969 All. 40 (FB).

9.07 Carrying on a profession essential

At the same time, it should be remembered that a person can be taxed, only if he carries on a profession, trade, calling or employment. If no "profession" is being carried on by a person, then he cannot be taxed under this power in the guise of a tax on a commodity. *T.K.Abraham* v. *State of Travancore-Cochin*, A.I.R. 1958 Ker. 129, 134. A person who carries on no activity cannot be taxed in the name of a tax on professions. Thus, in *C. Rajagopalachari* v. *Corporation of Madras*, A.I.R. 1964 S.C. 1172, 1178, it was held that the receipt of pension could not be the result of a profession, trade, calling or employment. Obviously, the word "employment" in this context has to be construed as limited to present employment. If the employee is at present in service, he may be taxed, even though he is already paying income tax. *Kamta Prasad* v. *Executive Officer*, A.I.R. 1974 S.C. 685.

The taxes specified in item 60 of the State List I are taxed on the carrying on of a profession, trade etc., and would, therefore, apply only to a case of *present employment*. The mere fact that a person has previously been in a profession or carried on a trade etc., cannot justify a tax under this Entry. The tax on the receipt of pension or on the income from investments which is referred to in the last part of section 111(1) of the Madras City Municipal Act is in truth and substance a tax on income. At the time the tax is levied, the pensioner is in no employment but is only in receipt of income though it might be for past services, in an employment.

Section 142A(1) of the Government of India Act, 193[illegible] corresponds to article 276(1) of the Constitution. If the taxes imposed were on a profession, trade, calling, or employment, section 142A(1) provides that such a tax shall not be deemed to be a tax on income, but where the tax imposed is one not on a profession etc. at all, it does not mean that the State might levy a tax on income and call it professions tax. *C. Rajagopalachari* v. *Corporation of Madras*, A.I.R. 1964 S.C. 1172.

9.08 Basis of taxation

So long as the tax is linked with the actual carrying on of the profession etc., it is immaterial what basis is adopted for levying it. Usually, local authorities adopt the income earned by a person as the basis for the assessment of the professions tax. If this basis is adopted, then, obviously, if the business shows no profit, no tax is payable. *Zila Parishad, Lucknow* v. *NDP Company*, (1976) Tax L.R. 2057(All.). But if any other basis is adopted, liability arises as soon as a person sets up a profession or business, even though the business may be running into a loss. *Zila Parishad, Muzaffarnagar* v. *Jugal Kishore Ram Swarup*, A.I.R. 1969 All. 40, 42. The basis of the tax on profession may be –

(i) the goods produced;
(ii) the value of the machinery;
(iii) paid up capital of the concern.

Illustration of the first basis (goods) is to be found in *Mahapalika of the City of Agra* v. *A.B.K.O. Association*, A.I.R. 1976 S.C. 1160: (1976) 3 S.C.C. 42. Illustration of the second basis (value of machinery) is to be found in *Manganese Ore (India) Ltd.* v. *Gram Panchayat*, (1976) Tax L.R. 1385 (Bom.).

The third basis (paid-up capital) is illustrated in *Calcutta Chemical Co. Ltd.* v. *Bhagalpur Municipality*, A.I.R. 1962 Pat. 465. Because of this wide latitude allowed by the case law, it would be permissible to levy the tax on persons carrying on the trade of husking, milling or grinding of grains. *District Council* v. *Kishori Lal*, A.I.R. 1949 Nag. 190. In fact, in a Kerala case, the pursuit of agriculture has been held to be the exercise of a "calling". *Velu* v. *Executive Officer*, (1967) K.L.T. 350. Similarly, the tax may be levied with reference to each bale of ginned cotton produced in a factory; *Municipal Committee* v. *M.E.I. Press*, A.I.R. 1948 Nag. 171; *Municipality of Chopda* v. *Moti Lal*, A.I.R. 1958 Bom. 487.

9.09 Link with profession

Nevertheless, there must be some link with a profession or calling or employment. Every activity that forms part of a profession or the carrying on of a business cannot necessarily be taxed. Thus, a tax on advertisement is not a tax on profession. *Ismail & Co.* v. *State of Kerala*, A.I.R. 1965 Ker. 237, 239. Entertainment is not a profession. *V.V. Srinivasamurthy* v. *State of Mysore*, A.I.R. 1959 S.C. 894; *Delite Talkies* v. *Jabalpur Corporation*, A.I.R. 1966 M.P. 298, 300. Similarly, stocking tobacco is not a "trade". *T.K. Abraham* v. *State of Travancore-Cochin*, A.I.R. 1958 Ker. 129, 134. Of course, the fact that certain activities are not professions or callings, does not mean that they cannot be taxed at all. They can be taxed, provided the power to tax them can be traceable to some other specific legislative entry within the State list. But this will not be a tax on profession.

9.10 Benefit of the State

The U.P. Vritte Vyapar, Ajivika And Sevayojan Kar Adhiniyam (21 of 1965) was held to be valid by the High Court of Allahabad which held that a tax

on profession and trade is not a new tax. It was being levied by the municipalities in India with the previous sanction of the local Government concerned as far back as the late eighteenth century. Under Entry 60, List 2 of the Seventh Schedule of the Constitution, the tax can be imposed for the benefit of a State also, in addition to that of a local body. It can be imposed in order to augment the revenues of a State. That is why the expression "for the benefit of" has been used. Though it has not been said in so many words in the Adhiniyam that the object of the tax is to augment the revenue of the State or to benefit the State, the Adhiniyam does not state that it is imposed for the benefit of anyone else. There is no constitutional or statutory provision requiring a taxing measure to mention the object for which the revenue received from that tax would be utilised.

The power to tax (and consequently the taxation itself) would be presumed to be for public good and would not be subjected to any judicial review or scrutiny on that account. In view of article 266, the revenues received from this tax would flow in the coffers of the State Government. Therefore, the tax in question has been imposed for the benefit of the State of U.P. and the Adhiniyam does not suffer from legal defect that it is not categorically stated therein that the tax is being imposed for the benefit of the State Government. *Sushil Chandra Anand* v. *State of U.P.*, A.I.R. 1969 All. 317 (FB).

9.11 Double taxation

In *Kamta Prasad Aggarwal* v. *Executive Officer, Ballabgarh*, A.I.R. 1976 S.C. 685, the Punjab Panchayat Samitis and Zila Parishads Act (3 of 1961), section 76 was at issue. It was held that imposition of profession tax by Panchayat Samitis under section 76 is not illegal merely on the ground that it amounts

to double taxation. A tax on profession is not necessarily connected with income. A tax on income can be imposed if there is income. A tax on profession can be imposed if a person carries on a profession. It was also held that section 76 is not bad on the ground that the total taxes imposed on profession etc. by the *State and the Samitis* exceed the maximum limit of Rs. 250 stated in article 276 of the Constitution.

