A

INCOME-TAX OFFICER, TUTICORIN

v.

T. S. DEVINATH NADAR & ORS.

October 25, 1967

B [K. N. WANCHOO, C.J., R. S. BACHAWAT, V. RAMASWAMI, G. K. MITTER AND K. S. HEGDE, JJ.]

Indian Income-tax Act, 1922 *as amended by Act* 25 *of* 1953, *s.* 35(5) *—Rectification of partner's assessment consequent on reassessment of firm—Section permitting such rectification in respect of "completed assessment" of partners—Section whether applies to partner's assessments finalised before* 1*st April* 1952.

C

The respondent and his four brothers were partners in a firm carrying on business in gunnies. The assessment of the firm for the year 1943-44 was completed on January 22, 1946 and the share income of each partner was also determined. The assessment of the respondent as an individual on the basis of his share so determined was completed on January 24, 1946. Subsequently the assessment of the firm was reopened by notice under s. 34 of the Indian Income-tax Act, 1922 issued on September 11, D 1952 and re-assessment by including some additional income was made in May 1959. In July 1959 notice under s. 35(5) was served on the respondent for consequential rectification of his assessment as an individual. The rectification was ultimately ordered to be made in August 1959. The respondent filed a writ petition in the High Court for quashing the order. Relying on the decision of this Court in *Second Addl. Income-tax Officer* v. *Atmala Nagaraj* the High Court quashed the impugned order. The Revenue appealed to this Court. The question that E fell for consideration was whether s. 35(5) which was introduced by the Income-tax Amendment Act, 1953 could be used to rectify assessments made before 1st April 1952, the date from which the said amendment came into force. The respondent urged that since the amendment had been brought into force from an anterior date no greater retrospectivity could be given to it.

HELD : (*Per* Wanchoo C.J., Bachawat, Ramaswami and Mitter, JJ.). F The aim of the legislation was to bring into line the assessment of the individual partner with that of the firm. It does not stand to reason that if the assessment of the firm is completed long after that of the individual by reason of proceedings under s. 34 or otherwise the discrepancy in the income of the partner as shown by the assessment of the firm and as an individual should continue or be left untouched, and the obvious and logical course should be to rectify the assessment of the individual on the basis of the final assessment of the firm. [39B]

G On a plain reading of s. 35(5) it appears that the legislature intended that the finding as to the non-inclusion of the proper share of the partner in the profit or loss of the firm in the assessment of the partner should excite the power of rectification. The power is to be exercised whenever "it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the income of the firm." The subject matter of rectification is the completed assessment of a partner in the H firm. This is brought out by the use of the words "when in respect of any completed assessment of a partner in a firm." There is nothing in the section to show that such "completed assessment" must take place after s. 35(5) was brought on the statute book. What must take place to give rise to the power of rectification is the finding on the assessment or

re-assessment of the firm. The finding alone must be made after the section came into force. The finding is to be given effect to or made operative on the 'completed assessment' of a partner. As the mischief sought to be rectified was the discrepancy between the income of the partner assessed as an individual and his income as computed on the assessment of the firm, the legislature must be held to have made the remedy applicable whenever the mischief was discovered. There would have been nothing unjust in making the power of rectification exercisable at any time after the discovery of the discrepancy but the legislature in its wisdom did not think that the power should be used except within a limited period of four years from the date of the final order in the case of the firm. [39D—H] A B

Second Addl. Income-tax Officer v. *Atmala Nagaraj* 46 I.T.R. 609, reversed.

Kanumarlapudi Lakshminarayana Chetty v. *First Additional Income-tax Officer, Nellore*, 29 I.T.R. 419, *Income-tax Officer, Madras* v. *S. K. Habibullah, Madras*, [1962] Supp. 2 S.C.R. 716, *Pardo* v. *Bingham*, L.R. 4 Chancery Appeals 735 and *Ahmedabad Manufacturing and Calico Printing Co. Ltd.* v. *S. C. Mehta*, [1963] Supp. 2 S.C.R. 92, referred to. C

Per Hegde, J (*dissenting*). The assessments of the respondents had become final in the year 1946 and under the law as it stood prior to the enactment of s. 35(5) those assessments could not have been interfered with. Section 35(5) neither expressly nor by necessary implication empowers the Income-tax Officer to reopen assessments which had become final. If the section empowers the reopening of all final assessments of the partners of firm, there was no need to give that provision a partial retrospectivity. [51H; 52A] D

The legislature used the expression "completed assessment" in s. 35(5) to distinguish that class of assessment from assessments which are made final under the Act. By using that expression the legislature intended that the assessment of a partner should not be considered as a final assessment till the assessment of the firm becomes final. In other words the partners' assessment would continue to be tentative till the firm's assessment becomes final. If that be the true interpretation of the expression "completed assessment" then the expression can only apply to assessments of partners made on or after April 1, 1952. The respondents' assessments could not be considered as "completed assessments" within the meaning of that word in s. 35(5). [52F-H] E F

The decision of this Court in *Atamla Nagaraj's* case is correct. Even assuming that s. 35(5) can receive a different interpretation, this Court would not be justified in overruling its previous decision except under compelling circumstances; otherwise confidence of the public in the soundness of the decision of this Court is bound to be shaken. [53C-E]

Bengal Immunity Co. Ltd. v. *State of Bihar & Ors.*, [1955] 2 S.C.R. 603, relied on.

Case law referred to. G

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 2154 to 2158 of 1966.

Appeals by special leave from the judgment and order dated March 27, 1963 of the Madras High Court in Writ Petitions Nos. 1229 to 1233 of 1961. H

S. K. Aiyar and *R. N. Sachthey*, for the appellant (in all the appeals).

T. A. Ramachandran, for the respondents (in all the appeals).

A The Judgment of WANCHOO, C.J., BACHAWAT, RAMASWAMI and MITTER, JJ. was delivered by MITTER, J. HEGDE, J. delivered a dissenting Opinion.

