

Tax law in the shadow of the higher judiciary

India's law of taxation is built on two central precepts. First, on the idea captured in Article 265 of the Constitution, that a tax may be imposed only with the authority of law. Second, on a principle of sureness, that any levy ought to be clear, consistent, and predictable. Both these precepts emanate out of a larger commitment to the rule of law, in particular to values of legality and certainty.

A reversal of judgments

Upholding these principles requires a commitment not only from the legislature but also from our courts too. But over the course of the last 12 months, there have been instances where the Supreme Court of India has undermined this commitment, by reversing well-reasoned judgments of High Courts, and by virtually enacting into existence taxes that lack legislative support. Two judgments, delivered by Justice M.R. Shah who retired from the Supreme Court on May 15, represent noteworthy examples.

In the more recent of the rulings, in *ITO vs Vikram Sujitkumar Bhatia*, the question before the Court concerned whether an amendment to a provision of the Income Tax Act, 1961, could have retrospective effect in the absence of legislative mandate.

The provision at stake, Section 153C of the Act, which stipulates the conditions under which a search made on a person's premises could result in the opening of proceedings against other persons and entities. Before an amendment to the law in 2015, Section 153C allowed the Revenue to proceed against third parties to a search, if material seized (such as money, bullion, jewellery, or books of accounts) "belongs or belong to" a person other than the one who was subject to the search.

At least three different High Courts held that the terms, "belongs or belong to," ought to be narrowly construed. In their reading, for incriminating material found during a search to serve as a basis for assessing persons alien to the search, that material must not merely relate to, or pertain to, such person but must "belong" to them. Therefore, a mere reference to a person's name would not by itself satisfy the law. There must be evidence that the material in question is the person's property.

To overcome these decisions, the law was amended in 2015. Section 153C now stipulated that assessments could be made against third parties to a search, even if the material seized – in the case of documents and books of accounts – "pertains or pertain to" the person or if information contained in those items "relates" to



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The central precepts on which India's law of taxation is built face erosion, as two judgments by the top court show

the person. The question turned to this: would the law apply to searches conducted prior to its enactment?

The amendment was not made expressly retrospective. In any event, as the Gujarat High Court held, it could not be so because such an application would impinge on rights that had vested on persons through the previous stipulation. This reasoning stems out of the idea that even if a law was merely procedural in nature, it would apply retrospectively only if it did not take away any substantive rights conferred on a person. Here, the Court found that the amendment was bringing into the fold of Section 153C a new class of assesseses, who were previously excluded.

On April 6, the Supreme Court reversed this verdict. Its reasons for doing so, insofar as they can be gleaned from the judgment, are twofold. One, that the old Section 153C had been replaced by amendment, and the words "belongs or belong to" had been substituted by "pertains or pertain to," and, therefore, one must presume that the unamended provision never existed in law, not even before the date of the amendment. Two, that the new law is declaratory, in that it seeks to explain an earlier provision, and is hence retrospective.

Court as maker, not interpreter

However, these professed reasons do not add up. Section 153C may have been amended through substitution. But the phrase "belongs to" continues to remain in the provision. What the altered law does is to add an additional stipulation: that even material – in the case of books of accounts and documents – that "pertains or pertain to" a person can serve as a ground for fresh proceedings. Therefore, the amendment by no means asserts what was always the position, but, instead, seeks to expand the law's domain with an eye to the future. The Court, in holding that it will apply to past searches, has acted not as an interpreter of the law but as a maker of the law.

The judgment in *Union of India vs Ashish Agarwal*, delivered in May last year, is not dissimilar. Its many ramifications continue to be felt. In it, the Court resuscitated notices of reassessment that had been issued by the Revenue without any sanction of law. In doing so, it not only reversed the Allahabad High Court's judgment that had been carried to it on appeal but also verdicts rendered by at least seven different High Courts that were not before it. Parties to those cases, numbering in the hundreds and thousands, did not so much as get

their audience in court.

The issue at stake in the case was simple. With effect from April 1, 2021, Parliament had enacted a new regime to govern reassessments of completed income-tax proceedings. But, despite the change in law, the Revenue continued to issue notices under a repealed provision, deriving authority, it believed, from executive notifications that extended timelines during the COVID-19-inflicted period. The High Courts declared these notices invalid, but also pointed out that the Income-Tax Department, if it so desired, was at liberty to invoke the new law, if the statute of limitation so permitted.

There is no doubt that the quashing of these notices would have had some effect on the revenue. There would have been cases where limitation had expired, leaving the authorities with no choice but to drop any proposal for reassessment. But if this situation called for mending, it was for the legislature to think of solutions.

Instead, the Court found – although this was not the government's pleaded case – that the "officers of the Revenue may have been under a bona fide belief that the amendments may not yet have been enforced". In other words, that state functionaries were ignorant of the law. In the Court's belief, mistakes of this kind must not be allowed to cost the exchequer. Therefore, the quashed notices were revived, and were deemed to have been issued under the amended law.

More than an encroachment

Through this, the Court was not only encroaching on legislative functions but was also striving to give life to what were otherwise entirely illegitimate actions. What followed the judgment was an especially bewildering situation, because the notices under the old law were evidently issued keeping in mind the preconditions that that law stipulated – as a result, this has only led to a fresh round of litigation.