9.12 The maximum limit under article 276

Reverting to the constitutional provision laying down the maximum limit for professions tax, courts seem to have enforced it rather strictly. Thus, if a tax is imposed on the basis of a percentage and the formula is such that it is possible to levy more than the maximum in any one case, the imposition would be invalid. *Bharat Kala Kendra* v. *Municipal Committee*, A.I.R. 1965 S.C. 555. Similarly, an enhancement of a tax beyond the maximum would be invalid, thus making it possible for the court to entertain a suit for recovery of the excess. *Ramkrishna* v. *Janpad Sabha*, A.I.R. 1962 S.C. 1073; *B.M. Lakhani* v. *Malkapur Municipality*, A.I.R. 1970 S.C. 1002; *Akot Municipality* v. *Mani Lal*, A.I.R. 1967 S.C. 1201, 1204.

9.13 Other previous taxes

Finally, it may be mentioned that article 277 of the Constitution, corresponding to section 143(2) of the Government of India Act, 1935 saves other taxes, duties, cesses or fees which were being lawfully levied by a State Government or local authority or body before the Constitution, notwithstanding that the tax is mentioned in the Union list. However, Parliament can make a different provision by law.

9.14 Tax on brick kiln owners: a case from U.P.

The U.P. Nagar Mahapalika Adhiniyam (2 of 1959), section 172, Proviso, permits a tax on professions, trades and callings. State Government notification dated 18-5-47 under section 128(1)(ii), U.P. Municipalities Act, 1916 imposing tax on brick manufacturers at the rate of annas 14 per thousand bricks has been held to be valid.

Prior to the coming into force of the Constitution on 26-1-50, the tax on trades, professions and callings was governed by the maximum limit laid down by section 142A of the Government of India Act, 1935 and the Municipal Council of Agra would be entitled to collect the tax at the rate fixed by the Notification, subject to a maximum of Rs.50 for each year from each manufacturer for the period prior to 26-1-50.

For the second period from the date of the Constitution, the maximum leviable by way of tax on trade or calling by Mahapalika will be Rs.250 per person as prescribed by article 276 of the Constitution. The High Court was wrong in so far as it held that from 1-2-60, there was to be a sudden drop in the maximum limit of tax leviable from Rs. 250 to Rs. 50 by misconstruction of the proviso to section 172 of U.P. Act of 1959. The proviso saves all species or classes of taxes and not merely the quantum or the rate. Mahapalika of the *City of Agra* v. *Agra Brick Kiln Owners Association*, A.I.R. 1976 S.C. 1160.

9.15 A case from Bombay

The Bombay District Municipal Act (3 of 1901), section 59(1)(b)(xi) was at issue in a Bombay case. There is nothing either in the Bombay District Municipal Act or in the Constitution which prevents

the State from levying a tax from a person other than the owner of the commodity which is subjected to a manufacturing process; and if the State is competent to levy a tax from a person other than the owner with the sanction of the State, municipality also is competent by virtue of section 59(1)(b)(xi) of the Bombay District Municipality Act to levy such a tax. A manager of a factory is normally a paid employee of the owner of the factory and he has no interest either in the factory or the commodity which is subjected to manufacturing process in the factory, but the imposition of liability to pay the tax is not on that account invalid.

It was held that the plaintiffs were not entitled to an order for refund of the tax already paid by them under protest because their suit was evidently filed beyond the period of six months and therefore prima facie barred. In the circumstances of the case, it must be held that the municipality levied and collected in execution or intended execution of the Act and even if the municipality acted beyond its authority, the act may be regarded as wrongful or irregular but it cannot be regarded as *ultra vires*. *Municipality of Chopda* v. *Motilal Manekchand*, A.I.R. 1958 Bom. 487.

9.16 Right to refund

If a municipality collects tax in excess of the maximum permitted by article 276 of the Constitution, a suit for refund is maintainable. *Billabhdas Mathurdas Lakhani* v. *Municipal Committee, Malkapur*, A.I.R. 1970 S.C. 1002 (J.C. Shah, K.S. Hegde and A.N. Grover, JJ.).

CHAPTER TEN

COMMODITIES TAXABLE

10.01 Nature of duty of excise

Following propositions are well established in respect of excise duties under the Indian Constitution:-

(a) The duty is on goods (manufactured or produced) and not on sale proceeds. (*Governor General v. Province of Madras*, (1945) 49 C.W.N. 381 (PC), affirming *Province of Madras v. Boddu Poudanna*, A.I.R. 1942 F.C. 33.

(b) The taxable article is the goods manufactured or produced. *In re CP & Berar Motor Spirit Taxation Act*, A.I.R. 1939 F.C. 1.

(c) The taxable event is production or manufacture of goods and not consumption. *Jiyajeerao Cotton Mills v. State of M.P.*, A.I.R. 1959 S.C. 270; *Jagannath v. State of M.P.*, A.I.R. 1963 S.C. 414.

(d) But the duty can (for convenience) be imposed at a stage subsequent to the manufacture or production. *Abdul Kadir v. State of Kerala*, A.I.R. 1962 S.C. 922.

The duty can be collected at the stage of issue of goods from the factory. *Abdul Kadir v. State of Kerala*, A.I.R. 1962 S.C. 922; *R.C. Lall v. Union of India*, A.I.R. 1962 S.C. 1281.

10.02 Production and manufacture

In legislative entries relating to excise, the

word 'produced', in juxtaposition with the word 'manufactured', contemplates some expenditure of human skill and labour in bringing the goods concerned into the condition which would attract the tax, even though it may not result in the transformation of the raw material into a different thing. *Empire Industries v. Union of India*, A.I.R. 1986 S.C. 662, paragraphs 45-46. By-products, incidental to the process of manufacture, such as scrap or waste, would come under this entry. *Khandelwal Works v. Union of India*, A.I.R. 1985 S.C. 1211, paragraph 39.

10.03 Excise duty : intermediate products

For some time past, considerable controversy has been going on with reference to the goods on which excise duty can be levied by the Government. Essentially, excise duty is a duty levied on the manufacturer of goods. It is distinct from tax on the sale of goods and is also distinct from tax on the consumption of goods, in so far as the point and stage for levy of the duty is generally the point or stage of manufacture. Under the constitutional scheme, the power to levy excise duties on various classes of goods has been divided between the Union and the States. However, barring substances such as intoxicating liquor, most of the important products of industry are within the Union's sphere of excise duty. In this sense, the scope and ambit of Central legislation on excise, and questions of interpretation of such legislation, are matters of day-to-day and considerable importance for businessmen. They are of equal importance for the government of India from the financial point of view, because a very large portion of Central revenues comes from the amount collected as excise duty under Central excise laws.

It is common knowledge in industry and technology that a manufactured product acquires its final shape after a number of successive processes.

In between the acquisition of raw materials by the industrial enterprise and its final culmination as a finished product ready for distribution to the wholesalers for distribution, generally there have to be undergone a number of stages. These stages have conveniently come to be known as intermediate stages. It is in this connection that legal and practical controversies have been going on for some time, as between the Government and the industrial enterprises. Shortly stated, the question is this. If, in the process of manufacture at one or more intermediate stages, the goods begin to acquire a tangible shape, can they be subjected to excise duty at that intermediate stage when, as a matter of industrial reality, the shape in which the goods stand at that intermediate stage is not intended to be the shape in which they will be sent to the market? In other words, what should determine the liability to excise tax - the final stage when the manufacturer intends to send the goods in the market or the intermediate stage at which the goods happen to stand at a particular moment when they are not yet proposed to be sent to the market by the manufacturer? This question arises, because some step of "manufacture" has already taken place at the intermediate stage and the goods might then be tangible enough to answer the description given in a particular item of the excise tariff. According to Union Carbide India Case (*infra*), it is not permissible for the Central Government to levy excise duty at the intermediate stage, if the shape in which the goods exist at that stage is one not meant for marketability. The Supreme Court has also held that in order to attract excise duty, the goods must be capable of sale to a consumer. This line of decision of the Supreme Court now puts an end to a long standing controversy and clarifies the law.