Mitter, J. This group of five appeals by special leave arises out of a common order made under Art. 226 of the Constitution B of the High Court of Judicature at Madras. The appeals involve the interpretation of s. 35(5) of the Income-tax Act, 1922.

The facts in Civil Appeal No. 2154 of 1966 relevant for the disposal of the appeal, taken by way of sample, are as follows. The respondent along with his four brothers were partners of a registered firm carrying on business in gunnies. The assess- C ment of the firm for the year 1943-44 was completed on January 22, 1946 and the share income of each partner was determined at Rs. 8,265/-. The assessment of the respondent as individual was completed on January 24, 1946 wherein was included his income from the partnership just noted. Subsequently, the assessment of the firm was re-opened by proceedings under D s. 34(1)(a) of the Act and a sum of Rs. 90,000/- was added to the income of the firm liable to be brought to tax. The notice under s. 34 was issued on September 11, 1952 and the re-assessment of the firm took place on May 30, 1959. On July 24, 1959 notice under s. 35(5) of the Act was served on the respondent for rectification of his assessment as an individual. The E rectification was ultimately ordered to be made on August 31, 1959. The respondent applied to the High Court for quashing the said order.

When the matter came to be heard by the High Court of Madras, there were already three reported decisions of this Court bearing on the interpretation of s. 35(5) of the Act. In the last F of these decisions, a doubt had been cast as to the correctness of the two earlier decisions but the High Court felt that the decision in *Second Addl. Income-tax Officer* v. *Atmala Nagaraj*(1) being the second decision of this Court in point of time, was fully applicable to the cases before it and in that view of the matter the order of rectification was quashed. Hence these appeals.

G

Before taking note of the earlier decisions of this Court, it would be appropriate to consider the relevant provisions of the Income-tax Act and interpret them as if the matter were *res integra*. If the result leads to a conflict of decisions, we will have to examine the question as to whether the view taken in an earlier case should be adhered to. It is only when this Court finds itself un- H able to accept the earlier view that it would be justified in deciding these appeals in a different way.

(1) 46 I.T.R. 659.

The two sub-sections of s. 35 which call for interpretation are transcribed as follows :

"35. Rectification of mistake.—(1) The Commissioner or Appellate Assistant Commissioner may, at any time within four years from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision under section 33A and the Income-tax Officer may, at any time within four years from the date of any assessment order or refund order passed by him on his own motion rectify any mistake apparent from the record of the appeal, revision, assessment or refund as the case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee :

Provided that no such rectification shall be made, having the effect of enhancing an assessment or reducing a refund unless the Commissioner, the Appellate Assistant Commissioner or the Income-tax Officer, as the case may be, has given notice to the assessee of his intention so to do and has allowed him a reasonable opportunity of being heard :

Provided further that no such rectification shall b made of any mistake in any order passed more than one year before the commencement of the Indian Income-tax (Amendment) Act, 1939.

(2) to (4) . . . . . .

(5) Where in respect of any completed assessment of a partner in a firm it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the income of the firm under section 31, section 33, section 33A, section 33B, section 66 or section 66A that the share of the partner in the profit or loss of the firm has not been included in the assessment of the partner or, if included, is not correct, the inclusion of the share in the assessment or the correction thereof, as the case may be, shall be deemed to be a rectification of a mistake apparent from the record within the meaning of this section, and the provisions of sub-section (1) shall apply thereto accordingly, the period of four years referred to in that sub-section being computed from the date of the final order passed in the case of the firm.

(6) to (10) . . . . . ."

Section 35(5) was brought on the statute book by the Income-tax (Amendment) Act, 1953 (XXV of 1953). Section 1(2) of the Act provided that

A "Subject to any special provision made in this behalf in this Act, it shall be deemed to have come into force on the 1st day of April, 1952."

The Amendment Act contained provisions which show that some of the amendments introduced were to be effective from dates other than 1st April, 1952. Section 19 of the Act of 1953 introB duced sub-sections (5), (6) and (7) of s. 35 of the original Act. Under sub-s. (1) of s. 35 the Income-tax authorities mentioned therein were empowered to rectify mistakes apparent from the record. Such power could, in the case of an Income-tax Officer, be exercised at any time within four years from the date of any assessment order passed by him on his own motion. The section nowC ever imposes a limitation in that the mistake must be in the record of the case itself. As a firm and the individuals composing it are separate entities for the purpose of Income-tax Act, they are assessed separately. Under s. 23(5)(a) of the Act when the assessee is a registered firm and its income has been assessed under sub-s. (1), sub-s. (3) or sub-s. (4) of that section the income-
D tax payable by the firm itself has to be determined and the total income of each partner of the firm including therein his share of the firm's income, profits and gains of the previous year have to be assessed and the sum payable by him on the basis of such assessment has to be determined. In as much however as a mistake discovered in the assessment of the firm was not a mistake apparent from the record of assessment of the individual partner,
E s. 35(1) did not enable the Income-tax Officer to rectify the assessment of the individual partner because of the discovery of the mistake in the assessment of the firm. The judgment of the Andhra Pradesh High Court in *Kanumarlapudi Lakshminarayana Chetty* v. *First Additional Income-tax Officer, Nellore*(1) wherein it was decided that when the mistake discovered in the assessment
F of the firm was not in the record of the individual partner s. 35(1) did not authorise the rectification of such mistakes was upheld by this Court in *The Income-tax Officer, Madras* v. *S. K. Habibullah, Madras*(2). Section 35(5) removes that difficulty. It expressly provides that where it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the in-
G come of the firm under the provisions of the specified sections that the share of the partner in the profit or loss of the firm has not been included in the assessment of the partner or, if included, is not correct, the inclusion of the share in the assessment or the correction thereof will be deemed to be a rectification of a mistake apparent from the record within the meaning of s. 35 so as to make sub-s. (1) of s. 35 applicable to the case of a completed assess-
H ment of a partner in a firm. Whereas under s. 35(1) rectification is only possible within four years from the date of any assessment

