

Doctrine of Impossibility - A Horizon of Possibilities!

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Introduction

“The word impossible is not in my dictionary.” – **Napoleon Bonaparte.**

But, certainly the word “impossible” is within the dictionary of the courts. Doctrine of impossibility has been acknowledged by Indian Courts under different legislation. It has been acknowledged under taxation laws also, both indirect as well as direct taxes.

Recently, the Hon’ble Supreme Court, in the case of **Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT [TS-106-SC-2021] [1]** delivered a landmark judgement on taxability of payment for software to non-resident, as royalty. This judgement given by the Apex Court applied old aged legal maxim related to the doctrine of impossibility. This article examines this judgement in the context of the doctrine of impossibility. Additionally, the author also analyses certain other High Court judgements that have applied the legal maxim of doctrine of impossibility under the direct tax laws.

Legal maxims related to Doctrine of impossibility

- ***lex non cogit ad impossibilia***

This means that the law does not demand the impossible. The law cannot compel a tax payer to do which he cannot possibly perform.

This maxim is usually applied by the Courts in those situations, where performance of obligation as per law becomes impossible.

- ***impotentia excusat legem***

This means that the law excuses inability. Whenever, there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused.

Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT

Section 9 of the Income-tax Act, 1961 (‘Act’) provides for various incomes that shall be deemed to accrue or arise in India. Section 9(1)(vi) of the Act provides when royalty income shall be deemed to accrue or arise in India. An Explanation 4 was inserted in Section 9(1)(vi) of the Act, by Finance Act, 2012. However, the said explanation was inserted with retrospective effect from 1st June 1976. This explanation is reproduced hereunder:

“For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred”

Thus, the Apex court needed to examine as to whether persons liable to deduct TDS under section 195 of the Act can be held liable to deduct such sums at a time when explanation 4 was factually not on the statute book.

The revenue authorities argued that computer software being covered by explanation 4 to Section 9(1)(vi) of the Act, the persons liable to deduct TDS under section 195 of the Act ought to have deducted tax at source on the footing that explanation 4 existed on the statute book with effect from 1976.

Judgements relied by the Apex Court, under legislations other than direct tax laws

The Apex Court relied on several judgements under different legislation such as Evidence Act, Electricity Act, Registration Act and even Tenancy legislation, that have in the past applied the doctrine of impossibility.

Arjun Panditrao Khotkar V. Kailash Kushanrao Gorantyal[\[2\]](#)

This judgement was delivered by Hon'ble Supreme Court under the Evidence Act, 1872. The respondents in this case, tried their level best and made all the efforts to get requisite certificate under section 65-B(4) of the Evidence Act, 1872 and applied for the certificate through concerned authority. However, if other party is not replying to demand for certificate then the respondent can apply to the Court under relevant provisions of Evidence Act, CPC or CrPC. After this the responsibility of respondent is over and he has done his best to obtain the certificate but could not get the certificate and hence was relieved from mandatory obligation to furnish the certificate under the doctrine of impossibility.

Cochin State Power & Light Corpn. Ltd Vs State of Kerala[\[3\]](#)

This judgement was delivered by Hon'ble Supreme Court under the Electricity Act, 1910. Section 6(4) of the Electricity Act, 1910 imposes upon State Electricity Board to give a notice in writing of its intention to exercise the option of purchasing an undertaking by the Board atleast 18 months before the expiry of the relevant period. Section 6 came into force on 5-9-1959 and the relevant period expired on 3-12-1960. Thus, it was impossible for the State Electricity Board to give notice of atleast 18 months, as it could not have contemplated that Section 6 would come into force and thus, it was impossible for the State Board to comply the provisions of Section 6(4) of the Electricity Act, 1910 and the Hon'ble Supreme Court applied the doctrine of impossibility and relived the State Board from these requirements.

Raj Kumar Dey V. Tarapada Dey[\[4\]](#)

Apart from the legal maxim *lex non cogit ad impossibilia*, one more maxim was observed by the Apex court in this judgement namely, *actus curiae neminem gravabit* which means that An Act of the Court shall prejudice no man.

