CHAPTER 20
A PARADIGM SHIFT IN TAX JURISPRUDENCE

SYNOPSIS

When earth breaks up and heaven expands,
How will the change strike me and you
In the house not made with hands?

—Robert Browning, *By the Fire-side*. xxvii

1. The Prelude

In recent years we have witnessed a paradigm shift in income-tax Jurisprudence. Thomas S. Kuhn explains paradigm-shift in his landmark book, *The Structure of Scientific Revolutions*[1] "when our sense of the very nature of a subject and its possibilities and limitations change radically"[2]. A paradigm is conceptually a world-view. His core thesis on this point has been stated concisely in an article on Kuhn in the *New Encyclopaedia Britannica:*

> "Scientists typically accept a prevailing paradigm and try to extend its scope by refining theories, explaining puzzling data, and establishing more precise measures of standards and phenomena. Eventually, however, their efforts may generate insoluble theoretical problems or experimental anomalies that expose a paradigm's inadequacies or contradict it altogether. This accumulation of difficulties triggers a crisis that can only be resolved by an intellectual revolution that replaces an old paradigm with a new one"[3].

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1. In 1962.
2. Bernard Bergonzi, "Late Victorian to Modernist" in *The Oxford Illustrated History of English Literature* Ed. by Pat Rogers, pp. 408-409.
3. At p. 27.

He argued that the paradigms determine experiments, condition the mind of the enquirer, and have impact on the problems and their relative importance. His ideas specially the concept of paradigm shift were found so enlightening that the concept has been extended to other disciplines *viz.* economics, political science, and management. The history of income tax illustrates a paradigm shift.

2. A Paradigm shift examined under a Historical Perspective

The days have gone when the revenue officers were a hated lot. Dr. Johnson had defined Excise in his Dictionary as "a hateful tax levied upon commodities, and adjudged not by the common judges of property, but wretches hired by those to whom excise is paid." Noting this definition of Excise, H.H. Monroe comments: "The same would in due course, and was, said about odious officers of Revenue."[4] Now the tax-gatherers are discharging public duties cast on them by Parliament so that resources of the State can be augmented for the welfare of the people.

But the shadow of the past seems to loom large in two areas:

(i) in the field of the interpretation of the income-tax law, and

(ii) in the general attitudes towards the violation of legal obligations pertaining to tax law.

Rowlatt J. in *Cape Brandy Syndicate v. IR*[5] observed:

> "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."

The view harks back to what Lord Cairns said in *Partington v. Attorney General*.[6] This case was decided much before the practice of reference through case stated by General and Special Commissioners to the courts had commenced in England. Obviously it was not an income-tax case. It pertained to certain issues relating to probate duties. It is in this context that Lord Cairns observed:

> "As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute,

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4. H.H. Monroe's *Intolerable Inquisition ? Reflections on the Law of Tax,* p. 45.
5. [1921] 1 KB 64, 71, *approved by the House of Lords in Canadian Eagle Oil Company Ltd v. R,* [1946] A.C 119.
6. [1869] L. R. 4 E. & I. App. H.L. 100.

> what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

The reason for adopting a strict approach in the interpretation of the tax law can be found in what Lord Cairns himself said in *Pryce v. Monmouthshire Canal and Railway Co.*[7]:

> "The cases which have decided that taxing Acts are to be construed with strictness and that no payment is to be extracted from the subject which is not clearly and unequivocally required by Act of Parliament to be made, probably meant little more than this, that, inasmuch as there was not any prior liability in a subject to pay any particular tax, nor any antecedent relationship between the taxpayer and the taxing authority, no reasoning founded upon any supposed relationship of the taxpayer and the taxing authority could be brought to bear on the construction of the Act, and therefore the taxpayer had a right to stand upon a literal construction of the words used, whatever might be the consequence."

It would be shown later that the reasons for the view of Lord Cairns underwent a fundamental change. In fact, divergent views were not absent even before the emergence of this paradigm-shift. This would be evident from what Monroe says after having quoted the above-mentioned paragraph from Lord Cairns judgment:

