IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI „D" BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Suchitra Kamble (Judicial Member)]

ITA No. 966/Mum/2020
Assessment year: 1999-2000

Deputy Commissioner of Income Tax
Central Circle 6(4), Mumbai **..……Appellant**

Vs.

Dilip J Thakkar **……...……Respondent**
12/22B, Acropolis, Malabar Hills
Mumbai 400 006 [PAN: AACPT9000H)

Appearances by:
Sunil Jha *along with* **Neha Thakur,** *for the appellan*
Dilip J Thakkar*, respondent in person*

Date of concluding the hearing : 13/01/2022
Date of pronouncing the order : 16/02/2022

O R D E R

Per Pramod Kumar VP

1. This appeal raises an interesting question, of macro-level importance, about the time limit, under section 149 of the Income Tax Act, 1961, within which notice for reassessment can be issued in respect of "**income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment**", for our consideration. While the stand of the Assessing Officer is that the time limit for reopening the assessments involving income escaping assessment in relation of any asset outside India is sixteen years from the end of the assessment year which is being sought to be reopened, as is said to be the unambiguous position of law under section 149(1)(c) of the Income Tax Act, 1961 *(hereinafter referred to as 'the Act)*, the assessee"s contention, which has found favour with the learned Commissioner (Appeals) by her reading down the law, is that such an extended time limit of sixteen years, as against the limit of six years prevailing as on 1st July 2012 when section 149(1)(c) came into force, will come into play only in respect of the cases which could have been reopened on 1st July 2012 anyway. Effectively, thus, the reopening of assessments, in respect of income relating to assets located outside India, within sixteen years from the end of the relevant assessment year has been held to be effective, in a full-fledged manner, only with effect from 1st April 2022.

2. It is in this backdrop the appellant Assessing Officer has challenged the correctness of the order dated 26th November 2019 passed by the learned Commissioner (Appeals) in the

matter of assessment under section 143(3) read with section 147 for the assessment year 1999-2000.

3. To adjudicate on this appeal, only a very few material facts need to be noted. Mr Thakkar, the assessee before us, is one of the senior-most chartered accountants in Mumbai and he has been in public practice, as such, for well more than sixty years. On 10th August 2011, his residential premises was subjected to a search and seizure operation. Suffice to note, for our purposes, that some of the papers found during this search and seizure operation indicated, amongst other things and according to the Assessing Officer- and we are not really concerned with the correctness of the findings of the Assessing Officer at this stage as we are only examining the reassessment validity aspect, that the assessee, along with one Suryakant Chagganlal Suchak, had invested UK £ 15,00,000 in India Resurgent Bonds issued by the State Bank of India, for non-resident Indians, that the assessee had received UK £ 14,400 from a non-resident, that the assessee had a bank account in HSBC Republic Bank (Suisse) SA *[subsequently renamed as HSBC Private Bank (Suisse) SA]*, Geneva, as a trustee of the Chagganlal Suchak Family Trust, and this account had deposits to the tune of US $ 31,29,878. According to the Assessing Officer, it was also discovered that the seized papers show payments aggregating to UK £ 3,30,400 to the assessee and his family members-namely D J Thakkar, Indira D Thakkar Mitali R Lakhanpal and Deval E Anthony. In the assessee's statement, recorded under section 132, it was accepted that the assessee's father in law. Shri Chagganlal M Suchak had set aside a corpus for the benefit of his children and grandchildren, which was invested in Resurgent India Bonds, and the beneficiaries of this corpus included the assessee's wife and children. The assessee claimed that the legacy so received by him and his family members was duly disclosed in the tax returns but this fact could not be verified due to the non-availability of the related tax returns. There are many nuances to the findings of the Assessing Officer but, as at this stage and for the reasons we will set out in a short while, it is not really necessary to examine those aspects of the matter; suffice to note that it was in this background, on the allegation of income from an asset located outside India that the assessment for the assessment year 1990 2000 was reopened on 27th March 2015. When the challenge to the validity of reassessment came up for adjudication before the learned Commissioner (Appeals), she noted that, as on 1st July 2012, i.e. when enhancement in time limit for reopening assessment from six to sixteen years was introduced in section 149, the assessment had reached finality. This amendment, therefore, could not come to the rescue of the Assessing Officer. In other words, according to the learned Commissioner (Appeals) even though the period for reopening the assessments in case of income from assets located outside India stood increased to 16 years with effect from 1st July 2012, it could only take prospective effect and the assessments having already reached finality will remain unaffected by this amendment. In other words, so far as the assessment years which have become final as on 1st July 2012 in the pre-amendment law, i.e. up to the assessment years 2005-06, could not have been revisited by the Assessing Officer even under the post amendment provision enabling the Assessing Officer to reopen cases up to sixteen years from the end of the relevant assessment year in respect of income escaping assessment with respect to any asset located outside India. The Assessing Officer is aggrieved by this finding, and is in appeal before us.

4. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

5. The law, as it stood at the material point of time, i.e. 27th March 2015, was as follows:

Section 149- Time limit for notice.

(1) No notice under section 148 shall be issued for the relevant assessment year,—

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b) or clause (c);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year;

(c) if four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment.

Explanation.—In determining income chargeable to tax which has escaped assessment for the purposes of this subsection, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section.

(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.

(3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non-resident under section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of six years from the end of the relevant assessment year.

Explanation.—For the removal of doubts, it is hereby clarified that the provisions of sub-sections (1) and (3), as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012.

6. In our humble understanding, the statutory provisions are quite clear and unambiguous. Section 149(1)(c) provides that no notice for reassessment can be issued if "more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment". Therefore, as long as sixteen years from the end of the relevant assessment year have not expired, the reassessment notice is in a case involving income from assets located outside India. As for the retrospective application of this provision, Explanation to Section 149 unambiguously provides that **"the provisions of sub-sections (1) and (3), as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012".** The amendment in Section 149(1), introduced with effect from 1st July 2012, is thus expressly stated to be retrospective in nature, and there is, in our humble

understanding, there is no bar on the validity of the retrospectivity of the taxing statute as long as it is clearly specified to be so. As noted, after referring to numerous judicial precedents, by Justice G P Singh in his oft-quoted treatise „**Principles of Statutory Interpretation (14th Edition- 2021 reprint- ISBN 978-93-5143-965-3; pages 579-580)**", "**The Union Parliament** and the State Legislature have plenary powers of legislation within the fields assigned to them and, subject to the certain constitutional and judicially recognised restrictions, **can legislate prospectively as well as retrospectively**" and that "It is a cardinal principle of construction that **every statute is *prima facie* prospective unless it is expressly, or by necessary implication, made to have a retrospective operation**". What essentially follows that there is no bar on the retrospectivity of a statute, though, in the absence of any express intention to that effect, it is presumed to be only prospective. The validity of a statute being retrospective in effect cannot, as such, be questioned in principle. In any event, it is not open to a forum like this Appellate Tribunal- much less a Commissioner (Appeals), to contest validity of a retrospective amendment in law. Once the statute clearly provides that the amended section 153(1) and (3), as amended by the Finance Act 2012, shall also be applicable to "any" assessment year beginning on or before 1st day of April 2012, it cannot be open to us to hold otherwise. To suggest that this amendment was intended to be prospective in effect would mean that the legislature, which undisputedly has the powers to make amendments with retrospective effect, intended to introduce section 149(1)(c) to take full effect from 1st April 2022- an incongruity by any standard. The interpretation adopted by the learned Commissioner (Appeals) is thus clearly contrary to the specific words of the statute and unambiguous intent of the legislature. We, therefore, vacate the relief, quashing the reassessment proceedings as time-barred, granted by the learned Commissioner (Appeals) and restore the st nd of the Assessing Officer on this point. Our humble understanding is that so far as escaped income from an asset outside India is concerned, any completed assessment can be reopened as long as sixteen years have not elapsed from the end of the relevant assessment year. Admittedly, that is not the position in the present case, as the relevant assessment year was completed on 31st March 2000, and the assessment was reopened on 27th March 2015 The plea of the Assessing Officer is thus indeed well taken.