(1) 29 I.T.R. 419. (2) [1962] Supp. 2 S.C.R. 716.

order or refund order passed by the Income-tax Officer, the starting point of computation of the period of four years under s. 35(5) is the date of the final order passed in the case of the firm. A

The point which has been canvassed in this case in favour of the respondent is that as the section was brought on the statute book on the 1st April 1952 any mistake anterior to that date cannot be rectified. It was argued that the opening words of the section reading B

> "Where in respect of any completed assessment of a partner in a firm"

go to show that only assessments completed after the introduction of the provision *i.e.* on 1st April 1952 were in the contemplation of the legislature as proper subject for rectification. It was urged that according to the well known canons of construction legislation which impairs an existing right or obligation except as regards matters of procedure, is not to have retrospective operation unless such construction is clear from the terms of the Act itself. This argument was sought to be fortified by a reference to sub-s. (2) of s. 1 of the Income-tax Amendment Act of 1953 on the ground that the legislature was bringing this provision on the statute book as from an anterior date and consequently no greater retrospectivity should be given to it. "The general rule" as Halsbury puts it in Vol. 36, (third edition), page 423 : C D E

> " . . . . . is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or of evidence, are *prima facie* prospective; and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature." F

The law was also succinctly stated by Lord Hatherley, L.C. in *Pardo* v. *Bingham*(1) where on the question as to whether a statute operated retrospectively it was said

> "In fact, we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated." G

Applying the above principles, we find that the aim of the legislation was to bring into line the assessment of the individual partner with that of the firm. It was well known that in many cases a firm's final assessment dragged on for years while the assessments of the individuals composing of it were completed H

(1) L.R. 4 Chancery Appeals 735.

A long before the assessment of the firm itself because in the case of individuals the matter was fairly simple. It does not stand to reason that if the assessment of the firm is completed long after that of the individual by reason of proceedings under s. 34 or otherwise, the discrepancy in the income of the partner as shown by the assessment of the firm and as an individual should con-
B .inue or be left untouched and the obvious and logical course should be to rectify the assessment of the individual on the basis of the final assessment of the firm. Sub-s. (5) of s. 35 is only a step in that direction but the legislature in its wisdom thought it best that assessments of individuals which had taken place before the final order in the assessment of the firm should not be disturb-
C ed except within four years therefrom. Under the Income-tax Act, 1922 a final assessment could not be altered except under proceedings sanctioned by s. 34 or s. 35 of the Act within the limits of time thereby prescribed. Leaving aside for a moment the point of time when sub-s. (5) came into the statute book, on a plain reading of the provision it appears to us that the legislature intended that the finding as to the non-inclusion of the pro-
D per share of the partner in the profit or loss of the firm in the assessment of the partner should excite the power of rectification. The power is to be exercised whenever "it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the income of the firm". The subject matter of rectification is the completed assessment of a partner in a firm.
E This is brought out by the use of the words "where in respect of any completed asssessment of a partner in a firm". There is nothing in the section to show that such "completed assessment" must take place after the provision *i.e.* s. 35(5) was brought on the statute book. What is to take place to give rise to the power of rectification is the finding on the assessment or re-assessment of
F the firm etc. The finding alone must be made after section comes into force. The finding is to be given effect to or made more operative on the "completed assessment" of a partner. As the mischief sought to be rectified was the discrepancy between the income of the partner assessed as an individual and his income as computed on the assessment of the firm, the legislature must be held to have made the remedy, applicable whenever the mischief was
G discovered. There would have been nothing unjust in making the power of rectification exercisable at any time after the discovery of the discrepancy but the legislature in its wisdom did not think that the power should be used except within a limited period of four years from the date of the final order.

H This group of appeals has been referred to a larger Bench than one of the three Judges before whom the matter was opened on May 4, 1967 because of the earlier decisions of this Court. We now proceed to examine these decisions chronologically. In *The*

Income-tax Officer, Madras v. *S. K. Habibullah*(1) the facts were as follows. One Mohiuddin who was a partner in two registered firms submitted returns of his income incorporating therein the estimated share of losses in the two firms for the assessment years 1946-47 and 1947-48. The estimates of the assessee were accepted by the Income-tax Officer who completed the assessment for the two years on February 20, 1950. The assessment of one of the firms for the same years was completed on October 31, 1950 but the proportionate share of the assessee for the losses was computed at much smaller figures. The assessment of the other firm for 1947-48 was completed on June 30, 1951 again for a smaller sum than that estimated by the assessee. The Income-tax Officer started rectification proceedings on May 4, 1953 and ultimately passed an order for rectification on March 27, 1954 after taking into account the share of the losses as computed in the assessment of the two firms. It will be noted at once that the finding about the incorrectness of the losses of the firm as estimated by the assessee as also the completion of his assessment preceded April 1, 1952 and on the view of the section which we have taken it could not be made applicable at all. It was stated in express terms by this Court :

> "The power to rectify assessment of a partner consequent upon the assessment of the firm of which he is a partner by including or correcting his share of profit or loss can therefore be exercised only in the case of assessment of the firm made on or after April 1, 1952."

The decision in *Habibullah's*(1) case therefore in no way conflicts with the view of s. 35(5) which we have taken above. In passing, however, it may be noted that in *Habibullah's*(1) case a reference was made to sub-s. (6) of s. 35 which was introduced in the statute book by s. 19 of the Amendment Act of 1953 at the same time as sub-s. (5). There are certain words in sub-s. (6) which are not to be found in sub-s. (5) and on a contrast between the language used in the two sub-sections it was observed in *Habibullah's*(1) case :

> "When the Legislature under cl. (6) of s. 35 expressly authorised rectification in the circumstances mentioned therein even if the assessment has been completed before the Indian Income-tax (Amendment) Act, 1953, and it made no such provision in cl. (5), it would be reasonable to infer that the Legislature did not intend to grant to the revenue authorities a power to rectify assessments falling within cl. (5) where the firm's assessment was completed before April 1, 1952."