> "Notwithstanding the tradition that Parliament could only be supposed to have taxed a man if it said so in clear and unambiguous terms, it seems at least possible that the rule of construction was not always quite as rigid as it became after the time of Lord Cairns. For example there is a significant footnote in some editions of Blackstone's Commentaries in Chapter 8, which under the heading "of Persons" deals with tax. Edward Christian, Downing Professor of Law at Cambridge, edited the editions. The footnote reads: "It is considered a rule of construction of revenue acts, in ambiguous cases, to lean in favour of the revenue. This rule is agreeable to good policy and the public interest; but, beyond that, which may be regarded as established law, no one can ever be said to have an undue advantage in our courts." The reconciling factor may be "ambiguity": after all, one man's ambiguity is another man's clarity. As late as 1899 Mr. Justice Wills questioned whether there was any distinction to be made between constructing taxing Acts and other Acts. In *Styles v. Treasurer of Middle Temple* [8] he said "I quite agree that every tax, if it is to be supported at all, must be found within the clear language of an Act of Parliament, but I am myself rather disposed to repudiate the notion of there being any artificial distinction between the rules to be applied to a taxing Act and the rules to be applied to any other Act. I do not think such artificial distinctions ever can help anybody in arriving at the true meaning of words."[9]

One of the lectures that Monroe delivered in the Hamlyn Lectures series was on "The law of tax and the common people."[10] He aptly pointed out that the historical background of Income-tax suggests "why tax law was regarded as

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7. [1879] 4 A.C. 197 H.L.
8. (1899) 68 L.J. Q.B. 1046; 4 Tax Cas. 123.
9. H.H. Monroe, *Intolerable Inquisition? Reflections on The Law of Tax*. p. 52.
10. *Ibid* pp. 64-84.

different from other areas of law and why compliance with tax law was put in a special category. The record suggests that cheating at tax is and always has been widespread. Within limits it has been made socially acceptable." With great perspicacity Monroe, who was a Queen's Counsel and was also the Presiding Special Commissioner, analysed the conventional judicial approach.

> "If social attitudes to evasion are tolerant, judicial attitudes to avoidance are ambiguous. Inevitably one judge will emphasize the citizen's right to arrange his affairs within permitted legal limits to avoid the incidence of tax.[11] Another will be critical of the expenditure of so much ingenuity and expertise in a pursuit so devoid of public benefit.[12] Yet a third will find the artificial pretences involved in many schemes worthy of censure.[13] Inevitably metaphors are introduced into the discussion of policy and of individual cases: "There is a certain fascination in being one of the referees of a match between a well-advised taxpayer and the equally well-advised Commissioners of Inland Revenue, conducted under the rules which govern tax avoidance. These rules are complex, the moves are sophisticated, and the stakes are high."[14] There can be few other branches of the law where the interaction of interests between community and individual is regarded as no more than a game."

The author has not read anywhere a better account of the paradigm shift in the tax jurisprudence than that in the judgment of Lord Scarman in *Inland Revenue Comrs v National Federation of Self-Employed and Small Businesses Ltd*.[15] In my view this is a great case of public interest litigation (PIL, for short) in the field of revenue law. It is a landmark decision, which by widening the concept of *locus standi* permits any public-spirited person to bring to the notice of the court the unlawfulness of the conduct of the government in revenue matters. Our Supreme Court in *S. P. Gupta's and ors. v. UOI*[16] quoted with approval the view of Lord Diplock on *locus standi* set forth in *Inland Revenue Comrs Case.* This aspect of the matter would be discussed in a separate chapter entitled "PIL in Revenue Matters".

In *IRC v. Federation of Self-Employed*, Lord Scarman explained the nature of the income-tax law and pointed out the duties of the authorities administering the income-tax law. He clarified what the appropriate judicial approach should be:

> "But I do not accept that the principle of fairness in dealing with the affairs of taxpayers is a mere matter of desirable policy or moral obligation. Not do I accept that the duty to collect 'every part of Inland Revenue' is a duty owed exclusively to the Crown. Notwithstanding the Treasury case in 1872, I am persuaded that the modern case law recognizes a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly, to use their discretionary powers so that, subject to the requirements of good management, discrimination between one

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11. e.g. Lord Tomlin in *Duke of Westminster v. CIR*, [1936] A.C. 119, Tax Cas , 490.
12. e.g. Lord Simon in *Latilla v. CIR* [1943] A.C. 377, 25 Tax Cas. 107.
13. e.g. Templeman L.J. In *IRC v. Gravin*, [1980] S.T.C. 295 and *W.T. Ramsay Ltd. v. IRC*, [1979] S.T.C. 582.
14. Per Donaldson L.J. *In IRC v. Garvin* [1980] STC 296 at 313.
15. (1981) 2 ALL ER 93 at 107 (H L).
16. AIR 1982 SC 149.