This judgement was delivered by Hon'ble Supreme Court under the Registration Act, 1908. The arbitrators were being prevented from registration of the award, as pursuant to order of the court, the award was filed with the Court. Arbitrator could not disobey the order of the court and hence could not take the award from the custody of the court which prevented him for carrying out registration of the award under the Registration Act, 1909. The arbitrators even tried to obtain custody of the award but the court declined to give them. Thus, they could not follow the provisions of Registration Act, 1908 as they had to follow the order of the Court. That is to say, the Act of court led prevention of registration of the award under the Registration Act, 1908.

Hira Tikoo V State (UT of Chandigarh)[\[5\]](#)

This judgement was delivered by Hon'ble Supreme Court under the tenancy legislation.

The doctrine of impossibility was applied by the Apex court to relieve authorities of fulfilling their obligations to allot plots, when such plots have been found to be unallottable, owing to contravention of the Central statues.

Observation by Hon'ble Supreme Court

1) the two Latin maxims, *lex non cogit ad impossibilia*, i.e., the law does not demand the impossible and *impotentia excusat legem*, i.e., when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused.

2) the “person” mentioned in section 195 of the Act cannot be expected to do the impossible, namely, to apply the expanded definition of “royalty” inserted by explanation 4 to section 9(1)(vi) of the Income Tax Act, for the assessment years in question, at a time when such explanation was not actually and factually in the statute.

High Court judgments under the Income-tax Act, 1961 on the Doctrine of Impossibility

[CIT v. NGC Networks \(India\) Pvt. Ltd](#)

Hon'ble Bombay High Court in the case of **CIT v. NGC Networks (India) Pvt. Ltd**^[6] [\[TS-5186-HC-2018\(BOMBAY\)-O\]](#), has applied legal maxim, *lex non cogit ad impossibilia* and held that tax payers' are not obligated to do the impossible, i.e. to apply a provision of a statute when it was not actually and factually on the statute book.

The judgement was in the context of tax deduction at source on account of retrospective amendment in explanation 6 to Section 9(1)(vi) of the Act that was done in 2012 with retrospective effect from 1976. The court held that the tax payer could not have contemplated when he made the payment (which was subject to tax deduction at source u/s 194C of the Act), would require tax deduction u/s 194J of the Act due to some future amendment with retrospective effect.

The Hon'ble Supreme Court in the case of **Engineering Analysis Centre of Excellence** relied upon this judgement. It may be noted that the court appreciated the legal maxim *lex non cogit ad impossibilia* and observed that a party cannot be called upon to perform an impossible Act i.e. to comply with a provision not in force at the relevant time but introduced later by retrospective amendment.

Reliance was also placed on judgement delivered by Hon'ble Bombay High Court in case of **Commissioner of Income Tax V. Cello Plast**. The Cello Plast judgement is discussed separately ahead.

CIT v. Western Coalfields Ltd^[7]

Hon'ble Bombay High Court in the case of **CIT v. Western Coalfields Ltd.**, ITA No. 93/2008 has applied the doctrine of impossibility. The judgement was in the context of tax deduction at source by employer

Once the salary is paid by the employer after deducting tax at source as per the law prevailing on the date of paying the salary, then any subsequent amendment in law brought about retrospectively cannot require the employer to deduct tax at source for the past period, because the salary for that period has already been paid. Consequently, the employer cannot be made liable for the consequences set out in Section 201 of the Act on account of the retrospective amendment to Section 17(2) of the Act. Thus, it was impossible for the employer to deduct tax on the salary.

The Hon'ble Supreme Court in the case of **Engineering Analysis Centre of Excellence** relied upon this judgement

CIT Vs Cello Plast^[8] [\[TS-602-HC-2012\(BOMBAY\)-O\]](#)

This judgement delivered by Hon'ble Bombay High Court apart from relying on *Lex not cogit impossibila* (law does not compel a man to do that which he cannot possibly perform) also relies on the legal maxim, *impossibilium nulla obligatio est*. This means that law does not expect a party to do the impossible).

Section 54EC of the Act prescribes exemption from long term capital gains in case same is invested in certain bonds. Section 54EC of the Act requires the investment in any bond namely Rural Electrification

Corporation Limited or National Highway Authority of India. Further Section 54EC of the Act states that the exemption of long-term capital gains would be available only in case the investment is done within six months from date of transfer. In the instant case it was impossible for the assessee to invest in the bonds within six months of date of transfer because, the said bonds were not available in the market for investment. Thus, the doctrine of impossibility was applied, as it was not possible for the assessee to invest in these bonds, as they were not available and benefit was given to the assessee.