(1) [1962] Supp. 2 S.C.R. 716.

A This reasoning was advanced before us in aid of the argument that sub-s. (5) should have no retrospective operation beyond April 1, 1952. We do not want to express any view as to the interpretation of sub-s. (6) but in our opinion, sub-s. (5) was clearly intended to give retrospective effect to final orders made in the case of the firm by incorporation of the result thereof in B the case of the partner as an individual.

The second decision of this Court is that of *Second Addl. Income-tax Officer* v. *Atmala Nagaraja*(1). In this case the proceedings related to the assessment of the respondent for the assessment year 1950-51. The respondent in one of the appeals was assessed as an individual while in the other appeal tne respondent C was assessed as a Hindu undivided family. The original assessment was completed in both cases on January 22, 1952. The two assessees held shares in two registered firms and the shares from the profits of these firms were included in the assessable ncome of the two respondents. The assessments of the firms were completed by an order dated October 16, 1954 when it was D found that the aggregate shares of income from the two firms in the case of each of the respondents were more than that for what they had been assessed. After starting proceedings under s. 35 an additional demand was made whereupon the respondents moved the High Court of Andhra Pradesh. After referring to *Habibullah's*(2) case and *K. Lakshminarayana Chetty's*(3) case it was said : E

> "The assessment of the respondents was a final assessment before April 1, 1952, and sub-section (5) has not been made applicable to such assessment, either expressly or by implication. It has been given a limited retrospectivity from April 1, 1952, and it was held by this court in the cited case that it was not open to courts F to give more retrospectivity to it. Resort in this case could only be taken to the law as it stood before the introduction of sub-section (5), and as determined already by this court, the record of the firm's assessment could not then be called in aid to demonstrate an error on the record of a partner's assessment. . . . G In our opinion, sub-section (5) could not be used in this case, and the decision of the High Court was right."

With very great respect, we find ourselves unable to concur. As we have already said, sub-s. (5) becomes operative as soon as it is found on the assessment or re-assessment of the firm or on H any reduction or enhancement made in the income of the firm

(1) 46 I.T.R. 609. (2) [1962] Supp. 2 S.C.R. 716.

(3) 29 I.T.R. 419.

that the share of the partner in the profit or loss of the firm had not been included in the assessment of the partner or if included was not correct. The completion of the assessment of the partner as an individual need not happen after April 1, 1952. The completed assessment of the partner is the subject matter of rectification and this may have preceded the above mentioned date. Such completion does not control the operation of the sub-section. In the result, we find ourselves unable to concur in the decision or the reasoning in *Atmala Nagaraj's*(1) case.

The last case in the series is that of *Ahmedabad Manufacturing and Calico Printing Co. Ltd.* v. *S. C. Mehta*(2). In this case the Court had to consider sub-s. (10) of s. 35 which was introduced by s. 19 of the Finance Act, 1956. The Bench hearing this appeal was composed of five Judges and two of them, S. K. Das and J. L. Kapur, JJ., took the view that *Habibullah's*(3) case had been correctly decided but that *Atmala Nagaraj's*(1) case might require re-consideration although they did not express any final opinion on that point. Sarkar, J. (as he then was) did not think that much assistance could be had from *Habibullah's* case(3) in the matter of interpretation of sub-s. (10) of s. 35. He said further :

> "There is nothing in *S. K. Habibullah's*(3) case to indicate that in the opinion of the learned Judges deciding it there were any words which would indicate that sub-s. (5) was to have a retrospective operation. In my view, sub-s. (10) contains such words."

The judgment of the two other Judges, Hidayatullah and Raghubar Dayal, JJ. was delivered by Hidayatullah, J. who dealt with the subject of retrospective operation of statutes elaborately and discussed *Habibullah's* case(3) at some length and expressed the view (at p. 125) that although the section mentioned the final order in the firm's assessment as the starting point "there was nothing to show that this new *terminus a quo* must be after 1-4-1952 before sub-s. (5) could be used." According to Hidayatullah, J. "the words of the sub-section were entirely indifferent to this aspect." The learned Judge was however careful to add that this must not be considered as his final opinion on sub-s. (5). Any opinion of Hidayatullah, J. even with the above qualification merits the highest respect. After giving very anxious consideration to the views expressed by the learned Judge, we still hold that by sub-s. (5) of s. 35 the legislature intended that rectification should be made on the finding as to the incorrectness of the assessment of the firm after the provision was introduced in the statute book, *viz.*, 1-4-1952. There would have been nothing unjust or inequitable in the legislature directing that rectification

(1) 46. I.T.R. 609. (2) [1963] Supp. 2 S.C.R. 92.
(3) [1962] Supp. 2 S.C.R. 716.

of the assessment of the partner should always follow the assessment or re-assessment of the firm made finally. On the other hand, we think rectification of the partner's assessment should logically follow the re-assessment or modification of the firm's assessment. Otherwise, there would be an unaccounted for divergence between a person's assessment as an individual and his assessment as a partner of a firm. But the legislature, in our opinion, did not intend to disturb completed assessment of partners except within the period of time indicated earlier in this judgment and unless the finding as to the incorrectness of the firm's assessment was made after the *terminus a quo* above mentioned.

In the result, the appeals are allowed. The judgment and order of the High Court of Madras are set aside and the orders of rectifiction passed by the Income-tax Officer are held to be effective and binding on the respondents. In the circumstances there will be no order as to the costs of these appeals.