> group of taxpayers and another does not arise, to ensure that there are no favourites and no sacrificial victims. The duty has to be considered as one of several arising within the complex comprised in the care and management of tax, every part of which it is their duty, if they can, to collect.
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> Authority for this view is plentiful, albeit only persuasive in character. Viscount Simon LC in *Latilla v. Inland Revenue Comrs* [1943] 1 All ER 265 at 266, [1943] AC 377 at 381, 25 Tax Cas 107 at 117, discussing the evil of tax avoidance schemes, commented that 'one result of such methods, if they succeed, is…..to increase, *pro tanto*, the load of tax on the shoulders of the great body of good citizens …' In the Arsenal case [1977] 2 All ER 267 at 272, [1979] AC I at 17 Lord Wilberforce commented, admittedly in the context of rates but in terms which cannot rationally exclude a taxpayer, that 'To produce a sense of justice is as important objective of taxation policy.' In *Vestey v. Inland Revenue Comrs* [1977] 3 All ER 1073 at 1098, [1979] Ch 177 at 197, [1977] STC 414 at 439 Walton J. said that it is in 'the interest not only of all individual taxpayers …but also in the interests of the Revenue…that the tax system should be fair'.
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> The duty of fairness as between one taxpayer and another is clearly recognized in these (and other passages) in the modern case law. Is it a mere moral duty, a matter for policy, but not a rule of law? If it be so, I do not understand why distinguished judges allow themselves to discuss the topic: they are concerned with law, not policy. And is it acceptable for the courts to leave matters of right and wrong, which give rise to genuine grievance and are justiciable in the sense that they may be decided and an effective remedy provided by the courts, to the mercy of policy? Are we in the twilight world of 'maladministration' where only Parliament and the ombudsman may enter, or on the commanding heights of the law? The courts have a role, long established, in the public law. They are available to the citizen who has a genuine grievance if he can show that it is one in respect of which prerogative relief is appropriate. I would not be a party to the retreat of the courts from this field of public law merely because the duties imposed on the Revenue are complex and call for management decisions in which discretion must play a significant role."[17]

With compressed reasoning Lord Scarman has pronounced on some points of greatest importance. The following propositions follow from what he has observed:

(i) In dealing with the affairs of taxpayers the principles of fairness should operate.

(ii) The duty to collect 'every part of Inland Revenue' is a duty not owed exclusively to the Crown. It is a legal duty owed by the Revenue to the general body of the taxpayers without discrimination.

(iii) The duty of the Revenue is to "consider as one of several arising within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect".

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17. (1982) 2 All ER 93 at 112.

(iv) The success of tax avoidance scheme increases the load on the shoulders of the great body of good citizens.

(v) To produce a sense of justice is an important objective of taxation policy.

(vi) The courts have a role, long established, in the Public Law.

(vii) There cannot be 'the retreat of the courts from this field of public law merely because the duties imposed on the Revenue are complex and call for management decisions in which discretion must play a significant role.'

The principle of fairness governs actions, judicial or *quasi*-judicial even administrative. The concept of duty to act fairly "has often been used by judges to denote an implied procedural obligation. In general it means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions which are not analytically judicial but administrative."[18] What is arbitrary is obviously unfair; and is, *ipso jure* a negation of equality. Our Supreme Court has developed the new dimension of Article 14 of the Constitution of the India in a set of landmark cases holding that what is arbitrary is violative of Article 14 of the Constitution of India.[19]

The conventional view that revenue is a matter of exclusive concern of the executive has yielded place to the principle that the Revenue owes duty to the general body of the taxpayers. The leading case reflecting the traditional idea is *R. v. Lords Comrs of the Treasury*.[20] Different judgments had been delivered in this case. For our immediate concern the central proposition of the case has been stated thus:

"……no mandamus will issue to the treasury to pay moneys appropriated by Parliament for a given purpose, since the money is granted to the Crown, and even though it is in the hands of the Treasury, they are merely the instrument of the Crown for handling the money."[21]

By rejecting this conventional view shaped in the Victorian ethos, Lord Scarman has boldly recognized and declared the role of the Revenue in the present democratic society and its social mores and the modern world-view.

Lord Scarman has stated the duty of the tax administration with remarkable concision and clarity. Taxes are levied in terms of the law. The authorities created under the income-tax law carry out the mandate granted to them by Parliament. The supreme object of the income-tax law is to collect by way of tax

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18. De Smith, *Judicial review* of Administrative Action, 4th ed. pp. 238-239.