10.04 The Union Carbide case

Thus, in *Union Carbide India Ltd.* v. *Union*

of India, (1986) 24 E.L.T. 169 (SC), the company was engaged in the manufacture of flashlights or torches, under the brand name of Eveready. The manufacture of these torches involves the use of aluminium bodies. Thus, there came into existence aluminium cans at the intermediate stage and the Department levied duty on these cans. Taken literally, the cans fell within some items of tariff, because they were either "extruded sheets and sections" of aluminium or they were "pipes and tubes". The assessee objected to the duty on the ground that these cans were never marketed as such, and were not goods known to the market. This contention was not accepted by the Allahabad High Court, but was accepted on appeal by the Supreme Court. The crucial basis of the Supreme Court's judgment was that (i) excise duty can be levied only on goods; (ii) the goods must be manufactured or produced; (iii) the goods must be capable of sale to a consumer. Combining these three requirements, the Supreme Court held that aluminium cans arising in the process of manufacturing flashlights could not be subjected to excise duty, because they were not capable of sale to the consumer and were not known in the market. The rationale of the Supreme Court's emphasis on marketability is linked with the economic realities of the situation. It is well-known that excise duties are passed on to the ultimate consumer, who bears the burden. That is how the consumer comes in the picture. After this judgment, it will not be possible for the authorities to levy excise duty by a literal reading of the mere entries in the excise tariff. An item may fall within the excise tariff, but, if the manufacturer who is sought to be burdened with duty manufactures a product of which that item represents only an intermediate stage, then excise duty cannot be levied at that stage. The Supreme Court was not impressed by the argument that aluminium cans in this particular case were capable of purchase by other manufacturers of flashlights. The crucial test is the possibility of an intention to subject them to purchase by the ultimate consumer.

10.05 Existence of goods not enough

It should be mentioned that in an earlier case also, the Supreme Court had emphasised that the mere existence of goods in a dutiable state is not enough for levying excise duty, if the stage is one of intermediate character. *Union of India* v. *Ahmedabad Manufacturing and Calico Printing Co. Ltd.*, (1985) 21 E.L.T. 633 (SC). In that case, the goods involved were from the art silk fabric industry. If a fabric contains sixty per cent or more of artificial silk, then it will be classified as artificial silk fabric. The final fabrics produced had 61.50% artificial silk and were therefore liable to duty as artificial silk fabric under excise tariff item number 22. But at an earlier intermediate stage of production, the fabrics were containing 54% cotton content and only 46% artificial silk. The contention of the excise authorities was that at that stage the manufacturer should pay excise duty on the basis of the fabrics being cotton fabrics. This contention was not accepted by the Supreme Court. Unless the statute provided to the contrary, the classification of the manufactured product should depend on the nature and character at the final stage of production, if the intermediate stage formed an integral part of the manufacture of the product in question.

10.06 Impact of the judgment

The impact of these judgments of the Supreme Court is that intermediate stages are ruled out for the levy of excise duty. Of course, in a doubtful case, evidence might have to be led to show that goods at the intermediate stage were not marketable. This is a matter to be proved by business documents, supported by the affidavits of those engaged in the trade. In the Supreme Court judgment of 1986 mentioned above, the excise department did not produce any evidence of marketability. Once more, the Supreme

Court has made it clear that taxing statutes have to be construed in conjunction with and subject to the Constitution, notwithstanding that the statutory language may not repeat each and every ingredient of the constitutional dimensions of the particular duty.

10.07 Packing material: Section 4(4)(d)(i), Central Excises and Salt Act, 1944

Under section 4(4)(d)(i), Central Excises and Salt Act, 1944, cost of packing which is of a durable nature and which is "returnable" by the buyer to the assessee is not to be included in the assessable value of the excisable goods. Courts construe the word "returnable" as requiring legal returnability. In *K. Radha Krishnaiah* v. *Collector of Central Excise*, (1987) 27 E.L.T.598 (SC), the Supreme Court held that "returnable" packing means such packing as is returnable by the buyer to the assessee under an arrangement.

Actual return of the packing is not necessary. *Collector of Central Excise, Chandigarh* v. *Rajaram Corn Products (Punjab) Private Ltd.*, (1987) 29 E.L.T. 705 (CEGAT, Special Bench, New Delhi). What is necessary is, that if the buyer chooses to return, the packing, the seller should be bound to accept it and to refund the stipulated amount. *Collector of Central Excise, Chandigarh* v. *Rajaram Corn Products (Punjab) Private Ltd.*, (1987) 29 E.L.T. 705 (CEGAT, Special Bench, New Delhi). If the cost is realisable by the assessee, the goods are not "returnable" even if the cost is to be paid in six equal instalments. *Indian Vegetable Products Ltd., Bombay* v. *Collector of Central Excise, Bombay*, (1977) 29 E.L.T. 707 (CEGAT, Special Bench, New Delhi).

10.08 Excisable goods : returnable packing

"Returnability" of packing under section 4(4)(1), Central Excises etc. Act is not confined to a formal agreement for return of packing. *Ajit Glass Works* v. *Union of India*, (1987) 31 E.L.T. 615 (Bom.).

10.09 Franchise

Where a company manufactures goods under a franchise obtained from another company to use the brand name of another company, the former company (franchisee) remains the manufacturer. *Goa Bottling Co.* v. *Union of India*, (1987) 28 E.L.T. 215 (Bom.); *Kamra Bottling Co.* v. *Assistant Collector, Central Excise, Bikaner*, (1987) 27 E.L.T. 240 (Raj.).

10.10 Franchise and value

Where a manufacturer manufactures excisable goods as per specifications of his customer under an agreement providing for affixation of the customer's brand name on the manufactured goods, then the enhancement in value of goods because of value attached to the brand is not to be added. But the position is different, if the manufacturer has acquired the right to use the brand. In the former case, the price fetched by the goods manufactured by the manufacturer is the price without the brand name. In the latter case, the sale price fetched by sales effected by the (acquired) brand name in wholesale is the basis for computation of excise duty. *Sidhsons* v. *Union of India*, (1986) 26 E.L.T. 881 (SC); *Union of India* v. *Cibatul*, (1985) 22 E.L.T. 302 (SC); *Joint Secretary to Government of India* v. *Food Specialities*, (1985) 22 E.L.T. 324 (SC).

10.11 Customs invoice and royalty

If a company imports certain goods (for the manufacture of cars), the price stated in the invoice sent by the supplier to the importer should be accepted by the Customs Department. If the importer also pays lump sum royalty and running royalty towards manufacture locally of certain products, the royalty amount cannot be added to the price in the invoice. *Collector of Customs* v. *Maruti Udyog Ltd.*, (1987) 28 E.L.T. 390.