Hegde, J. The respondents in these appeals were the partners of a registered firm carrying on business in gunnies. For the assessment year 1943-44, *i.e.*, the assessment year ending March 31, 1944, the firm in question was assessed to tax on 22-1-46. Two days thereafter, namely on January 24, 1946, the partners of the said firm were also assessed to tax for the assessment year 1943-44 after taking into consideration their share of profits in the firm. The Indian Income Tax Act 1922, to be hereinafter referred to as the Act, was amended by Act 25 of 1953. The said amending Act among other provisions incorporated s. 35(5) into the Act. Section 1(2) of that Act provided that "subject to any special provision made in this behalf in this Act, it shall be deemed to have come into force on the 1st day of April 1952". On September 11, 1952, the ITO issued notice to the firm under s. 34 of the Act requiring the firm to show cause why its assessment for the assessment year 1943-44 should not be re-opened and enhanced for the reasons mentioned in that notice. In the proceedings that followed the assessment of the firm was substantially enhanced on 30-5-59. Thereafter, the proceedings against the respondents were initiated under s. 35(5) read with s. 35(1) as per the notices dated 24-7-59. In those proceedings the assessment of the respondents for the assessment year 1943-44 was enhanced. The respondents challenged the validity of those proceedings in the High Court of Judicature at Madras in writ petitions 1229-1233 of 1961 on its file. The High Court following the decisions of this Court in *Income Tax Officer, Madras v. S. K. Habibullah*(1) and *Second Additional Income Tax Officer, Guntur* v. *Atmala Nagaraj and others*(2), allowed those writ petitions and quashed

(1) [1962] Supp. 2 S.C.R. 716. (2) 46 I.T.R. 609.

the impugned orders. These appeals are directed against the said decision.

As the matters now stand, the question of law arising for decision is not *res integra*. It is concluded by the decision of this Court in *Atmala Nagaraj's*(1) case, wherein this Court laid down that sub-s. 5 of s. 35 was not applicable to cases where the assessment of a partner of a firm was completed before April 1, 1952 even though the assessment of the firm was completed after April 1, 1952.

Evidently, encouraged by some of the observations in the decision of this Court in *Ahmedabad Mfg. & Calico Printing Co., Ltd.* v. *S. S. Mehta, Income Tax Officer and another*(2), Mr. S. K. Aiyer, learned counsel for the department contended that *Habibullah's*(3) case and *Atmala Nagaraj's*(1) case were not correctly decided and that they should be overruled. Though the majority have not acceded to the contention of Mr. S. K. Aiyer that *Habibullah's*(3) case has not been correctly decided, it has accepted his contention that *Atmala Nagaraj's*(1) case was not correctly decided. As I am unable to concur with that conclusion, I am constrained to deliver this dissenting judgment. In my opinion, no case is made out to overrule the decision of this Court either in *Habibullah's*(3) case or in *Atmala Nagaraj's*(1) case.

As seen earlier, the assessments in question were made as far back as January 24, 1946. Every assessment under the Act is final unless the same is modified in appeal or revision or reopened under s. 34 or rectified under s. 35. The assessment with which we are concerned in this case was neither modified in appeal or revision nor reopened under s. 34. The question for decision is whether it can be rectified under s. 35.

Under the Act, the assessment of a firm and the assessment of its partners are two different assessments though in assessing a partner his share in the firm's profits is added to his other income. In fact, the profits of a registered firm are subject to double tax, firstly in the hands of the firm and nextly in the hands of its partners. As the law stood prior to the amending Act 25 of 1953, the assessment of a partner could not be rectified under s. 35(1) on the ground that the firm's assessment had been enhanced as a result of re-assessment. In other words, the re-assessment of a firm could not be considered as a mistake apparent from the records of the assessment of its partners. That was the view taken by the Andhra Pradesh High Court in *Kanumarlapudi Lakshminarayana Chetty* v. *First Additional Income tax Officer, Nellore*(4) and that view was accepted as correct by this Court in *Habibullah's* case(3). Therefore, all that we have to see is whether

(1) 46 I.T.R. 609.
(2) [1963] Supp. 2 S.C.R. 92.
(3) [1962] Sup. 2 S.C.R. 716.
(4) 29 I.T.R. 419.

A s. 35(5) one of the group of clauses added by Act 25 of 1953 could have been availed of by the ITO in making the impugned rectifications.

Section 35(5), the the extent it is material for our present purpose, reads as follows :

> "Where in respect of any completed assessment of a
> B partner in a firm, it is found on the assessment or re-assessment of a firm....that the share of the partner in the profit or loss of the firm has not been included in the assessment of the partner, or, if included, is not correct, the inclusion of the share of the assessment or the correction thereof, as the case may be, shall be deemed
> C to be a rectification of a mistake apparent from the record within the meaning of this section, and provisions of sub-sections (1) shall apply thereto accordingly, the period of four years referred to in that sub-section being computed from the date of the final order passed in the case of the firm."

D Section 35(1) empowers the income tax authorities to rectify mistakes apparent from the record of certain orders passed by them. The clause (omitting parts not material) provides that the income tax officer may, any time within the four years from the date of any assessment order passed by him, on his own motion, rectify any mistake apparent from the record of the assessment.
E As seen earlier, prior to the amending Act 25 of 1953, the ITO could not have made the rectifications with which we are concerned in these appeals. Therefore, the question for decision is whether by the exercise of the powers conferred on him by s. 35(5), the ITO could have validly made the impugned rectifications ?