19. *Maneka Gandhi v. Union*, AIR 1978 SC 597; *E.P Royappa v. T.N.*, AIR 1974 SC 555; *R.D. Shetty v. Airport Authority*, AIR 1979 SC 1628; *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487;

20. (1982) LR 7 QB 387.

21. *R. v. Lords Commissioners of the Treasury*, (1872) LR 7 QB 387 *[the proposition drawn from the case is set out in Wade & Forsyth, Administrative Law, Seventh Edition, p. 657.*

what is due under the law. What Lord Scarman said is precisely what Lord Diplock pointed out in his judgment in the same case:

> "All that I need say here is that the Board are charged by statute with the care, management and collection on behalf of the Crown of income tax, corporation tax and capital gains tax. In the exercise of these functions the Board have a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge the highest net return that is practicable having regard to the staff available to them and the cost of collection."[22]

This is what Lord Hewart had observed in *Rex v. Special Commissioner*[23]: the duties imposed upon the Commissioners of Income-tax are "in the interest of the general body of tax payers, to see what the true assessment ought to be, and that process, a public process directed to public ends." This view inspired the members of the Indian Revenue Service to formulate a slogan at the National Academy of Direct Taxes has developed a slogan which every member of the Indian Revenue Service utters off and on : not a paisa less, not a paisa more (not a penny less not a penny more).

Lord Scarman is pressing the point of functional justice. If there is one overarching principle in the administration of Public Law it is the unflinching concern and commitment to do justice. This commitment to justice no longer is a tide, which passes by revenue matters in deference to the executive. The concept of the PIL in revenue matters originates from this activist judicial approach, which is most appropriate in our present-day dirigisme. This would also involve the commitment of the tax authorities that no body succeeds in evading legal duties by resorting to any device or by setting up any façade by playing truants with law or by putting purely formal and analytical interpretation having no concern for what is fair and just.

The proposition at point (vi) *supra* deserves to be read in the context of what Lord Diplock said in his judgment in the same case:

> "……it is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a Court of justice for the lawfulness of what they do, and of that the Court is the only judge."

He held that the members of the executive are accountable to the courts for any breach of law.

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22. *Inland Revenue Comrs v. National Federation of Self-Employed and Small Businesses Ltd.*, (1981) 2 ALL ER 93 at 107 (H L) at p. 101.

23. (20 TC 381 at 384, quoted *by Kanga & Palkhivala* 7th ed. at p. 1509.

The approach which emerges from the long extract from Lord Scarman's judgments is in tune with the idea of Dicey who stated that "at the present day, however, the whole public revenue is treated not as the property of the Sovereign, but as public income…"[24] What differentiates 19th century approach from the present day approach, and what constitutes of the main purpose of taxation have been thus stated in a standard book of reference:

> "Current theories suggest that governments should not use the tax instrument as a revenue raising device exclusively. Taxes are considered to have three functions: (1) fiscal or budgetary, to cover government expenditures insofar as they are not financed from other sources (fees, profits from public enterprises, the issue of public debt, the creation of money); (2) economic, to promote such general goals as full employment monetary stability, and a satisfactory rate of economic growth within the framework of a market economy, and (3) social or redistributive, to lessen inequalities in the distribution of income and wealth to the extent they are considered excessive and unjust."[25]

3. McDowell's Case[26]

This paradigm shift in income-tax jurisprudence is evidenced in many recent judicial decisions. As it is not possible to discuss them within the constraints of this work the author intends taking up two decisions, one by the House of Lords in *Furniss v. Dawson*,[27] and the other by the Supreme Court of India in *McDowell & Co. Ltd. v. Commercial Tax Officer.*[28] Excise duty was payable by the manufacturer but it was paid by the purchaser. The question was whether the excise duty paid formed part of the turnover of the manufacturer. The Court held in affirmative. On the face, the case had no potentiality to become a land-mark decision. But by adopting a wide judicial perspective the Court made the decision momentous for its powerful reasoning articulating some of the fundamentals of a paradigm shift. Lord Denning found in *the High Trees Case*[29] an apparently simple case but he made it a landmark case on Promissory Estoppels. Our Supreme Court in *McDowell's case* did something of that sort.