10.12 Commercial meaning

In *Asian Paints India Ltd.* v. *Collector of Central Excise*, (1988) 2 S.C.J. 338, 341, para 7 (issue dated 5th July, 1988), the Supreme Court has held that the Customs, Excise and Gold (Control) Appellate Tribunal had rightly held that "decopaint" was an emulsion paint. It is well settled that commercial meaning has to be given to the expressions in tariff items, where the word has not been defined. The case arose on Central Excise, but in sales tax law also, the same approach applies. In *Indo International Industries* v. *Commissioner of Sales Tax, U.P.*, (1981) 3 S.C.R. 294, it was held that in interpreting items in statutes like the Excise Act or Sales Tax Acts, whose primary object is to raise revenue, and, for that purpose to classify diverse products, articles and substances, resort should be had not to the scientific and technical meaning of the terms or expressions used, but to their popular meaning, i.e. the meaning attached to those products, substances and articles by those dealing in them. In this context, the Canadian Exchequer Court case in *King* v. *Planters Co.*, (1951) C.L.R. (Ex) 122 and the U.S. Supreme Court decision in *Two Hundred Chests of Tea*, (1824) 6 L. Ed. 128 are also cited. They emphasise that in respect of tariff items, commercial understanding should preferred. The Legislature does not suppose our merchants to be naturalists or geologists or botanists.

10.13 Sales tax law : classification of goods

In regard to sales tax laws also, it has been held that resort should be had not to the scientific and technical meaning of the terms and expressions, but to their popular meaning, i.e. to the meaning attached by those dealing in them. In the absence of a statutory definition, the meaning in common parlance or commercial parlance has to be adopted and, if there is no evidence forthcoming about the meaning of a term in common parlance, then the dictionary meaning of the goods to be clarified will be made use of. *Ram Avtar Budhan Prasad* v. *A.S.T.O. Akola*, A.I.R. 1961 S.C. 1325; *Commissioner of Sales Tax, U.P.* v. *Jaswant Singh Charan Singh*, A.I.R. 1967 S.C. 1454; *Indo International Industries* v. *Commissioner of Sales Tax, U.P.*, A.I.R. 1976 S.C. 1418.

Illustrations

(i) The expression "hosiery" covers all knitwears, such as socks, banians and mufflers. *P. Kanniappan* v. *State of T.N.*, (1986) 61 S.T.C. 25; *Jaipur Hosiery Mills* v. *State of Rajasthan*, A.I.R. 1971 S.C. 1330. *Laxmi Stores* v. *S.T.O.*, (1983) 53 S.T.C. 244 (All.).

(ii) The expression "electrical goods" does not cover wet storage batteries sold separately from cars. *C.S.T.* v. *Dawar Bros.*, (1986) 61 S.T.C. 35 (M.P.).

(iii) The expression "paper" does not include ammonia paper, or ferro paper, used for preparing site plans. *C.S.T.* v. *Macneill & Barry Ltd.*, (1986) 61 S.T.C. 76 (SC).

(iv) The expression "varnish" does not include armature coil winding oil, which is used only as an adhesive and not for polishing. *Mariamman Industries* v.

State of T.N., (1986) 61 S.T.C. 358 (Mad.).

(v) The expression "cosmetics & toilet requisites" includes "Roshan Sheetal Tail", used for treating mental weakness etc. *C.S.T. v. Raj & Co.*, (1986) 62 S.T.C. 76 (All.).

(vi) The expression "electrical goods" must be construed as per ordinary parlance and covers electrical furnaces used for heat treatment in electrical and ceramic industry. *Simplicity Engineers v. C.S.T.*, (1986) 62 S.T.C. 267 (Del.).

(vii) The expression "medicine and pharmaceutical preparations" includes "catguts-sutures", used in surgical treatment to prevent decay and to control haemorrhage, because "drug" as defined includes all medicines for internal or external use of human beings or animals in the diagnosis, treatment or mitigation or prevention of disease. *C.S.T. v. Allied Surgical Emporium*, (1986) 63 S.T.C. 331 (All.).

CHAPTER ELEVEN

TRANSACTIONS TAXABLE

11.01 Taxable transaction (sales tax)

(i) Sales or purchases in respect of which there is no liability to tax imposed by statute, and on which the legislature cannot impose liability, cannot be included in the calculation of turnover for the purpose of assessment, and the exact sum which the dealer is liable to pay must be ascertained, without any reference whatever to the same.

(ii) But where exemptions are granted by statute for certain goods from sales tax, the transactions relating to them are included in the gross turnover (subject to deductions) for calculating sales tax. *A.V. Fernandez v. State of Kerala*, (1957) 8 S.T.C. 561 (SC); *Ahmed Khan & Sons v. Commercial Tax Officer*, (1986) 63 S.T.C. 104 (Cal.).

11.02 Concept of sale

By virtue of the Constitution (46th Amendment) Act, 1982, tax on sale of goods is given a wide connotation. Article 366 (29A) reads -

> "(29A) 'tax on the sale or purchase of goods' includes-
>
> (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
>
> (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

"(c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration;

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

CHAPTER TWELVE

TIME AND PLACE

12.01 Time of taxability for customs duty

(a) For customs duty, being charged on import, it is necessary that the goods in question must be chargeable to duty on the date of import. *Universal Imports Agency* v. *Chief Controller of Imports and Exports*, A.I.R. 1961 S.C. 41. This position also governs the rate of tax. *Synthetics & Chemicals Ltd.* v. *S.C. Coutinho*, (1981) 8 E.L.T. 414 (Bom.); *Orient Paper Mills Ltd.* v. *Union of India*, (1978) 2 E.L.T. 328.

(b) If there is no *initial chargeability* of the particular goods on the date of *import*, by reason of -

(i) exemption given by statute, or
(ii) exemption given by notification, or
(iii) the wording of the tariff item,

then the goods would not be liable to customs duty merely because the exemption is subsequently withdrawn. *Synthetics & Chemicals Ltd.* v. *S.C. Coutinho*, (1981) 8 E.L.T. 414 (Bom.); *M.S. Sawhney* v. *Sylvania and Laxman*,/(1975) 77 B.L.R. 880.

(c) Customs authorities cannot, by arbitrarily postponing the date of clearance, levy a higher rate of import duty which might have been imposed in the meantime. *Assistant Collector of Customs* v. *Dulex Clock Co.*, A.I.R. 1972 S.C. 1747; *Orient Paper Mills Ltd.* v. *Union of India*, (1978) 2 E.L.T. 328.

12.02 Section 15, Customs Act

The statutory provision on the subject is section 15, Customs Act, 1962 reading as under:-

> "15. (1) The rate of duty and tariff valuation, if any, applicable to any imported goods shall be the rate and valuation in force -
>
> (a) in the case of goods entered for home consumption under section 46 on the date on which a bill of entry in respect of such goods is presented under that section;
>
> (b) in the case of goods cleared from the warehouse under section 69 on the date on which the goods are actually removed from the warehouse;
>
> (c) in the case of any other goods, on the date of payment of duty;
>
> provided that if a bill of entry has been presented before that date of entry inwards of the vessel by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards.
>
> (2) The provisions of this section shall not apply to baggage of goods imported by post."