F It may be noted that in these cases both the assessment of the firm as well as the assessment of its partners were made long before April 1, 1952. But the assessment of the firm was reopened and the firm reassessed after that date. In *Habibullah's*(1) case this Court laid down that the legislature had given to cl. 5 of s. 35 which was incorporated with effect from April 1, 1952, a partial retrospective operation. The provision enacted by cl. 5 is not
G procedural in character. It affects the vested rights of the assessee. Therefore in the absence of compelling reasons, the court would not be justified in giving a greater retrospectivity to that provision than is warranted by the plain words used by the legislature. Cl. 5 of s. 35 does not purport to amend cl. 1 of the same section. It confers additional powers upon the income tax
H authorities and that power cannot be exercised in respect of assessment of a firm which had been completed before the date on which the power had been invested. This Court quoted with approval

(1) [1962]Supp. 2 S.C.R. 716.

the observations of the Privy Council in *Income Tax Commissioner* v. *Khemchand Ramdas*(1) :

> "When once a final assessment is arrived at, it cannot, in their Lordships' opinion, be reopened except in the circumstances detailed in sections 34 and 35 of the Act....and within the time limited by those sections."

From this decision the correctness of which is not doubted by the majority, it follows that s. 35(5) is only retrospective as from April 1, 1952; it has no greater retrospectivity and that section cannot affect vested rights. No doubt that decision was dealing with the assessment of a firm, but the ratio of that decision, in my opinion, applies with equal force to the assessment of a partner. If the assessment of a firm made before April 1, 1952 cannot be reopened under s. 35(1) read with s. 35(5), the same must be equally true of the assessment of a partner of a firm. The ratio of the decision in *Habibullah's*(2) case is that rights which have become final prior to April 1, 1952 cannot be affected by having recourse to s. 35(5).

By applying the ratio of the decision in *Habibullah's*(2) case, this Court held in *Atmala Nagaraj's*(3) case that sub-s. 5 of s. 35 was not applicable to cases where the assessment of a partner was completed before April 1, 1952 even though the assessment of the firm of which he was the partner was completed after April 1, 1952. At p. 612 of the report, this is what this Court observed in *Atmala Nagaraj's*(3) case :

> "Here, the original assessment was made before the amendment, and to that assessment the amended provision cannot still be made applicable for the reason to be given by us, even though the assessments of the firms were after April 1, 1952, and sub-section (5) has not been made applicable to such assessment, either expressly or by implication. It has been given a limited retrospectivity from April 1, 1952, and it was held by this court in the cited case that it was not open to courts to give more retrospectivity to it. Resort in this case could only be taken to the law as it stood before the introduction of sub-section (5), and as determined already by this Court, the record of the firm's assessment could not then be called in aid to demonstrate an error on the record of a partner's assessment. It was further held in *S. K. Habibullah's*(2) case that the provision enacted by sub-section (5) is not procedural in character and that it affects vested rights of an assessee. In our

(1) 65 I.A. 248. (2) [1962] Supp. 2 S.C.R. 716.
(3) 46 I.T.R. 609.

A opinion, sub-section (5) could not be used in this case, and the decision of the High Court was right."

It may be noted that both the decisions in *Habibullah's* case(1) and *Atmala Nagaraj's* case(2) were rendered by the same Bench (consisting S. K. Das, Hidayatullah and Shah, JJ.) I am unB able to accept the contention that *Atmala Nagaraj's* case(2) laid down any new legal principle. It merely applied the principle laid down in *Habibullah's* case(1) to the facts of that case. In my opinion there is no legal basis to distinguish the one from the other.

In *Ahmedabad Manufacturing and Calico Ptg., Co.*, case(3), C this Court was called upon to interpret the scope of sub-s. 10 of s. 35 of the Act which was brought into force on April 1, 1956. The language of that provision is wholly different from that of s. 35(5). It is not clear from the report why in that case it became necessary to consider the correctness of the decisions of this Court in *Habibullah's* case(1) and *Atmala Nagaraj's*(2) case. But D it appears that in the course of the arguments the correctness of those decisions was put into issue. Three separate judgments were delivered in that case, one on behalf of S. K. Das and Kapur, JJ, by Das, J. another on behalf of Hidayatullah and Raghubar Dayal, JJ. by Hidayatullah J, and the third by Sarkar, J. Sarkar, J. in his judgment, merely referred to *Habibullah's* case(1) and E not to *Atmala Nagaraj's*(2) case. Dealing with *Habibullah's* case(1), this is what his Lordship observed :

> "As to *S. K. Habibullah's* case(1) I do not think that much assistance can be had from it. It applied the rule of presumption against a statute having a retrospective operation—as to which rule, of course, there is no dis- F pute—to sub-s. (5) of s. 35. Now cases on the construction of one statute are rarely of value in construing another statute, for each case turns on the language with which it is concerned and statutes are not often expressed in the same language. The language used in sub-ss. (5) and (10) seems to me to be wholly diffe- G rent. There is nothing in *S. K. Habibullah's* case(1) to indicate that in the opinion of the the learned Judges deciding it there were any words which would indicate that sub-s.(5) was to have a retrospective operation. H In my view, sub-s. (10) contains such words. Furthermore, I do not find that the other considerations to which I have referred arose for discussion in that case. In my view, the two cases are entirely different."

(1) [1962] Supp. 2 S.C.R. 716. (2) 46 I.T.R. 609.
(3) [1963] Supp. 2 S.C.R. 92.

Das, J. accepted the correctness of the decision in *Habibullah's* case(1) but while dealing with *Atmala Nagaraj's* case(2) he observed :

> "We may point out, however, that in *Second Additional Income tax Officer* v. *Atmala Nagaraj*(2) this court went a step further and held that sub-s. (5) of s. 35 was not applicable to cases where the assessment of the partner was completed before April 1, 1952, even though the assessment of the firm was completed after April 1, 1952. Learned counsel for the appellant frankly conceded before us that he did not wish to go as far as that and contend that even in a case where a declaration of dividend was made after April 1, 1956, sub-s. (10) would not apply; because that would make sub-s. (10) unworkable. The decision is *Second Additional Income Tax Officer v. Atmala Nagaraj*(2) may perhaps require reconsideration as to which we need not express any final opinion now, but so far as this case is concerned we see no reason why the principle in *S. K. Habibullah's* case(1) will not apply."