(a) Historical Perspective adopted

The most important point in *McDowell's case* is the recognition of TIME as a distinguishing factor in matters of interpretation. This approach brings to mind what Lord Buckmaster said in *Stag Line Ltd. v. Foscolo Mango & Co. Ltd.*[30]

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[24]. A.V. Dicey, An Introduction to the Study of the Law of the Constitution (10th ed.) p. 311.
[25]. Taxation in *Encyclopaedia Britannica* Vol. 32. p. 408.
[26]. *McDowell & Co. Ltd. v. Commercial Tax Officer,* [1985] 154 ITR 148 SC.
[27]. [1984] 1 All ER 530.
[28]. [1985] 154 ITR 148.
[29]. *Central London Property Trust Ltd. v. High Trees House Ltd*. (1947) K.B. 130.
[30]. [1931] All ER Rep 666 H L.

> "It hardly needed the great authority of Lord Herschell in *Hick v. Raymond* and Reid (2) to decide that in constructing such a word it must be construed in relation to all the circumstances, for it is obvious that what may be reasonable under certain conditions may be wholly unreasonable when the conditions are changed. Every condition and every circumstance must be regarded, and it must be reasonable, too, in relation to both parties to the contract and not merely to one."

Justice Chinnappa Reddy in *McDowell's case* observed:

> "During the period between the two world wars, a theory came to be propounded and developed that it was perfectly open for persons to evade (avoid) income-tax if they could do so legally [31] …Then came World War II and in its wake huge profiteering and racketeering, something which persists till today, but on a much larger scale. The attitude of the courts towards avoidance of tax perceptibly changed and hardened…"

He referred to the observations of many eminent judges in many well-known cases. He quoted the observations of *Lord Roskill in Furniss v. Dawson*:

> "The error, if I may venture to use that word, into which the courts below have fallen is that they have looked back to 1936 and not forward from 1982."

During the years between the two World Wars and also some years which followed the Second World War, judicial creativity was low. The portrait of the decline of values, which T.S Eliot provides in his 'The Waste Land', has its parallel in many fields including law. Prof. H.W. R. Wade aptly commented:

> "During and after the Second World War a deep gloom settled upon administrative law, which reduced it to the lowest ebb at which it had stood for centuries. The Courts and the legal profession seemed to have forgotten the achievements of their predecessors and they showed little stomach for continuing their centuries-old work of imposing law upon government.[32]"

And H.M. Seervai observes:

> "But 'the great depression' had its effect on our Courts as well, as will be apparent from our discussion of the writ jurisdiction as exercised by our Courts. We will also described how "the great depression" came to an end and led to a development which made Lord Diplock declare that he regarded a comprehensive system of administrative law developed over a period of 30 years as the 'greatest achievement of English courts in my lifetime'.[33]"

(b) A Judicial Approach

Justice Chinnappa Reddy observed:

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31. 154 ITR 148 at 152.
32. H.W.R. Wade, Administrative Law, (5th ed.) p. 18.
33. *R. v. I.R.C. Ex p. Fed, of Self-employed*, (1982) A.C. 617 at. p. 641.

> "In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. A hint of this approach is to be found in the judgment of Desai J. in Wood-Polymer Ltd., *In re* & Bengal Hotels Limited, *In re* [1977] 47 Comp Cas 597 (Guj), where the learned judge refused to accord sanction to the amalgamation of companies as it would lead to avoidance of tax.
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> It is neither fair nor desirable to expect the legislature to intervene and take care of every device and scheme to avoid taxation. It is up to the court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of "emerging" techniques of interpretation as was done in Ramsay, Burma Oil and Dawson, to expose the devices for what they really are and to refuse to give judicial benediction."

The approach of Justice Reddy is shared by all other judges as it evident from the following observations in the judgment delivered by Justice Ranganath Misra on his own behalf of the other judges: to quote

> "Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.
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> On this aspect, one of us, Chinnappa Reddy J. has proposed a separate and detailed opinion with which we agree."

(c) The duty of the court in cases were tax avoidance device is at work

Justice Reddy summarised the factors, which the court must take into account to ward off the evil consequences of tax avoidance in these words:

> "We think that the time has come for us to depart from the Westminster principle as emphatically as the British courts have done and to dissociate ourselves from the observations of Shah J. and similar observations made elsewhere. The evil consequences of tax avoidance are manifold. First, there is substantial loss of much needed public revenue, particularly in a welfare state like ours. Next, there is the serious disturbance caused to the economy of the country by the piling up of mountains of black money, directly causing inflation. Then there is "the large hidden loss" to the community (as pointed out by Master Sheatcroft in 18 Modern law Review 209) by some of the best brains in the country being involved in the perpetual war waged between the tax-avoider and his expert team of advisers, lawyers and accountants on the one side and the tax-gatherer and his perhaps not no skillful advisers on the other side. Then again there is the "sense of injustice and inequality which tax avoidance arouses in the breasts of those who are unwilling or unable to