12.03 Actual clearance date

Where there is no arbitrary postponement of clearance by the customs authorities, the provisions of section 15(1)(b), Customs Act apply so as to empower the authorities to impose duty at the rate prevailing on actual clearance date. *Prakash Cotton Mills Ltd.* v. *B. Sen*, (1979) 4 E.L.T. 241 (SC).

12.04 Entry into territorial waters

For the purpose of calculating the rate of duty leviable on goods imported, the rate of duty applicable to such imported goods is the rate prevailing on the dates mentioned in section 15, Customs Act. The date for calculating the rate of duty is not the date when the ship carrying the goods enters the territorial waters, but is the date in the context of various circumstances specified in section 15, Customs Act; *Jain Shudh Vanaspati Co. v. Union of India*, (1983) 3 Comp. L.J. 129 (Del.): (1983) 14 E.L.T. 1688.

CHAPTER THIRTEEN

RATES

13.01 Rates

Rates of tax are an essential part of the process of taxation. So far as the narrow aspect of statutory interpretation goes, the only statutory provision is that contained in the General Clauses Act, 1897 to the effect that where an Act lays down duty on goods of certain quantity to be levied at a particular rate, duty as calculated on that rate is leviable on goods of a different quantity. This may sound to be obvious, but was necessary to obviate technical objections.

13.02 Practical problems

Practical problems arise when the legislature does not itself lay down the rate of tax, but leaves it to be fixed by a delegate - a question discussed in a subsequent Chapter[1].

13.03 Delegation regarding rates

The power to tax is a legislative function and its essence cannot be delegated. *Rajnarain* v. *Chairman, Patna Admn.*, (1955) 1 S.C.R. 290. The rate of tax may be prescribed by the legislature or may be left to another authority, provided the policy is laid down in the parent Act. *Corporation of Calcutta* v. *Liberty Cinema*, A.I.R. 1965 S.C. 1107; *Devi Das* v. *State of Punjab*, A.I.R. 1967 S.C. 1895.

---

1 Chapter 17, Infra

13.04 Maximum rate: fixation in parent Act

(a) The legislature may fix a maximum rate and authorise the executive to lay down the actual rate of tax. *Sita Ram* v. *State of U.P.*, A.I.R. 1972 S.C. 1168.

(b) Where the delegation of fixing the rate is in favour of a local authority but the maximum limit is not laid down in the parent Act, the delegation is nevertheless valid, provided the delegate is given guidance as to exercise of the power. *Devi Das* v. *State of Punjab*, A.I.R. 1967 S.C. 1895; *Sita Ram* v. *State of U.P.*, A.I.R. 1972 S.C. 1168; *Delhi Municipality* v. *B.G.S. & W. Mills*, A.I.R. 1968 S.C. 1232, 1244, 1247, 1254; *Avinder* v. *State of Punjab*, (1979) 1 S.C.C. 137, paragraphs 23-24.

13.05 Classes of goods

Rates to be charged in respect of different classes of goods may be delegated, if policy is laid down. *Babu Ram* v. *State of Punjab*, A.I.R. 1979 S.C. 1475. In *Corporation of Calcutta* v. *Liberty Cinema*, A.I.R. 1965 S.C. 1107: (1965) 2 S.C.R. 477, section 548(2), Calcutta Municipal Act, 1951 authorised the Corporation to levy licence fee "at such rate as may from time to time be fixed by the Corporation". The majority of the Supreme Court held it to be licence fee and also upheld the delegation on the ground that needs of the taxing body for carrying out its functions under the statute for which alone the taxing power was conferred on it, afforded sufficient guidance. The case of *Delhi Municipality* v. *Birla Cotton Spg. & Wvg. Mills*, A.I.R. 1968 S.C. 1232 spells out some of the needed safeguards.

13.06 Selection of goods

A provision in a Municipal Act -

(a) imposing octroi on certain goods, and

(b) giving power to impose it on other articles,

is valid as conditional legislation. *Bangalore W.C. & S. Mills* v. *Corporation of Bangalore*, A.I.R. 1962 S.C. 1263, 1266.

CHAPTER FOURTEEN

EXEMPTIONS

14.01 Operation

An exemption from tax is operative, even if the tariff entry in the notification is not accurate (i.e. not applicable to the goods exempted). *Jain Engineering Co. v. Collector of Customs*, (1987) 14 E.C.C. 141 (SC).

14.02 Exemption and import regulations

Exemption cannot be taken away by provisions in project import regulations. *T.N. Newspapers v. Appraiser*, (1987) 15 E.C.C. 6 (Mad.).

14.03 Excise duty

Excise duty can be levied only on "manufacture", i.e. on a process which results in the production of "goods". Laying of pipes is not "manufacture". *Union of India v. D.C.M.*, (1963) Suppl. 1 S.C.R. 580.

14.04 Tax exemptions by notification

The Calcutta High Court in *I.T.C. India v. Union of India*, (1988) 25 Ind. Jud. Rep. (Cal.) 179, has held that a tax exemption notification has to be construed strictly and all its ingredients properly satisfied, before the exemption can be claimed. Citizens cannot claim the benefit of ambiguity in the exemption notification. It may be mentioned that this principle has been laid down by the Supreme Court in some cases. *C.I.T. v. Ramkrishna Deo*, A.I.R. 1959 S.C. 239, 241, 242; *Atkot Municipality v. Manilal Manekji*, A.I.R. 1967 S.C. 1201, 1204; *Commissioner*

of Wealth Tax v. *Officer in charge, Court of Wards*, A.I.R. 1977 S.C. 113, 117.

A notification which exempts from customs duty "internal combustion piston engines and parts thereof" has the effect of exempting not merely all parts, but also one or more parts. This is so, even if the description in the tariff does not make a reference to parts. *General Engineering Co.* v. *Collector of Customs, Bombay*, (1987) 32 E.L.T. 3 (SC).

14.05 Exemptions by incorporation

Goods exempt by an entry in the relevant schedule, or exempt by notification, have come up for judicial interpretation. Where a commodity is exempted from sales tax by reference to its definition in another statute, only the definition in the other statute applies. Thus, the Kerala Sales Tax Act, 3rd Schedule, entry No. 5 exempted sugar from tax. Sugar was defined by incorporation, i.e. by referring to the Central Excise & Salt Act, 1944, First Schedule, entry No. 1. It was held that "sugar" included imported sugar. *State Trading Corporation* v. *Assistant Commissioner*, (1986) 61 S.T.C. 190 (Ker.). Hence, it was exempt from sales tax.

14.06 Scope of exemption

The Delhi Sales Tax Act, 3rd Schedule, entry 17 (exempted goods) reads as under:-

> "agricultural implements including chaff cutters and Persian wheels or part thereof and electric motors including monoblock pump sets of 3 to 7.5 H.P."

The question arose whether all electric motors are exempt or only those upto 7.5 H.P. The High Court

held that only the latter are exempt, because the exemption was intended for motors used in agriculture. *Commissioner of Sales Tax* v. *Siemens India Ltd.*, (1986) 61 S.T.C. 194 (Del.).