What is more, in doing this, the Court also invoked its most infamous power: Article 142 of the Constitution, which allows it to pass orders for "doing complete justice to a cause". It has previously been held that this power ought not to be applied in breach of statutory law. Yet, here was a case where the Court not only resuscitated actions that lacked any legislative support but also reversed judgments that were simply not on appeal before it.

Article 265 of the Constitution forbids taxation without legislation. But if the Supreme Court is willing to play Parliament, this peremptory promise will remain illusory.

Musings on the frictions in India-Canada ties

During a pro-Khalistani parade on June 4 in Brampton, Canada, there was a tableau that depicted a lady clad in a white sari, who was bloodied, with two soldiers training their guns on her. The board behind her read, "Revenge of attack on Shri Darbar Sahib". The side of the float carried the words, "Never forget 1984". Clearly, the tableau figures depicted were that of India's former Prime Minister Indira Gandhi and her assassins.

The Indian response

In a media conference on June 8, to commemorate nine years of Prime Minister Narendra Modi's administration, the External Affairs Minister, S. Jaishankar, was asked about the Brampton tableau. He chose not to refer directly to the offensive float though he indirectly indicated that it was "egregious". Instead, he focused, as he put it, on the "bigger" issue – the space Canada gives "to separatists, to extremists, to people who advocate violence." He added, "... and I think it's not good for the relationship and I think it's not good for Canada." Mr. Jaishankar did well to speak out, openly and forcefully, on Canada's hypocritical approaches on human rights issues and its decades long disdain for the territorial integrity of India.

This stated, it is remarkable that Mr. Jaishankar could not get himself around to take the name of Indira Gandhi. The glorification of "revenge" by anyone for the assassination of an Indian Prime Minister is an issue beyond party politics or personal pique for it concerns the dignity of the nation. This is so even if a Prime Minister took actions, like Indira Gandhi did in June 1984, that were controversial and the Congress party's role in the anti-Sikh 1984 riots was condemnable. Ironically, while Mr. Jaishankar did not name Indira Gandhi, the Canadian High Commissioner to India Cameron Mackay did. He tweeted, "I am appalled by reports of an event in Canada that celebrated the assassination of late Indian Prime



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Minister Indira Gandhi." Indeed, the country's positions would be better and more credibly articulated if the able, popular and powerful politician that Mr. Jaishankar has become does not completely obscure his former avatar of a distinguished diplomat.

Diaspora and foreign policy

The ethnic Indian community, including the Sikhs, plays an important role in Canada's public life. There are currently some ethnic Indians in Prime Minister Justin Trudeau's cabinet. At the press conference, Mr. Jaishankar mentioned Canada's indulgence of Khalistani elements (he did not use the word, but that is clearly what he had in mind) and aptly attributed it to 'vote bank' politics. It is the ethnic Indian, and, in this case, not restricted to a Khalistani-'vote bank' that had led Mr. Trudeau to comment on the farmers' agitation which was a purely domestic Indian issue. India naturally found Mr. Trudeau's remarks unacceptable.

Mr. Jaishankar's comments on Canadian attitudes to ethnic Indians provide an occasion to consider the Indian political class's approaches towards the diaspora which has gained political, financial and professional success in many countries. It has become a pillar of foreign policy, especially of the present dispensation which has also used Prime Minister Narendra Modi's popularity with a vast section of the diaspora to impress domestic public opinion. Also, wherever the diaspora is politically important, local politicians want to use Mr. Modi's popularity for their political purposes. The latest illustration of this phenomena was Mr. Modi's diaspora rally during his recent visit to Australia which was attended by Australian Prime Minister Anthony Albanese.

Following Mr. Modi's example, other Indian political players will also now play diaspora politics. The Congress's Rahul Gandhi's recent visit to the United States is a case in point. Thus,

the tradition that Indian domestic politics will not be taken beyond the shores of India no longer holds.

Another significant issue which Mr. Jaishankar addressed during the media briefing related to the remarks of Jody Thomas, Canada's National Security and Intelligence Adviser. Speaking at a conference organised by the Canada Global Affairs Institute on June 2, Ms. Thomas said, "When I talk about foreign interference and economic security, I'm now talking of a number of state actors and non-state proxies. This includes Russia, Iran, India." That said, the actor that comes up most on these issues, and it is no surprise to anybody, is China. In response Mr. Jaishankar used the Hindi language phrase, "*Ultra Chor Kotwal ko daten* (The thief scolds the police)". He rightly dismissed Ms. Thomas' comment outright. India cannot be accused of seeking to influence Canadian domestic affairs if its diplomats openly interact with the Indian diaspora there. Indian diplomats have the obligation to point to the diaspora and others the harmful impact on bilateral ties when Canadian politicians support separatism in India. These diplomatic activities cannot be construed as interference in Canada's internal affairs.

Canadian politics

The harsh reality of the current Canadian political situation is that Mr. Trudeau is critically dependent on the New Democratic Party (NDP) for his government's survival and Jagmeet Singh, the NDP leader, is a committed Khalistan sympathiser. He had asked Mr. Trudeau to intervene in the events in Punjab surrounding radical preacher Amritpal Singh's activities. Coming from a Canadian government ally, this was naturally unacceptable to India.

Bilateral ties are passing through difficult times but cooperation in many areas continues. One eye-catching one is the Cannabis medicine project.