profit by it." Last, but not the least is the ethics (to be precise, the lack of it) of transferring the burden of tax liability to the shoulders of the guideless, good citizens from those of the "artful dodgers". It may, indeed, be difficult for lesser mortals to attain the state of mind of Mr. Justice Holmes, who said, "Taxes are what we pay for a civilized society. I like to pay taxes. With them I buy civilization." But, surely, it is high time for he judiciary in India too to part its ways from the principle of Westminster and the alluring logic of tax avoidance. We now live in a welfare State whose financial needs, if backed by the law, have to be respected and met. We must recognize that there is behind taxation laws as much moral sanction as behind any other welfare legislation and it is a pretence to say that avoidance of taxation is not unethical and that it stands on no less a moral plane than honest payment of taxation."

4. Quest for justice

In *IRC v. McGuckian*[34] Lord Steyn, at the outset of his judgment, aptly observed:

> "My Lords, it matters how a court should approach the construction and application of a tax statute, notably in respect of the impact of the legislation on schemes for tax avoidance. In this case the approach to be adopted may well be determinative of the appeal".

And in *MacNiven's*[35] case Lord Hoffmann accurately stated:

> "There is ultimately only one principle of construction, namely to ascertain what Parliament meant by using the languages of the statute. All other 'principles of construction' can be no more than guides which past judges have put forward, some more helpful or insightful than others, to assist in the task of interpretation."

In *CWT v. Arvind Narottam*,[36] Justice Sabyasachi Mukharji ,

> "It is true that tax avoidance in an underdeveloped or developing economy should not be encouraged on practical as well as ideological grounds. One would wish, as noted by Reddy J. [in *McDowell & Co. Ltd. v. CTO*, (1985) 154 ITR 148 (SC)], that one could get the enthusiasm of justice Holmes that taxes are the price of civilization and one would like to pay that price to buy civilization. But the question, which many ordinary taxpayers very often, in a country of shortages with ostentatious consumption and deprivation for the large masses, ask, is, does he with taxes buy civilization or does he facilitate the waste and ostentation of the few. Unless waste and ostentation in Government spending are avoided or eschewed, no amount or moral sermons would change people's attitude to tax avoidance."

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34. [1997] 3 All ER 817, 823 HL.
35. *MacNiven v. Westmoreland Investments Ltd.* [2001] 1 All ER 874 HL.
36. [1988] 173 ITR, 497, 487 SC.

5. *Azadi Bachao* on *McDowell*: an unauthorised adventure causing Public Concern

The decision of the Constitution Bench in *McDowell and Company Limited. v. Commercial Tax Officer*[37] received a short shrift in *Union Of India & Ar. V. Azadi Bachao Andolan & Ar*[38]. This book has a separate Chapter on *McDowell* wherein the status of this great decision has been examined. For the present the following brief comments are considered enough:

(i) The rejection of Justice Reddy's ideas in his supplementary Judgment by the Division Bench in *Azadi Bachao* has no material effect as the Bench agreed with the view of the majority Judgment delivered by other four Judges who precisely say what Justice Reddy had said in so many words in a comprehensive perspective.

(ii) The Division Bench had no jurisdiction to depart even from what was stated by Justice Reddy because his reasoning became an integral part of the Constitution Bench's decision when the other four Judges *agreed* with the view of Justice Reddy. It is settled that the effect of a larger Bench decision cannot be diluted or affected by a smaller Bench.[39] There is a hierarchy within the Court itself here, where larger Benches overrule smaller Benches. This is the practice followed by this Court and now it has crystallized as a rule of law[40]. Proper course was to refer *McDowell* to a refer the points to a Constitution Bench, as was done in *Commissioner of Central Excise, Bolpur v. M/s. Ratan Melting & Wire Iindustries, Calcutta*[41] to resolve certain doubts.

PERISH THE THOUGHT

There are more things in heaven and earth, Horatio
Than are dreamt of in your philosophy.