But Hidayatullah, J. who as mentioned earlier was a party to both the decisions dealing with those decisions observed :

> "We do not naturally express a final opinion on sub-s. (5). We must leave that to a future case. We must, however, say that the two earlier cases may have to be reconsidered on some future occasion."

For the reasons to be presently stated I would rather prefer to follow the decisions in *Habibullah's* case(1) and *Atmala Nagaraj's* case(2) which I am sure must have been rendered after deep consideration rather than the passing doubts hesitatingly expressed by two of the learned Judges who were parties to those decisions. As seen earlier, even the majority has not shared the doubts expressed by Hidayatullah, J. as regards correctness of the decision in *Habibullah's* case(1).

The rule laid down in *Habibullah's*(1) and *Atmala Nagaraj's*(2) cases is a well settled rule. Dealing with the interpretation of taxing statutes, it is observed in Halsbury's Laws of England (Vol. 36, pp. 416-17) :

> "The language of a statute imposing a tax, duty or charge must receive a strict construction in the sense that there is no room for any intendment, and regard must be had to the clear meaning of the words. If the Crown claims a duty under a statute, it must show that that duty is imposed by clear and unambiguous words, and where the meaning of the statute is in doubt, it must

(1) [1962] Supp. 2 S.C.R. 716. (2) 46 I.T.R 609.

A be construed in favour of the subject, however, much within the spirit of the law the case might otherwise appear to be; but a fair and reasonable construction must be given to the language used without leaning to one side or the other.

B The rule that the literal construction of a statute must be adhered to, unless the context renders it plain that such a construction cannot be put on the words, is especially important in cases of statutes which impose taxation. There is no rule admitting equitable construction of a taxing statute; that is to say cases which are not within the actual words of the statute cannot be brought C within the statute by consideration of its governing principle or intention."

Rowlatt, J. observed in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*(1) :

D "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 a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

These principles have been accepted as correct both by the E English Courts and the superior courts in this country. It is now well settled that if the interpretation of a fiscal enactment is in doubt, the construction most beneficial to the subject should be adopted even if it results in obtaining an advantage to the subject; the subject cannot be taxed unless he comes within the letter of the law and the argument that he falls within the spirit of the law cannot avail the department.

F In *Commissioner of Income tax, Bombay* v. *Provident Investment Co., Ltd.*(2), this Court quoted with approval the following passage from an earlier decision of this Court in *A. V. Fernandez* v. *State of Kerala*(3) :

G "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. We must of necessity, therefore, have regard to H the actual provisions of the Act and the rules made there-

(1) [1921] 1 K.B. 64. (2) 32 I.T.R. 190.

(3) 8 S.T.C. 561.

under before we can come to the conclusion that the appellant was liable to assessment as contended by the Sales Tax authorities."

In *Commissioner of Income tax, Bombay* v. *Elphinstone Spinning and Weaving Mills Co., Ltd.*(1), this Court held that if the words of the taxing statute fail, then so must the tax. The courts cannot, except rarely and in clear cases, help the draftsmen by a favourable construction.

In *Commissioner of Income tax, Bombay* v. *Jalgaon Electric Supply Co., Ltd*(2), this Court again observed :

"The income tax law seeks to bring within the net of taxation certain class of income, and can only successfully do so if it frames a provision appropriate to that end. If the law fails and the tax payer cannot be brought within its letter, no question of unjustness as such arises."

In *Banarsi Debi and another* v. *Income tax Officer, Calcutta, and others*(3), it was observed :

"Before construing the section it will be useful to notice the relevant rules of construction of a fiscal statute. In *Oriental Bank Corporation* v. *Wright* (5 A.C. 842) the Judicial Committee held that if a statute professed to impose a charge, the intention to impose a charge on the subject must be shown by clear and unambiguous language. In *Canadian Eagle Oil Co.* v. *R.* [1946] A.C. 119, Viscount Simon L.C. observed : 'In the words of 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 a tax. Nothing is to be read in. Nothing is to be implied. One can only look fairly at the language used."

In other words, a taxing statute must be couched in express and unambiguous language. The same rule of construction has been accepted by this court in *Gursahai Saigal* v. *Commissioner of Income tax* (48 I.T.R. 1) wherein it was stated: '. . . . it is well recognised that the rule of construction that if a case is not covered within the four corners of the provisions of a 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

(1) 40 I.T.R. 142. (2) 40 I.T.R. 184.

(3) 53 I.T.R. 100, 104.

A of the matter, applies only to a taxing provision and has no application to all provisions in a taxing statute'."

In *Commissioner of Income tax, Madras* v. *Ajax Products Ltd.*(1) this Court quoted with approval the rule laid down by Rowlatt, J. in *Cape Brandy Syndicate* case(2) to which reference has already been made. It went further and observed :

B

> "To put in other words, the subject is not to be taxed unless the charging provision clearly imposes the obligation. Equally important is the rule of construction that if the words of a statute are precise and unambiguous, they must be accepted as declaring the express intention of the legislature."

C

From the foregoing decisions it is clear that the consideration whether a levy is just or unjust, whether it is equitable or not, a consideration which appears to have greatly weighed with the majority, is wholly irrelevant in considering the validity of a levy. The courts have repeatedly observed that there is no equity D in a tax. The observations of Lord Hatherley, L.C. in *Pardo* v. *Bingham*(3) "In fact we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated", were made while construing a non-taxing statute. The said rule has only a limited application in the interpretation of a taxing statute. Further, as observ- E ed by that learned Judge in that very case the question in each case is "whether the legislature had sufficiently expressed its intention" on the point in issue.