CHAPTER FIFTEEN

REFUND AND DRAWBACK

15.01 Mistake of law

Some areas of litigation against the Government in India have been unnecessarily rendered obscure by misconceptions, errors and wrong approaches on basic legal principles. The most notable example is the law relating to recovery of taxes levied illegally. Initially, it used to be taken for granted that money paid under mistake of law cannot be recovered, and therefore money paid under mistake of law as tax also remains irrecoverable, as a branch of the general principle relating to mistake of law.

15.02 Doctrines in contracts and in constitutional law

The doctrine that mistake of law gives no cause of action was evolved in the realm of the law of contracts and seems to have owed its origin to the so-called "presumption" that every citizen knows the law, and that if something is done in ignorance of law, it can neither be pleaded as a ground for excuse from criminal liability (for an act which is otherwise punishable), nor can it be made the basis of claim in civil proceedings. Added to this was the common law rule that the Crown (or the State) could not be sued. This rule of English constitutional law somehow came to be imported in India, so that it came to be doubted whether a citizen can legally seek refund of a tax purporting to be levied under the authority of law, but really going beyond what the law has authorised the State to levy.

15.03 Statutory clauses ousting judicial review

A further complication was introduced by the fact that in most taxing enactments, the legislative practice has been to insert "protection clauses" or "privative" clauses ousting the jurisdiction of courts. Leaving aside narrowly drawn provisions imposing time limits for the recovery of claims, these "ouster" clauses take one of the following three forms:

(i) Bar of suit - The statute may provide as under:-

> "No suit, prosecution or other legal proceeding shall lie for anything in good faith done or intended to be done under this Act."

This is now a formula almost invariably used in Central Acts. The object of a provision in this form is to override the right of suit conferred (or at least recognised) by section 9 of the Code of Civil Procedure, 1908.

(ii) Sometimes, the ouster clause (i.e. the clause ousting the jurisdiction of civil courts) makes the decision of a specified statutory tribunal or other body "final". The most well known example is section 7 of the Central Excises and Salt Act, 1944 which reads as under:-

> "Every order passed in appeal under this section shall, subject to the power of revision conferred by section 36, be final."

The principal object of a provision in this form is to bar further appeal or revision. But it may raise the question whether a civil suit to challenge the decision in question is also barred.

(iii) Finally, the statutory ouster clause

may be in the following manner:-

> "No order made or deemed to have been made under this Act shall be called in question in any court."

The great question that arises is this: do these clauses of this nature bar judicial review totally, and if not, what is the "residue" of reviewing power which the courts still possess, either in their ordinary capacity or when exercising writ jurisdiction? The position in this regard is nebulous.

15.04 The confusing picture

Confusion on the subject of recovery of taxes levied illegally has arisen because of misconceptions derived from more than one source, namely, -

(i) the law of contracts (or law of restitution) and its rule relating to mistake of law;

(ii) constitutional law relating to sovereign immunity for illegal acts in national law;

(iii) statutory ouster clauses.

15.05 Constitutional right: law and jurisdiction

For some time, the anomalous rules mentioned above continued to dominate Indian judicial approach. Similarly, the unsatisfactory statutory "ouster" clauses mentioned above also used to be regarded as sacrosanct. The position has undergone one important modification during the last few years. As the scope of judicial review came to be enlarged, doubts came to be felt regarding the vitality of statutory ouster

clauses, as also regarding the constitutional validity of common law rules against seeking refund of "illegal" taxes. The right to seek redress against an illegal tax is not directly given the status of a fundamental right, as such, in the Constitution. The right to property is also no longer a fundamental right. But the Constitution does give protection against illegal taxes by a specific provision in article 265. Besides this, article 300A (newly inserted) provides that a person shall not be deprived of property, save by the authority of law. The full significance of these articles has not yet come to be unfolded. It is often seen that lawyers challenging illegal levy, assessment or realisation of taxes of various kinds, submit before the court heavily loaded citations of case law as to whether there is an "error of law" or "error of jurisdiction". The former (according to the earlier view) was not a ground of judicial review unless the error was "apparent on the face of the record". The latter (error of jurisdiction) has always been regarded as a proper ground of judicial review. Even this distinction lost much of its importance after the well known pronouncement of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission*, (1969) 2 W.L.R. 163. According to Lord Diplock, this decision "renders obsolete the technical distinction between errors of law which go to jurisdiction and errors of law which do not". [Lord Diplock, "Administrative Law Judicial Review Reviewed" (1974) 33 Cambridge Law Journal 233, 234]. How far the English ruling has been followed in India is a matter into which one need not go. So far as taxation goes, the scope for judicial review of a

tax illegally "levied" is clear and beyond doubt, in the light of article 265 of the Constitution.

15.06 The citizen, the assesses and the State.

A specific question which has recently been occupying the attention of courts in India is this. If -

(a) a person has paid a certain amount as tax to the State, but

(b) it is later discovered that the tax was not payable in law, and

(c) that person claims refund from the State,

(d) can the State contend that it will not refund the tax because the person to whom it would be refunded will keep it instead of passing on the benefit of refund to the citizen (from whom it may have been collected)?

The controversy has been created because a shade of view has gathered ground, that if the person who paid the tax to the State is given refund in such circumstances, then he would get "unjust enrichment". Some misconception is also created by the Supreme Court judgment in *State of M.P. v. Vyankatlal*, A.I.R. 1985 S.C. 901.

15.07 The basic principle regarding third person's right.

The matter needs to be examined, first, on basic principles and secondly, in the light of an

important judgment of the Bombay High Court on the subject, namely *R. Parthasarthy, Asst. Collector of Central Excise* v. *Dipsi Chemicals Private Ltd.*, (1987) 12 Reports (Bom.) 508, judgment dated 15 September, 1987. On principle, if the State has illegally levied a tax, it is bound to refund it to the party from whom the amount of tax had been collected. It cannot take the plea that the person to whom the tax is to be refunded under the eventual decree will not pass on the benefit. As a matter of general law, in a litigation between A and B, the position of a third party cannot be pleaded as the basis of a defence. It is on this principle that a person who has trespassed over any premises cannot plead the title of a third person (*jus tertii*). Similarly, a person who has taken goods on hire from another cannot refuse to deliver them back to the latter by taking the plea that the goods belong to a third person. The person so refusing would be guilty of the tort of "conversion".

15.08 Procedural Law

As a matter of procedural law also, it may be stated that the court is concerned primarily with the parties before it. The range of controversy before a court is strictly limited to the rights and liabilities of the parties before it. The whole law of procedure is structured on this basic premise. Important topics of the law of civil procedure, such as the framing of issues, the binding effect of judgments, the law of *res judicata* and the persons against whom executability of the decree can be claimed - all have their scope and operation regulated by two basic principles:

(i) The court is exclusively concerned with

---

1 See para 15.09 infra

the parties before it, because it sits only to determine the *lis* presented to it.

(ii) The case of a party before the court must rise or fall according to the merits of that party's claim.