—Shakespeare

The emergence of new political equations, and a long spell of economic crisis caused depression in Europe during the years intervening between the two World Wars. "The crash/depression was important, however, because it was followed so soon by World War, when the intellectual climate changed: people saw—or thought they could see—that cooperation worked, rather than competition;

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37. AIR 1986 S 649 Coram : *Y. V. Chandrachud,, C.J.I., D. A. Desai, O. Chinnappa Reddy , E. S. Venkataramiah and Ranganath Misra JJ. J.*
38. [2003] 263 ITR 706 SC.
39. *UOI & Ors. v. Godfrey Phillips India Ltd*., AIR 1986 SC 806.
40. *A. R. Antulay v. R. S. Nayak.*
41. Case No: Civil Appeal No. 4022 of 1999.

the idea of welfare state caught on in wartime and set the tone for government between 1945 and, say, 1980".[42]

The Constitution, which we had given to ourselves on the twenty-sixth day of November 1949, expressed the values of the Welfare State. The Preamble to the Constitution, the Fundamental Rights, and the Directive Principles were framed to realize the objectives of the welfare state.

But by 1980 the trends and tendencies were undergoing momentous changes. The forces conspired to ensure the supremacy of the economic realm over the political realm. Very powerful corporate lobby had emerged which established close nexus with the persons in power in the United States and in other European countries. At the Bretton Woods certain institutions were created under the spell of the corporate *imperium* which had acquired complete dominance in the United States to which the great European countries were massively indebted. The ideas as to the welfare state was yielding place to a new configuration of raw realities. Margaret Thatcher in Britain in 1979 won, on the promise 'to haul back the frontiers of the state'. Regan became President of the U.S.A. in 1980. Milton Friedman, who was a rabid defender of capitalism and the free market economy, acquired a most prominent voice. He argued that things must change from what they were as the policies of the government were responsible for slow economic growth. His two important prescriptions were:

(a) a roll-back of the state by withdrawing from the welfare activities and the regulations framed to promote them;

(b) a reduction of tax; and

(c) a dedication to monetarist and supply-side policies.

Galbraith is of the view that the new realities led to the following features with devastating changes:

"(1) Advertising takes on a new importance. It is created by, and is creator of mass culture. Even unnecessary wants are created: hence advertisement becomes integral to the process of production.

(2) To facilitate more and more consumption there is a deliberate creation of more debt.

(3) In such a system "there will always be a tendency to inflation, even in peace (in the past inflation had generally been associated with wars). For Galbraith, this is systemic, arising from the very fact that the producers of goods must also create the wants for those same goods, if they are to be bought.

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42. *Watson,* A Terrible Beauty p. 646.

(4) Third, and as a result of this, public services—paid for by the government because no market can exist in these areas---will always be behind private, market-driven goods. Gailbraith both observes and predicts that public services will always be the poor relation in the affluent society, and public service workers will be among the least well off.

(5) His last point is that with the arrival of the product-driven society there also arrives the age of businessman—'more precisely, perhaps, the important executive'. So long as inequality was a matter of serious concern, says Galbraith, the tycoon had at best an ambiguous position: 'He performed a function of obvious urgency. But he was also regularly accused of taking too much for his services. As concern for inequality has declined, this reaction has disappeared."[43]

There was little space in the philosophy of Friedman for a consideration of poverty, which Friedman thought in any case would be drastically reduced if the system of free-market economy is allowed to rule. Both the Thatcher government and the Regan administration acted on the lines suggested by Friedman . Ronald Reagan, the President of the U.S.A., implemented Friedman's economic ideas with a lot of verve. By way of specimen of his ideas one can go through his ideas on education. This would clearly bring out the extent of departure from the idea of welfare state. In the mildest form, the agenda of education in the market economy, as developed by its chief priest Milton Friedman, has been been summarized thus:

> "In fact, Friedman's arguments went much further than traditional economic interests in markets. Besides arguing that the depression had been bought about *not* by the Crash, but by economic mismanagement by the U.S government in the wake of the Crash, Friedman argued that health, schooling, and racial discrimination could be helped by a return to market economics. Health, he thought, was hampered by the monopoly which physicals had over the training and licensing of fellow doctors. This had the effect, he said, of keeping down the supply of medical practitioners, which helped their earning power and acted to the advantage of patients. He outlined many 'medical' duties that could be carried out by technicians—were they allowed to exist—who could be paid much less than highly trained doctors [44]. With schools, Friedman's ideas distinguished, first, a 'neighbourhood effect' in education. That is to say, to an extent we all benefit from the fact that all of us are educated in certain way—in the basic skills of citizenship, without which no society can function. Friedman thought that this type of schooling should be provided centrally but the all other forms of education, in particular vocational courses (dentistry, hairdressing, carpentry) should be paid for. Even basic citizenship education, he thought, should operate on a voucher system, whereby parents could exchange their vouchers for schooling for their children at the schools of their choice."[45]

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43. *Watson*, A Terrible Beauty, p. 646.
44. Milton Friedman (with Rose Friedman), Capitalism and Freedom p. 156.
45. Peter Watson, *op.cit*. p. 519.

