

TAXLAWSCOPE

— beyond the scope —

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“Always Speaking”

**An Act of Parliament should be deemed to be
“always speaking”: Practical Legislation (1902), p. 83**

To the poser, “Whether the tax exemption given to “Newspapers” would be limited only to the print media or can be extended to its digital versions?”, nine out of ten times, I would have always said a big NO, as I had grown up with the tax-jurisprudence, which professed that the tax notifications are to be strictly interpreted. But the recent decision of Upper Tribunal Tax and Chancery in News Corp , UK and Ireland Limited vs. The Commissioner for Her Majesty’s Revenue and Customs (https://assets.publishing.service.gov.uk/media/5e022e8be5274a34128a4a47/News_Corp_UK_and_Ireland_Ltd_v_HMRC.pdf), gave me a different perspective.

One of all time challenges of any law pertains to adaptation of statutes with changing times. The challenges are more in taxing statutes where there is scope for widening tax base in view of technology driven transactions as gig economy, digital supplies, e-commerce operations etc. The words and phrases used in conventional legislations appear to be insufficient most of the times to accommodate the changes and create an effective tax landscape. Therefore, the role of courts, through application of principles of interpretation and construction is instrumental in aligning a conventional legislation to suit modern times. Going by the history, it could be seen that Courts have never hesitated to apply the canons of interpretation as a crucial aid for deciding a law as live or dead, with reference to a situation posed by changing circumstances. The 'always speaking doctrine' is one of such interpretational jargon which is becoming more and more relevant in modern times.

The 'Always Speaking Doctrine' means that the law shall be considered as always speaking, and that it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning. The doctrine arises

from presumption that the Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed.

In the decisions *supra*, the question that arose for consideration was whether Zero rating applicable to 'Newspapers' can be extended to electronic editions of newspapers. The relevant Entry exempted "Newspapers, journals and periodicals" from levy of VA. The appellant had claimed exemption on digital versions of their Newspaper claiming that they are entitled for exemption under above entry. The Department of Revenue had denied the benefit on ground that the scope of entry is limited only to physical things which are 'goods' and are not intended to cover the electronic versions which are treated more as a service. The matter had been decided in favour of Revenue by the First Tier Tribunal, which had adopted the principle of strict construction of taxing entries and has held that zero-rating is an exception to the general rule as to standard rating, the provision must be construed strictly and hence the e-versions of news papers are not entitled for exemption.

The Upper tribunal was to consider the issue Whether the meaning of the term “newspapers” was sufficiently broad, interpreted at the time of the initial enactment of the provision in 1972, to include the digital versions now available. If not, whether the ‘Always Speaking Doctrine’ can be adopted to widen the scope of entry or whether the rule of strict construction should prevail.

The Upper Tribunal has observed that the intention for exemption to news papers were to promote literacy, the dissemination of knowledge and democratic accountability by having informed public debate. These were the clearly defined social reasons to justify grant of exemption to newspapers. The appellant had relied on principle that the meaning of “newspapers”, to be construed in the context as at the time of the original enactment of the provision, is broad enough to include the digital versions now available. Recognizing, however, that the concept of a supply of digital versions of newspapers was not within the contemplation of the drafter of the legislation in 1972, News UK (appellant) relies in the alternative on the “always speaking” doctrine of statutory interpretation.

The Upper Tribunal, while arriving at a decision in favour of assessee, has held the following:

- Though the concerned entry dealt only with physical goods, it does not follow that it cannot include non-physical items. On the other hand, given that no digital version of any of the Items existed in 1972, when entry was originally brought in, it is fair to infer that the drafter was only contemplating the existence of physical items. The most that can be said is that at the time when the entry was inserted, only such things existed in physical form. That itself is not sufficient to hold that it was legislative intent to exclude something from entry which did not satisfy the legal test for goods
- In applying the “always speaking” doctrine, the essential question addressed by the Upper tribunal was whether the digital versions, fulfill the legislative purpose of the statutory provision. That purpose is, to promote literacy, the dissemination of knowledge and democratic accountability by having informed public debate in precisely the same way as the print version. Once it is appreciated that its characterisation as a

service, not a good, is not a reason in itself to disqualify it from falling within the definition of ‘Newspaper’, it is difficult to discern any legislative purpose for excluding it.

- The invention of a digital form of newspaper is precisely the type of technological development (not contemplated at the time of the passing of the legislation) that the “always speaking” doctrine is intended to address.
- Although zero-rating of newspapers is an exception to the general rule as to standard rating, and so attracts a strict interpretation, that is not the same thing as saying that the provision was intended to be “restrictive or circumscribed”.
- By construing ‘Newspapers’ as including ‘digital versions’, it does not amount to extension of scope of entry , rather it is a recognition – through a permitted tool of construction – that ‘Newspaper’ includes within its scope the digital versions.

It is interesting to note that the above decision has been rendered on principle of 'always speaking doctrine' despite the fact that the dictionary meanings of 'News Paper' did not support digital newspapers and also despite the established principle of strict interpretation of exemption.

The adoption of the 'Always Speaking Doctrine' is however counter to the principle that the first point to be borne in mind is that the Act must be construed as if one were interpreting it the day after it was passed.

But, as long as we live in a progressive society, it is imperative to follow such principles of interpretations which are equally progressive. Therefore adoption of 'always speaking doctrine' is a useful tool in aligning the conventional legislation to modern times.

Other References:

Other Cases where principle of ‘Always speaking doctrine ‘ was relied on :

- Aubrey Vs. The Queen
<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2017/13.html>
- Regina v. Burstow Regina v. Ireland
<https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd970724/irland01.htm>
- Royal College Of Nursing Of The United Kingdom V Department Of Health And Social Security: Hl 2 Jan 1981
<https://swarb.co.uk/royal-college-of-nursing-of-the-united-kingdom-v-department-of-health-and-social-security-hl-2-jan-1981/>