15.09 The Bombay case

In the Bombay case of *R. Parthasarathy* v. *Dipsi Chemicals Private Ltd.*, (1987) 12 Reports (Bom.) 508, the proposition was re-iterated that where excise duty is demanded and paid on a mistaken view of the law and the plaintiff claims refund from the State, the State cannot take the plea that if the amount was ordered to be paid to the plaintiffs, then the plaintiffs would be "unjustly enriched", because (according to the State) the plaintiffs themselves had collected the amount which had been paid to the Excise Department and if the amount was ordered to be repaid to the plaintiffs, the plaintiffs would retain the same without there being any obligation on them to refund the same to the persons who had originally paid the amount. The High Court of Bombay, in a very learned and convincing judgment pronounced by Mr. Justice R. A. Jahagirdar, rejected the contention. The High Court (in a Division Bench ruling) noted that the law on the subject had been reviewed by one of the members of the Bench in an earlier judgment. *Parle Products Ltd.* v. *Union of India*, 21st July, 1986, (1987) 30 E.L.T. 180 (Jahagirdar, J.). The earlier Single Judge ruling had held that the amount by way of excise duty which is collected without the authority of law, must be refunded to the person from whom the same is collected. The doctrine of unjust enrichment cannot be put up as a defence to a claim made on behalf of a citizen or company, against the State, which has collected the tax without the authority of law. The Single Judge had also held that the Supreme Court judgment in *State of M.P.* v.

Vyankatlal, A.I.R. 1985 S.C. 901, had not reviewed the theory of unjust enrichment. The same view had been taken in a subsequent Division Bench ruling of the Bombay High Court [*Rapidur (India) Ltd.* v. *Union of India*, decided on 16th October, 1986, (1987) 27 E.L.T. 222 (Bom.) (D.B.)] and also in another Division Bench ruling [*S.S. Miranda Ltd.* v. *Union of India*, decided on 27th August, 1987 (Bharucha & Tipnis, JJ.)].

In the latest Bombay judgment of *R.Parthasarathy* v. *Dipsi Chemicals*, Mr. Justice Jahagirdar pointed out that the Supreme Court judgment in *D. Cawasji & Co.* v. *State of Mysore*, A.I.R. 1975 S.C. 813 also did not lay down a contrary law and this had been held in *Maharashtra Vegetables Products* v. *Union of India*, judgment dated 20/21st June, 1980 (1981) E.L.T. 468.

The judgment of Mr. Justice Jahagirdar contains the following useful exposition of the law:-

> "It may not be out of place to briefly mention the principle on which the courts grant relief to the persons from whom taxes have been recovered by the State without the authority of law. The State cannot levy any tax without the authority of law. When, however, the State or the departments of the State, make a demand upon a manufacturer, asking the latter to pay excise duty on a particular product and at a particular rate, the latter has two options. If he does not agree with the demand, he can challenge the same by adopting appropriate proceedings. If, however, he has no dispute in the light of the law understood by him about the nature and extent of the demand made on him, he complies with the demand. If it is later discovered that there was a mistake of law in the demand and the payment of the duty, then naturally he is entitled to ask the person who has collected

"the duty without the authority of law to refund the same. In such a case, one cannot see how the person or the authority which has collected the duty without the authority of law can contend that the amount will not be refunded to the person from whom the same is collected. It is not as if that the person who has collected from his customers and paid it to the State has done so willingly. He has paid the amount of excise duty to the State and has done so willingly. He has paid the amount of excise duty to the State because he is under a compulsion to do so. If he refuses, penal consequences would follow. It is, therefore, unintelligible as to how the State can contend that though it has collected the duty illegally or without the authority of law, it will not refund the same to the person from whom it has collected and who has paid under the compulsion of law, on the ground that the amount, if refunded, will be retained by that person."

15.10 Section 72, Contract Act

In the above dicta of the Bombay High Court, it has been particularly emphasised that money paid as tax is money paid under compulsion. This emphasis was very relevant, because it had been argued before the High Court (on behalf of the State) that the money in question had not been paid by the company "under protest" and was a voluntary payment, outside the scope of section 72, Indian Contract Act. Section 72 reads as under:-

"72. A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it."

As the High Court pointed out, however, the amount is paid under compulsion of law and is therefore recoverable, assuming that the tax had been

levied or collected illegally.

15.11 Unjust enrichment

Refund thus cannot be withheld merely on the ground that the assessee, who has collected the tax from consumers, would be "unjustly enriched" if the tax illegally levied is refunded to him. *Arphy Incorporated* v. *Union of India*, (1987) 31 E.L.T. 627 (Bom.). Of course, statutory provisions can provide to the contrary.

15.12 Drawback: eligibility

"Drawback" arises when imported goods are re-exported. For claiming duty drawback on exported goods, export is enough. It is not necessary that the goods must have reached the destination. *Colour Chem ltd.* v. *Collector of Customs, Bombay*, (1986) 25 E.L.T. 402 (CEGAT Tribunal, West Regional Bench, Bombay). In the above case, the goods were, in fact, loaded on the ship and the ship left for the destination. At the destination, the goods were not landed, presumably because they were lost or misplaced. But the goods were not brought back to India. It was held that neither section 75, Customs Act, 1962 nor the duty drawback rules specifically require that the goods should have reached the foreign destination. The exporter is not bound to prove offloading at a foreign port.

15.13 Limitation

In *Salonath Tea Co. Ltd.* v. *Superintendent of Taxes, Nowgong*, (1988) 2 Comp. L.J. 25, 33, 34 (SC) (judgment dated 18 December, 1987, delivered by Sabyasachi Mukharji and S. Ranganathan, JJ.), the Supreme Court dealt with limitation for recovery of

illegal tax. Re-iterating the view taker. earlier in *Shiv Shankar Dal Mills* v. *State of Haryana*, (1980) 1 S.C.R. 1170, Sabyasachi Mukherji, J. took the view that there was no law of limitation for public bodies sued for returning a tax recovered wrongly. "..... ... it appears to us that this was a tax realised in breach of the section, the refund being of the money realised without the authority of law. The realisation is bad and there is a concomitant duty to refund the realisation as a corollary of the *constitutional inhibition* that should be respected unless it causes injustice or loss in any specific case or violates any specific provision of law." The other Judge Mr. Justice S. Ranganathan did not go into the question of limitation as a defence to writ petitions since, in the present case, even on the basis of article 113 read with section 23, Limitation Act, 1963, the suit was within time, having been filed within 3 years of the date on which plaintiff came to know of the illegality of the tax.

CHAPTER SIXTEEN

DOUBLE TAXATION

16.01 Interpretation

The subject of double taxation presents interesting problems of interpretation. There is no constitutional bar against double taxation. The fact that the same commodity comes to be taxed twice is no conclusive objection to the legality of taxation. But, as a matter of presumption, courts act on the principle that the legislature does not intend such double taxation. Clear words can of course, displace this presumption.

16.02 Double taxation: sales tax

As regards sales tax, once a particular turnover in the hands of an agent has been subjected to tax, it is not possible to levy tax on the same turnover in the hands of the principal. *State of Madras* v. *Pothuri Srinivasulu Chetty*, (1954) 5 S.T.C. 202.

CHAPTER SEVENTEEN

DELEGATED POWERS

17.01 Taxation and subordinate legislation

(1) No tax can be levied by statutory instrument unless the parent Act authorises its imposition. *Gopal Narain* v. *State of U.P.*, A.I.R. 1964 S.C. 370, 376.