These changes were engineered mostly by and for corporate *imperium* under the U.S. leadership whose two main items in the new agenda were:

(a) the government should perform only its classical functions, and must withdraw from welfare activities; and

(b) Taxation was to be reduced on the supposition that the best situation would be its elimination altogether.

To live within its means, and to cut it's coat according to its cloth. the State should downsize the government, reduce expenditure, and withdraw from welfare activities.

It is worth mentioning that the pro-capitalist lobby and those with interest in evasion/avoidance of taxes were uncomfortable in the U.K. as much as they are now in India. After *Furniss* there was so much pressure on the British Government to ditch this rule propounded in *Furnis*. The Chief Secretary had to inform the Treasury the intention of his Government to soft peddle the administrative approach in following the line of approach mandated by the House of Lords in tax evasion cases. A.H. Hermann has described how things proceeded in the U.K. thus:

> "Four years after the Law Lords put a seal of disapproval on artificial tax avoidance schemes in their 1984 decision in *Furniss v. Dawson* and the tax lawyers are still refusing to concede defeat. Erratic decisions in the chancery, where some judges disapproved of the new approach, encourage them. The cry has been 'Only Parliament can impose taxes and if the words of legislation can be read so as to bring an unintended benefit to the taxpayer, so be it.''[46]

If something of the same sort is to happen in our country, the nature of the judicial role should be considered by a Bench not less than of 7 Hon'ble Judges as in *McDowell* the four Hon'ble Judges had *agreed* with the concurring and supplemental judgment of Hon'ble Justice Reddy.

In the present-day corporate-driven economy, under the U.S. hegemony, the economic realm, with such institutions as the IMF, world Bank, and the W.T.O., has completely subordinated our political realm giving rise to the syndrome of a Sponsored State which we have to large extent already become. This morbid phenomenon has been examined in a separate Chapter "Towards the Sponsored State". In this ethos, attitude to taxes cannot be what Lord Scarman says in the *Inland Revenue's* celebrated case. This is a phase which looks down upon one who would refer to the view of Justice Holmes who said that taxes "are what we pay for civilized society" or that of Sir Leo Money who said, "I like to pay taxes. With them I buy civilization." We see now a clear recrudescence in some sectors of the attitude to taxation, which the ancestors of Gilbert had wished in W.S.

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46. *A.H. Hermann, Law v. Business (Butterworth).*

Gilbert's *Ruddigore*[47]. We are now in a phase wherein a former Attorney General (Mr Sorabjee)[48] could write in the press with evident barbs:

> "Thank God there is no patriotic duty to pay taxes which can be legitimately avoided unless, like the great Justice Holmes, one enjoys paying taxes, sharing his anachronistic belief that it is the price for the purchase of civilisation. Tax practitioners and consultants would face serious problems if Justice Holmes is taken seriously."

Delivering his *Hamlyn Lectures* 1n 1981 H.H. Monoroe had made an observation with insight. He said:

> "If social attitudes to evasion are tolerant, judicial attitudes to avoidance are ambiguous. Inevitably one judge will emphasize the citizen's right to arrange his affairs within permitted legal limits to avoid the incidence of tax."

Things, perish the thought, may turn out worse in this over-gripping phase of economic globalization. But we hope that the commitments under the Constitution would be carried out, and the *McDowell* approach would survive through a judicial gloss or through a legislative intervention. Concluding his *Modern Democracies* (Vol II p. 670) Lord Bryce perceptively observed:

> "Hope, often disappointed but always renewed, is the anchor by which the ship that carries democracy and its fortunes will have to ride out this latest storm as it has ridden out many storms before."

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47. Sir Ruthven Murgatroyd, Bad Baronet of Buddigore, is cross examined by his ghostly ancestors. Has he discharged obligation under the Withch's curse to commit a crime a day ?
"Rob. Really I do not know what you'd have. I've only been a bad baronet a week, and I've committed a crime punctually every day.
Sir, Rod. Let us inquire into this Monday?
Rob. Monday was Bank Holyday
Sir rod. True, Tusedey
Rob. On Tuesday I made a false income tax returen.
All. Ha! Ha!
1ar Ghost. That's nothing.
2nd Ghost. Nothing at all.
3rd Ghost. Everybody does that.
4th Ghost. It's expected of you."

48. *The Indian Express of 12-10-2003.*