A very important observation of Apex Court in case of **Directorate of Enforcement v. Deepak Mahajan [1994] 3 SCC 440** was cited, which is reproduced hereunder:

"Though the function of the Court is only to expound the law and not legislate, none the less the legislature cannot be asked to sit to resolve the difficulties in the implementation of its intention and the spirit of the law. In such circumstances, it is the duty of the Court to mould or creatively interpret the legislation by liberally interpreting the statute".

ITO V. LIC of India [\[9\] \[ITS-5256-ITAT-2000\(CALCUTTA\)-0\]](#)

Hon'ble Calcutta High Court delivered this judgement in the context of tax deduction at source on account of retrospective amendment brought by Direct Taxes Amendment Laws, 1989 with retrospective from assessment year 1962-63 on City Compensatory Allowance. Earlier City Compensatory Allowance was not regarded as part of salary income due to Hon'ble Calcutta High Court judgement. However, the tax payer could not have contemplated when he made the payment (relying on Hon'ble Calcutta High Court judgement) would require tax deduction due to future amendment with retrospective effect. The assessee had already paid the salary and, therefore, there was no possibility of deducting the tax at source, even if it wanted because there was nothing from which the tax could have been deducted. To deduct anything, there must be something from which the deduction could be made. Thus, the doctrine of impossibility was applied by Hon'ble Calcutta High Court.

CIT Vs Prem Kumar [\[10\] \[ITS-6063-HC-2007\(ALLAHABAD\)-0\]](#)

Hon'ble Allahabad High Court had applied the legal maxim *Lex non cogit ad impossibilia*, in the context of taxability of capital gains. Here, tax authorities wanted to tax compensation on acquisition of land in the year of possession and not when award of compensation was given.

If contention of tax authorities, were to be accepted, it would mean that the tax payer would have to file return disclosing capital gain arising to him without even knowing the amount of capital gains because award was not yet given. Thus, the doctrine of impossibility was applied, wherein it was impossible for the tax payer to disclose the amount of capital gains as award was not given yet. In the words of the Hon'ble High Court:

'Lex non cogit ad impossibilia' is an age-old maxim, meaning that the law does not compel a man to do what he cannot possibly perform. Requiring the assessee to file a proper and complete return by including the income under the head 'Capital gains' would be impossible for the assessee, in cases where award of compensation has not been given"

Concluding Remarks

All things, considered, doctrine of impossibility is dealt with positively by the Courts in India and even under the direct tax laws. So next time, when we are preparing our grounds of appeal, we need to check whether the issue under consideration is covered by the doctrine of impossibility. If yes, we have a good case in our hand! However, a word of small caution, it will depend upon each fact of each case and circumstance. The fact needs to be analysed and checked what circumstances had prevented a person from performing an act under the law. Depending upon each individual case, the courts will take decision accordingly. So, it would be a good defence but it should not be the only defence, that is to say, it would be one of the grounds. Having said that, in cases where the doctrine of impossibility is directly applicable, then that single ground/ defence would be extremely useful for the entire case!

Disclaimer:

1) *It was not possible to include all the direct tax case laws pertaining to the doctrine of impossibility in one single article. Thus, only selected case laws at High Court level were considered in this article and only those case laws, which the author thought were important have been considered. Case laws at Tribunal level have not been considered in this article.*

2) *This article contains personal opinion of the author, it is only for general information and is not intended to provide legal advice. Readers desiring legal advice should consult with experts. The author does not accept any liabilities for any loss or damage of any kind arising out of any inaccurate or incomplete information in this article nor for any actions taken in reliance thereon.*

[1] [\[TS-106-SC-2021\]](#)

[2] (2020) 7 SCC 1

[3] (1965) 3 SCR 187

[4] (1987) 4 SCC 398

[5] (2004) 6 SCC 765

[6] ITA No. 397/2015 [\[TS-5186-HC-2018\(BOMBAY\)-O\]](#)

[7] ITA No. 93/2008

[8] [2012] (Bom.) [\[TS-602-HC-2012\(BOMBAY\)-O\]](#)

[\[9\] \[TS-5256-ITAT-2000\(CALCUTTA\)-O\]](#)

[\[10\] \[2008\] \(Allahabad\) \[TS-6063-HC-2007\(ALLAHABAD\)-O\]](#)