(2) A Municipal rule, regulation or, bye law cannot transgress the limitations imposed on the State legislature. *Jothi, Timber Mart* v. *Calicut Municipality*, A.I.R. 1970 S.C. 265.

(3) Procedurally also, the subordinate legislation must conform to the parent Act. *Jothi, Timber Mart* v. *Calicut Municipality*, A.I.R. 1970 S.C. 265.

(4) Subordinate authority cannot add to the list of taxable commodities. *Jothi Timber Mart* v. *Calicut Municipality*, A.I.R. 1970 S.C. 265, 266.

(5) Sanction of the specified authority (if so required by the parent Act) should be obtained before making subordinate legislation. *Ghulam* v. *State of Rajasthan*, A.I.R. 1963 S.C. 379, 384.

(6) Retrospective effect cannot be given without specific authority. *I.T.O.* v. *Ponnoose*, A.I.R. 1970 S.C. 385, 388.

(7) Charges for "service" authorised by the parent Act should not be used as authorising taxation. *Daymond* v. *Plymouth City Council*, (1976) A.C. 609.

17.02 Delegation: Validity

Essential legislative function cannot be delegated. *Khambhalia Municipality* v. *Gujarat State*, A.I.R. 1967 S.C. 1048; *Harakchand* v. *Union of India*, A.I.R. 1970 S.C. 1453. Taxation is a legislative function. *Rajnarain* v. *Chairman, Patna Admn.*, (1955) 1 S.C.R. 290. Power to make exemptions cannot be delegated without proper guidelines. *Dwarka Prasad* v. *State of U.P.*, A.I.R. 1954 S.C. 224.

17.03 Rate

The Legislature must -

(a) prescribe the rate, or

(b) lay down policy for the fixation of rate of tax.

Corporation of Calcutta v. *Liberty Cinema*, A.I.R. 1965 S.C. 1107; *Devi Das* v. *State of Punjab*, A.I.R. 1967 S.C. 1895.

17.04 Elasticity

(a) The Legislature may fix the maximum rate and authorise the executive to impose tax within the maximum.

(b) If the parent Act does not fix the maximum, it must give guidance or lay down the policy [*Avinder* v. *State of Punjab*, (1979) 1 S.C.C. 137, paragraphs 23-24; *J.R.G. Mills Assn.* v. *Union of India*, A.I.R. 1970 S.C. 1589, 1594] or so frame the statute that the delegate fixes the rate with Government approval or after consulting the local inhabitants. *Delhi Mun.* v. *B.C.S. & W. Mills*, A.I.R. 1968 S.C. 1232, 1247.

17.05 Details

Details of taxing legislation can be delegated, such as persons or commodities or transactions to be taxed or rates for different classes of goods. *W.I. Theatres* v. *Municipal Corporation*, A.I.R. 1959 S.C. 586· *Hira Lal* v. *State of U.P.*, A.I.R. 1973 S.C. 1034; *Babu Ram* v. *State of Punjab*, A.I.R. 1979 S.C. 1475.

CHAPTER EIGHTEEN

MISCELLANEOUS

18.01 Public Sector Corporations

Public sector corporations are not immune from taxation. They are not "State" for the purpose of article 289 of the Constitution. *Andhra Pradesh State Road Transport Corporation* v. *I.T.O.*, (1964) 52 I.T.R. 524 (SC). American view to the contrary - *Mark Graves John* v. *People of the State of New York*, (1939) 83 Law Ed. 927 - has not been followed in India.

18.02 Excise licence whether property

A Central excise licence is a "property" within article 300A of the Constitution. Even if it is a personal licence (section 52, Easement Act) the licensee cannot be deprived of it without notice. Amendment of the licence on the ground of alleged formation of partnership without notice is illegal. "It is no consolation to say that neither the Act nor the rules provide for notice. It is not a mere matter of form, but substance, in relation to the deprivation of property or privilege." *K. Arumugaswamy* v. *Supdt. Central Excise, Sivakasi*, (1986) 26 E.L.T. 518 (Mad.).

18.03 Legal fictions in taxation laws

The word "deemed" is often used to create legal fictions, though it may be used for other purposes also (e.g. to include what is uncertain or to give an artificial construction). *Consolidated*

Coffee Ltd. v. *Coffee Board*, A.I.R. 1980 S.C. 1468. Legal fictions are, in general, to be limited to the purposes in view. *Bengal Immunity Co.* v. *State of Bihar*, A.I.R. 1955 S.C. 661. The principle has been applied in taxation enactments also. See the undermentioned cases:-

(1) *C.I.T.* v. *Bombay Trust Corporation*, A.I.R. 1930 P.C. 54.

(2) *Radhakissen* v. *Durga Prasad*, A.I.R. 1940 P.C. 167.

(3) *A.I.T.O.* v. *Alfred*, A.I.R. 1962 S.C. 663.

(4) *I.T. Commissioner* v. *Amarchand*, A.I.R. 1963 S.C. 1448.

(5) *C.I.T.* v. *James Anderson*, A.I.R. 1964 S.C. 1761.

(6) *C.I.T. Madras* v. *Express Newspapers Ltd., Madras*, A.I.R. 1965 S.C. 33.

(7) *Cambay Electric Supply Industrial Co.* v. *C.I.T. Gujarat*, A.I.R. 1978 S.C. 1099.

18.04 Meaning of words

The word "plant" is not confined to things which perform mechanical operations or process: The word covers all basic tools of trade. *Scientific Engineering House* v. *C.I.T.*, (1986) 157 I.T.R. 86, 96 (SC). The assessee had paid a sum of money to a foreign collaborator for certain "documents" (manufacturing drawings, designs, charts etc.). The assessee claimed depreciation for the same, on the ground that the documentation so acquired was "plant". The Income Tax Department treated it as capital expenditure for acquiring technical know-how. But

the Supreme Court accepted the contention of the assessee. Its reasoning was as under:-

> "Plant would include any article or object, fixed or movable, live or dead, used by a businessman for carrying on his business and it is not necessarily confined to an apparatus which is used for mechanical operations or processes or is employed in mechanical or industrial business. In order to qualify as plant, the article must have some degree of durability."

18.05 Import licence and customs authority

In *Shivshankar Tilakraj* v. *Union of India*, (1987) 28 E.L.T. 342 (Bom.), the Bombay High Court has held that customs authorities are not empowered to investigate into the correctness or otherwise of an import licence given by the import export authorities.

18.06 Modes of recovery

Resort to more than one mode of recovery of tax, simultaneously with another mode, (tax arrears being huge) is not illegal. *McDowell & Co.* v. *Asst. Commissioner, Sales Tax*, (1986) 62 S.T.C. 164 (Mad.).

18.07 Attachable property

Section 60, Code of Civil Procedure (certain property exempt from attachment) does not apply to recovery of tax, unless the relevant statute so provides. Hence, a residential house (exempt from attachment under section 60 as amended in Haryana)

can be attached for the recovery of sales tax. *Kartar Kaur v. State of Haryana*, (1986) 63 S.T.C. 295 (P&H).

18.08 Burden of proof

Where sales tax proceedings are re-opened for re-assessment, the burden of proof lies on the Department. *Gramin Bhalla Udyog Sangh* v. C.S.T., (1986) 63 S.T.C. 465.