I do not think that the impugned assessments can be said to be just or equitable even if that consideration is at all relevant. F The assessments of partners of firms, whose assessments had become final before April 1, 1952 cannot be reopened. There is no just or equitable ground to differentiate the case of the respondents from those assessees. As seen earlier, the assessment of the respondents had become final as far back as 1946. They would have arranged their affairs on that basis. Thirteen years thereafter, they were called upon to pay additional tax. It can- G not be said that that is just or equitable.

This takes me to the question whether the impugned assessments come clearly within the scope of s. 35(5). That is the only relevant consideration. But before going into that question we must remind ourselves that the assessments of the respondents had become final in the year 1946 and under the law as it stood H prior to the enactment of s. 35(5), those assessments could not

(1) 55 I.T.R. 741, [1965] 1 S.C.R. 70. (2) [1921] 1. K.B. 64.

(3) 4 Ch. Appeals 735.

have been interfered with. Section 35(5) unlike several other provisions in the amending Act of 1953 had been given only a partial retrospective effect. It is made to be operative as from April 1, 1952. In this background let us now proceed to examine s. 35(5). A

Before a case can be held to fall within the scope of s. 35(5), two requirements must be satisfied, namely, (1) that the assessment or reassessment of the firm must have taken place on or after April 1, 1952, and (2) the assessment of the partner must be a "completed assessment". The next question to be decided is whether the "completed assessment" referred to in s. 35(5) includes an assessment which had become final prior to April 1, 1952. B C

I am unable to find out how the firm's assessment could have been validly reopened under s. 34, in September 1952. By the time the notice under s. 34 was issued, the eight years' period of limitation prescribed in s. 34 had expired. But the validity of the firm's re-assessment does not appear to have been challenged at any time before the hearing of these appeals. Hence it is not safe to pursue that question. D

The concept of a "completed assessment" was introduced for the first time by the amending Act 25 of 1952. The Act as it stood till then only spoke of assessments, re-assessments and rectification of assessments. What did the legislature mean by saying "completed assessment" in s. 35(5) ? That expression is not defined in the Act. The legislature must be considered to have deliberately used that expression in place of the expression "assessment" an expression familiar to courts and the connotation of which is well settled. On the basis of well recognised canons of construction of statutes we must give that expression a meaning different from that given to "assessment". Evidently, the legislature used the expression "completed assessments" to distinguish that class of assessments from assessments which are final under the Act. It appears to me, by using that expression, the legislature intended that the assessment of a partner should not be considered as a final assessment till the assessment of the firm becomes final. In other words, the partner's assessment would continue to be tentative till the company's assessment becomes final. If that be the true interpretation of the expression "completed assessment", as I think it is, then that expression can only apply to assessments of partners made on or after April 1, 1952. The respondents' assessments as mentioned earlier had become final prior to that date. Hence the respondents' assessments cannot be considered as "completed assessments" within the meaning of that word in s. 35(5). Consequently those assessments must be held to be outside the scope of that section. E F G H

A Section 35(5) neither expressly nor by necessary implication empowers the I.T.O. to reopen assessments which had become final. If the legislature wanted to confer such a power it should have said so as it did in s.35(6) and in several other provisions in the amending Act,—ss.3(2), 7(2) and 30(2) of that Act. Further, if s. 35(5) empowers the reopening of all final assessments B of partners of firms, where was the need to give that provision a partial retrospectivity? That very circumstance negatives the contention of the department. Even if it is to be held that the expression "completed assessment" is an ambiguous expression, in that event also, the power conferred under s. 35(5) could not have been exercised to rectify the assessments in question.

C From the foregoing it follows that the decision of this Court in *Atmala Nagaraj's* case(1) is correct. Even assuming that s. 35(5) can receive a different interpretation and that interpretation is more reasonable than that adopted by this Court in *Atmala Nagaraj's* case(1), in that event also this Court would not be justified in overruling its previous decision, which has the force of law in view of D Art. 141 of the Constitution. I am of the opinion that the decisions of this Court should not be overruled except under compelling circumstances. It is only when this Court is fully convinced that public interest of a substantial character would be jeopardized by a previous decision of this Court, this Court should overrule that decision. Every time this Court overrules its previous decision, the confidence of the public in the soundness of E the decision of this Court is bound to be shaken.

Re-consideration of the decisions of this Court should be confined to questions of great public importance. In law finality is of utmost importance. Legal problems should not be treated as mere subjects for mental exercise. This Court must overrule its F previous decisions only when it comes to the conclusion that it is manifestly wrong, not upon a mere suggestion that some or all of the members of the later Court might arrive at a different conclusion if the matter was *res integra.* In *Bengal Immunity Co. Ltd.* v. *The State of Bihar and others*(2), this Court laid down that there is nothing in the Constitution which prevents the Supreme Court from departing from a previous decision of its own if the Court is G satisfied of its error and its baneful effect on the general interest of the public. Das, Acting C.J., speaking for the majority, observed in the course of his judgment (at p. 630 of the report):

> "It is needless for us to say that we shoud not lightly dissent from a previous pronouncement of this Court. Our power of review, which undoubtedly exists, must be H exercised with due care and caution and only for advancing the public well being in the light of the surrounding

(1) 46 I.T.R. 609. (2) [1955] 2 S.C.R. 603.

circumstances of each case brought to our notice but we do not consider it right to confine our power within rigidly fixed limits as suggested before us."

The question of law with which we are concerned in this case was of minor importance, at all times. It has become all the more so because of the passage of time, as it has relevance only to assessments of partners of firms made before April 1, 1952, and that too in cases where the question of enhancing those assessments arises as a result of the assessment or re-assessment of the concerned firms on or after April 1, 1952. Such cases are not likely to be many.

For the reasons mentioned above, I dismiss these appeals with costs.

ORDER

In accordance with the opinion of the majority the appeals are allowed, the judgment and order of the High Court of Madras are set aside and the orders of rectification passed by the Income tax Officer are held to be effective and binding on the respondents. In the circumstances there will be no order as to costs of these appeals.

G.C.