7. As regards the Hon'ble non-jurisdictional High Court judgment in the case of **Braham Dutt Vs ACIT [(2018) 100 taxmann.com 324 (Del)],** it is important to bear in mind that Their Lordships have construed and inferred the amendment in law to be only prospective in effect, on the ground that the law was not explicitly stated to be retrospective in effect. A careful reading of the judgment does not leave any doubt about this fundamental legal position. It was not the case that Their Lordships noted that the law is retrospective in effect and read down the law on the ground that such a retrospectivity is *ultra vires* or unconstitutional. Quite to the contrary, Their Lordships have proceeded on the basis that there is no specific mention about the amendment being retrospective in effect, and this fact is evident from several observations made by Their Lordships again and again- such as **(a)** "In this case, the interpretation proposed by the revenue has the potential of arming its authorities to re-open settled matters, in respect of issues where the citizen could genuinely be sanguine and had no obligation of the kind which the Revenue seeks to impose by the present amendment. All the more significant is the fact that absent a clear indication, every statute is presumed to be prospective"; **(b)** "In *Govinddas* v. *ITO* [1976] 103 ITR 123 the Supreme Court held that Section 171 (6) of the Income Tax Act was prospective and inapplicable for any assessment year prior to 1st April, 1962, the date on which the Act came into force and observed that…..Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, the retrospective operation should not

be given to a statute so as to take away or impair any existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure", and **(c)** "as the liability to pay tax is computed according to the law in force at the beginning of the assessment year, i.e., the first day of April, any change in law upsetting the position and imposing tax liability after that date, even if made during the currency of the assessment year, unless specifically made retrospective, does not apply to the assessment for that year" [All emphasis supplied by us now]. On several occasions thus, Their Lordships have said that unless a provision is expressly stated to be retrospective in effect, it can only be treated as prospective in effect. There is no, and cannot be any, quarrel on this proposition, but the question relevant to our adjudication is how to interpret the working of section 149(1)(c) in view of the fact that by virtue of Explanation below Section 149(3), Section 149(1)(c) is specifically stated to have a retrospective application. To us, that question poses little difficulty. There is no bar on the legislative powers for the enactment of retrospective legislation. The controversy is only with respect to interpretation of a law as retrospective in effect unless the law specifically states so. Hon'ble Supreme Court's constitutional bench judgment, in the case of **CIT Vs Vatika Township Pvt Ltd [(2014) 367 ITR 466 (SC)]** has also observed that "Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation , and have observed, in respectful concurrence with an earlier decision of Hon'ble Supreme Court on that issues, that "In the case of *CIT* v. *Scindia Steam Navigation Co. Ltd.* [1961] 42 ITR 589, this Court held that as the liability to pay tax is computed according to the law in force at the beginning of the assessment year, i.e., the first day of April, any change in law affecting tax liability after that date though made during the currency of the assessment year, unless specifically made retrospective, does not apply to the assessment for that year" We humbly bow to these well-settled legal propositions. What essentially follows as a corollary to these propositions is that when it is expressly stated to be retrospective, there is no bar on retrospective application of the said provision either. If that be so, and as Explanation below Section 149(3) specifically states the provision to be retrospective in effect, there cannot be any good reasons to hold the section 149(1)(c) to be only prospective in effect. It must be given full effect as visualized and stated by the law itself.

8. In Braham Dutt's case *(supra),* however, there was no occasion to refer to, or take note of, the Explanation below Section 149(3), introduced with effect from 1st April 2012, which categorically made the amendment retrospective by stating that **"(f)or the removal of doubts, it is at this moment clarified that the provisions of sub-sections (1) and (3), as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012".** The section reproduced in the judgment text, as referred to by the parties, missed out on this part of the statutory provision, and it was not brought to the notice of Their Lordships. It is not the position that the said Explanation has been held to be ultra vires or unconstitutional, and there was no occasion to deal with the same. However, that precisely is the legal provision so strenuously relied upon by Shri Jha, learned Commissioner (Departmental Representative). As to what is the nature of the binding force of a non-jurisdictional High Court judgment, we may refer to the following observations in a coordinate bench decision in the case of **Bank of India Vs ACIT [(2021) 125 taxmann.com 155(Mum)]**:

> ……it is also essential to bear in mind that the said judicial precedent is from a non-jurisdictional High Court…….. Let us, in this background, examine the binding nature of this judicial precedent outside Hon'ble Karnataka High Court's jurisdiction. While

dealing with judicial precedents from non-jurisdictional High Courts, we may usefully take of observations of Hon'ble jurisdictional High Court in the case of *CIT* v. *Thana Electricity Co. Ltd.* [1994] 206 ITR 727 (Bom.), to the effect "The decision of one High Court is neither binding precedent for another High Court nor the courts or the Tribunals outside its territorial jurisdiction. It is well-settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect". Unlike the decisions of Hon'ble jurisdictional High Court, which bind us in letter and in spirit on account of the binding force of law, the decisions of Hon'ble non-jurisdictional High Court are followed by the lower authorities on account of the persuasive effect of these decisions and on account of the concept of judicial propriety- factors which are inherently subjective in nature. Quite clearly, therefore, the applicability of the non-jurisdictional High Court is never absolute, without exceptions and as a matter of course. That is the principle implicit in the Hon'ble Supreme Court's judgment in the case of *Asstt. CIT* v. *Saurashtra Kutch Stock Exchange Ltd.* [2008] 173 Taxman 322/305 ITR 227 wherein Their Lordships have upheld the plea that "non-consideration of a decision of Jurisdictional Court or of the Supreme Court can be said to be a mistake apparent from the record . The decisions of Hon'ble non-jurisdictional High Courts are thus placed at a level certainly below the Hon'ble High Court, and it's a conscious call that is required to be taken concerning the question whether, on the facts of a particular situation, the non-jurisdictional High Court is required to be followed. Therefore, the decisions of non-jurisdictional High Courts do not constitute a binding judicial precedent in all cases. To a forum like us, following a jurisdictional High Court decision is a compulsion of law and sacrosanct that way, but following a non-jurisdictional High Court is a call of judicial propriety which is never absolute, as it is inherently required to be blended with many other important considerations within the framework of law, or something which cannot be, in deserving cases, deviated from.

9. Clearly, thus, the Hon'ble non-jurisdictional High Court decisions do not bind us in law in all the situations, as held by our Hon'ble jurisdictional High Court in the case of Thane Electricity Co Ltd *(supra),* and, more so in this case, particularly when Explanation below Section 149(3), which did not come up for consideration before Their Lordships, has explicitly been relied upon by the learned Commissioner (Departmental Representative) before us. The Hon'ble non-jurisdictional High Court judgment, as we have seen in our analysis of legal position earlier in this order, in any event, do not constitute unquestionably binding judicial precedents, which cannot be deviated from, for us. While the views expressed by even non-jurisdictional High Court does deserve utmost respect and reverence, that position is still a step below the unquestionable binding force of law. On the peculiar facts of this case, it is not open to us to disregard the Explanation above below Section 149(3) based on a judicial precedent that had no occasion to even deal with the same. Regarding the Hon'ble Supreme Court's summary dismissal of SLP against the Braham Dutt judgment *(supra),* as relied upon by the assessee, it is only elementary that mere dismissal of an SLP does not amount to a decision on the law. Such a summary dismissal of SLP cannot be treated as a binding precedent under article 141 of the Constitution of India- as has been held by several judgments of Hon'ble Supreme Court time and again, and reiterated by Hon'ble Bombay High Court in the case of **CIT vs Pamwi Tissues Ltd. [(2008) 215 CTR 150 (Bom)].** Nothing, therefore, turns on the dismissal of the SLP either.

10. In all fairness to the respondent, however, the learned Commissioner (Appeals) has not considered many other facets of the matter. These facets significantly influence the outcome of this appeal on merits. We may add that the learned respondent had filed detailed submissions before us, including copies of the trust deed, but then, as there is no adjudication on merits by the learned Commissioner (Appeals), we did not consider it appropriate to deal with the same. In view of the fact that the respondent is a very senior citizen in his eighties, that the assessee's arguments on merits have not been dealt with at all on merits, that the assessee has a prima facie arguable case on merits, and to ensure the matter reaches finality within a reasonable time frame, we deem it fit and proper to direct, as a result of vacating the relief on the ground of reassessment having been quashed, the Commissioner (Appeals) to dispose of the matter on merits at the earliest and in no event later than 180 days from the date of service of this order. We order so.

11. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 16th day of February 2022.

Sd/-
Suchitra Kamble
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 16th day of February, 2022

Copies to: *(1) The appellant (2) The respondent*
(3) CIT (4) CIT(A)
(5) DR (6) Guard File

By order etc

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai