IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.771 OF 2014

Mr Rashmikant Kundalia and another ... Petitioners
v/s
Union of India and others ... Respondents

Mr B.L. Gandhi i/b Mr K.C. Pandey for Petitioners.
Mr Anil Singh, Additional Solicitor General with Mr A.R. Malhotra and N.A. Kazi for Respondent – UOI.

CORAM : MOHIT S. SHAH, C.J. &
B.P. COLABAWALLA, J.

Reserved On : 29th January, 2015.
Pronounced On : 06th February, 2015.

JUDGMENT [Per B.P. Colabawalla J.]

1. Rule. Respondents through their respective counsel waive service. By consent of parties, rule made returnable forthwith and heard finally.

2. By this Writ Petition filed under Article 226 of the Constitution of India, the Petitioners have challenged the constitutional validity of section 234E of the Income Tax Act, 1961. Section 234E seeks to levy a fee of Rs.200/- per day (subject to certain other conditions as set out therein) inter alia on a person who deducts Tax at Source (TDS) and then fails to deliver or cause to be delivered the TDS return/statements to the authorities within the prescribed period. Consequently, the Petitioners have also sought a declaration that the notices issued to Petitioner Nos.2 and 3 under section 200A of the Act are null, void and bad-in-law being ultra vires the Constitution of India.

3. It is stated in the Petition that Petitioner No.1 is a practising Chartered Accountant who has received several notices under section 200A of the Act that were served by the Revenue on his various clients. According to the Petitioners, section 234E is ultra vires and violative of Article 14 of the Constitution of India and therefore deserves to be struck down by this Court. Consequently, even the notices issued by the Revenue ought to be set aside.

4. To challenge the constitutional validity of section 234E, the

main thrust of the argument of the Petitioners was that what was sought to be levied under the said section was a "fee" which necessarily could be levied only for a service that was rendered, failing which the levy of such a fee was unconstitutional. It was argued that a "fee" is known in the commercial and legal world to be a recompense of some service or some special service performed, and it cannot be collected for any dis-service or default. The learned counsel for the Petitioners submitted that by using the word "fee", the Legislature has not stated what is the nature of service being provided for filing the return belatedly. The learned counsel submitted that compensation for dis-service was essentially in the nature of a penalty, and since the Legislature had categorically termed the levy under section 234E of the Act as a "fee", it necessarily could be levied only in the event the Government was providing any service or any special service. In the absence thereof, the said section seeks to collect tax in the guise of a fee, was the submission. This, according to the learned counsel, was impermissible either in common law or under the taxing statute, and encroached on the rights of life and liberty of the citizens. In the instant case, it was submitted that the Petitioners were providing a honorary service to the Union of India by deducting the tax of other assessees and therafter depositing the same with the Revenue. In such a situation, they

could not be made liable for any delay in filing the TDS return/statements, was the submission.

5. Apart from the aforesaid argument, it was further submitted that the provisions of section 234E were extremely onerous inasmuch as the Assessing Officer was not vested with any power to condone the delay in filing the TDS return/statements belatedly and there was also no provision of Appeal against any arbitrary order passed by the Assessing Officer under section 234E of the Act.

6. On the other hand, the learned Additional Solicitor General appearing on behalf of the Respondents, submitted that TDS is one of the modes of collection of taxes. At the time of making / crediting payment to a payee (the deductee), the payer (the deductor) was required to deduct a certain percentage as and by way of TDS and deposit the same with the tax authorities within the prescribed time period. Thereafter, the deductee got credit of the amount so deducted against his tax liability on the basis of the information furnished by the deductor in the TDS return/statements. He submitted that TDS, as the very name implies, aims at collection of revenue at the very source of income. It is essentially a method of

collecting tax which combines the concepts of *"pay as you earn"* and *"collect as it is being earned"*. Its significance to the Government lies in the fact that it prepones the collection of tax, ensures a regular source of revenue and provides for a greater reach and a wider base for tax. At the same time, to the tax payer, it distributes the incidence of tax and provides for a simple and convenient mode of payment.

7. Keeping this object in mind, the learned Additional Solicitor General submitted that timely submission of TDS statements containing the details of persons on whose behalf tax is deducted, becomes very crucial because unless and until the Revenue receives the details of the tax deducted (through the TDS statements), timely processing of income tax returns of assessees seeking credit of TDS is not possible. In case the Department goes ahead and processes the income tax return of the assessee without giving credit for TDS due to non-filing of TDS return/statements by the deductor, then the grievance of the deductee would be multiplied in as mush as instead of issuing a refund to the assessee (in a given case), infructuous demands would to be raised. Hence non-filing of the TDS return/statements by the deductor in a timely manner has multitude effects eroding the credibility of an efficient tax administration system, was the

submission of the learned Additional Solicitor General.

8. The learned Additional Solicitor General further submitted that the title of section 234E per se indicates that the section is regarding collection of a fee. This was not a penal provision but a fee for not furnishing the TDS return/statements within the prescribed time frame as the late submission of TDS statements creates additional work for the Income Tax Department. In many cases, due to late submission of the TDS return/statements, the Department has to revise the assessment order already passed in the case of the deductee for determining his correct tax liability. Moreover, in case of an income tax return having a refund claim, the Department has to pay extra interest due to delay in determining the correct amount of refund for want of information of tax deducted, which in turn results in delay of issue of refund. The fee under section 234E is levied to address this additional work burden forced upon the Department by the deductor by not furnishing the information in time which he is statutorily bound to furnish within the prescribed time. The learned Additional Solicitor General submitted that looking at it from this perspective, it cannot be said that section 234E of the Act is either ultra vires the Constitution or in any way violates Article 14 thereof. He

therefore submitted that there is no merit in the Petition and the same ought to be dismissed with costs.

9. We have heard the learned counsel, and perused the papers and proceedings in the Petition. Section 200 of the Act deals with the duty of a person deducting tax. It reads thus:

> ***"200. Duty of person deducting tax.***—
>
> *(1) Any person deducting any sum in accordance with the foregoing provisions of this chapter shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs.*
>
> *(2) Any person being an employer, referred to in sub-section (1-A) of Section 192 shall pay, within the prescribed time, the tax to the credit of the Central Government or as the Board directs.*
>
> *(3) Any person deducting any sum on or after the 1st day of April, 2005 in accordance with the foregoing provisions of this chapter or, as the case may be, any person being an employer referred to in sub-section (1-A) of Section 192 shall, after paying the tax deducted to the credit of the Central Government within the prescribed time, prepare such statements for such period as may be prescribed and deliver or cause to be delivered to the prescribed income tax authority or the person authorised by such authoriy such statement in such form and verified in such manner and setting forth such particulars and within such time as may be prescribed.*
>
> [1]***[****Provided that the person may also deliver to the prescribed authority a correction statement for rectification of any mistake or to add, delete or update the information furnished in the statement delivered under this sub-section in such form and verified in such manner as may be specified by the authority.****]"***

10. On a perusal of section 200, it is clear that sub-section (3)

1 Inserted by Finance Act (No.2) Act, 2014 w.e.f. 1-10-2014

thereof, and with which we are concerned, inter alia stipulates that any person responsible for deducting any sum by way of tax, on or after 1st April, 2005 in accordance with the foregoing provisions of Chapter XVII or, as the case may be, any person being an employer referred to in sub-section (1A) of section 192 shall, after paying the tax so deducted to the credit of the Central Government within the prescribed time, prepare such statements for such period as may be prescribed and deliver or cause to be delivered to the prescribed income tax authority or the person authorised by such authority, such statements, in such form and verified in such manner and setting forth such particulars and within such time as may be prescribed. The proviso (which was inserted w.e.f. 01-10-2014) further stipulates that a person may also deliver to the prescribed authority a correction statement for rectification of any mistake or to add, delete or update the information furnished in the statement. Similarly, the proviso to sub-section (3) of section 206C and which deal with profits and gains from the business of trading in alcoholic liquor, forest produce, scrap etc. also provide for similar provisions as set out in section 200(3). Though in the present case we are not concerned with section 206C, we are referring to it in passing only because the proviso to sub-section (3) of section 206C finds mentions in section 234E, the constitutional validity of which is

challenged before us.

11. Section 234E, the constitutional validity of which is challenged before us, was brought into the Income Tax Act, 1961 with effect from 1st July 2012. The said section reads as under :-

> ***"G – Levy of fee in certain cases***
>
> ***234-E. Fee for default in furnishing statements****.—(1) Without prejudice to the provisions of the Act, where a person fails to deliver or cause to be delivered a statement within the time prescribed in sub-section (3) of Section 200 or the proviso to sub-section (3) of Section 206C, he shall be liable to pay, by way of fee, a sum of two hundred rupees for every day during which the failure continues.*
>
> *(2) The amount of fee referred to in sub-section (1) shall not exceed the amount of tax deductible or collectible, as the case may be.*
>
> *(3) The amount of fee referred to in sub-section (1) shall be paid before delivering or causing to be delivered a statement in accordance with sub-section (3) of Section 200 or the proviso to sub-section (3) of Section 206C.*
>
> *(4) The provisions of this section shall apply to a statement referred to in sub-section (3) of Section 200 or the proviso to sub-section (3) of Section 206C which is to be delivered or caused to be delivered for tax deducted at source or tax collected at source, as the case may be, on or after the 1st day of July, 2012."*

12. On a perusal of sub-section (1) of section 234E, it is clear that a fee is sought to be levied inter alia on a person who fails to deliver or cause to be delivered the TDS return/statements within the prescribed time in sub-section (3) of section 200. The fee prescribed is Rs.200/- for every day during which the failure continues. Sub-section (2) further stipulates

that the amount of fee referred to in sub-section (1) shall not exceed the amount of tax deductible or collectible as the case may be.

13. It is not in dispute that as per the existing provisions, a person responsible for deduction of tax (the deductor) is required to furnish periodical quarterly statements containing the details of deduction of tax made during the quarter, by the prescribed due date. Undoubtedly, delay in furnishing of TDS return/statements has a cascading effect. Under the Income Tax Act, there is an obligation on the Income Tax Department to process the income tax returns within the specified period from the date of filing. The Department cannot accurately process the return on whose behalf tax has been deducted (the deductee) until information of such deductions is furnished by the deductor within the prescribed time. The timely processing of returns is the bedrock of an efficient tax administration system. If the income tax returns, especially having refund claims, are not processed in a timely manner, then (i) a delay occurs in the granting of credit of TDS to the person on whose behalf tax is deducted (the deductee) and consequently leads to delay in issuing refunds to the deductee, or raising of infructuous demands against the deductee; (ii) the confidence of a general taxpayer on the tax administration is eroded; (iii)

the late payment of refund affects the Government financially as the Government has to pay interest for delay in granting the refunds; and (iv) the delay in receipt of refunds results into a cash flow crunch, especially for business entities.

14. We find that the Legislature took note of the fact that a substantial number of deductors were not furnishing their TDS retun/statements within the prescribed time frame which was absolutely essential. This led to an additional work burden upon the Department due to the fault of the deductor by not furnishing the information in time and which he was statutorily bound to furnish. It is in this light, and to compensate for the additional work burden forced upon the Department, that a fee was sought to be levied under section 234E of the Act. Looking at this from this perspective, we are clearly of the view that section 234E of the Act is not punitive in nature but a fee which is a fixed charge for the extra service which the Department has to provide due to the late filing of the TDS statements.

15. As stated earlier, due to late submission of TDS statements means the Department is burdened with extra work which is otherwise not

required if the TDS statements were furnished within the prescribed time. This fee is for the payment of the additional burden forced upon the Department. A person deducting the tax (the deductor), is allowed to file his TDS statement beyond the prescribed time provided he pays the fee as prescribed unde section 234E of the Act. In other words, the late filing of the TDS return/statements is regularised upon payment of the fee as set out in section 234E. This is nothing but a privilege and a special service to the deductor allowing him to file the TDS return/statements beyond the time prescribed by the Act and/or the Rules. We therefore cannot agree with the argument of the Petitioners that the fee that is sought to be collected under section 234E of the Act is really nothing but a collection in the guise of a tax.

16. We are supported in our view by a judgement of a division bench of the Calcutta High Court in the case of ***Howrah Tax Payers' Association Vs. The Government of West Bengal and Anr.***[2] Before the Calcutta High Court, the constitutional validity of imposition of a *"late fee"* under section 32(2) of the *West Bengal Value Added Tax Act, 2003* came up for consideration. After analysing the provisions of the Bengal

2 (2011) 5 CHN 430 : 2010 SCC OnLine Cal 2520

Value Added Tax Act, the Calcutta High Court held as under:-

> ***"10.*** *In case of levying tax there is no quid pro quo between the Tax payer and the State. But element of quid pro quo is a must in case of imposing Fee. By virtue of impugned amendment, a dealer is entitled to get service indirectly from the authority upon payment of late fee. His irregular filing of return is regularised upon payment of late fee without being suffered from penal consequences which can not be categorised as nothing but special service. Thus, there exists quid pro quo in imposing late fee.*
>
> ***11.*** *In this context it is pertinent to mention here that though a fee must be co-related to the services rendered, such relationship need not be mathematical one even casual co-relationship in all that is necessary. The view of the Apex Court in (2005) 2 SCC 345 (referred to by the learned Tribunal at page 14 of the impugned judgement) removed all the doubts on this issue.**"***
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> (emphasis supplied)

17. It would also be apposite to refer to the observations of the Supreme Court in the case ***Sona Chandi Oal Committee v. State of Maharashtra***[3]**,** and which judgement has been referred to by the Calcutta High Court. The Supreme Court, in paragraph 22 stated thus:-

> ***"22.*** *A three-Judge Bench of this Court in B.S.E. Brokers' Forum v. Securities and Exchange Board of India [(2001) 3 SCC 482] after considering a large number of authorities, has held that much ice has melted in the Himalayas after the rendering of the earlier judgments as there was a sea change in the judicial thinking as to the difference between a tax and a fee since then. Placing reliance on the following judgments of this Court in the last 20 years, namely, Sreenivasa General Traders v.State of A.P. [(1983) 4 SCC 353] , City Corpn. of Calicut v. Thachambalath Sadasivan[(1985) 2 SCC 112 : 1985 SCC (Tax) 211] , Sirsilk Ltd. v. Textiles Committee [1989 Supp (1) SCC 168 : 1989 SCC (Tax) 219] , Commr. & Secy. to Govt., Commercial Taxes & Religious Endowments Deptt. v. Sree Murugan Financing Corpn. [(1992) 3 SCC 488] , Secy. to Govt. of Madras v. P.R. Sriramulu [(1996) 1 SCC 345] , Vam Organic Chemicals Ltd. v. State of*

3 (2005) 2 SCC 345

U.P. [(1997) 2 SCC 715], Research Foundation for Science, Technology & Ecology v. Ministry of Agriculture [(1999) 1 SCC 655] andSecunderabad Hyderabad Hotel Owners' Assn. v. Hyderabad Municipal Corpn.[(1999) 2 SCC 274] it was held that the traditional concept of quid pro quo in a fee has undergone considerable transformation. So far as the regulatory fee is concerned, the service to be rendered is not a condition precedent and the same does not lose the character of a fee provided the fee so charged is not excessive. It was not necessary that service to be rendered by the collecting authority should be confined to the contributories alone. The levy does not cease to be a fee merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have a direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the service. Quid pro quo in the strict sense was not always a sine qua non for a fee. All that is necessary is that there should be a reasonable relationship between the levy of fee and the services rendered. It was observed that it was not necessary to establish that those who pay the fee must receive direct or special benefit or advantage of the services rendered for which the fee was being paid. It was held that if one who is liable to pay, receives general benefit from the authority levying the fee, the element of service required for collecting the fee is satisfied."

(emphasis supplied)

18. We are therefore clearly of the view that the fee sought to be levied under section 234E of the Income Tax Act, 1961 is not in the guise of a tax that is sought to be levied on the deductor. We also do not find the provisions of section 234E as being onerous on the ground that the section does not empower the Assessing Officer to condone the delay in late filing of the TDS return/statements, or that no appeal is provided for from an arbitrary order passed under section 234E. It must be noted that a right of appeal is not a matter of right but is a creature of the statute, and if the Legislature deems it fit not to provide a remedy of appeal, so be it. Even in

such a scenario it is not as if the aggrieved party is left remediless. Such aggrieved person can always approach this Court in its extra ordinary equitable jurisdiction under Article 226 / 227 of the Constitution of India, as the case may be. We therefore cannot agree with the argument of the Petitioners that simply because no remedy of appeal is provided for, the provisions of section 234E are onerous. Similarly, on the same parity of reasoning, we find the argument regarding condonation of delay also to be wholly without any merit.

19. It is now well settled that even though this Court exercising jurisdiction under Article 226 of the Constitution of India has the power to declare a statute (or any provision thereof) as unconstitutional, it should exercise great restraint before exercising such a power. Really speaking, there is only one ground for declaring an act of the legislature as invalid, and that is if it clearly violates some provision of the Constitution of India in so evident a manner so as to leave no manner of doubt. Before declaring a statute to be unconstitutional, the Court must be absolutely sure that there can be no manner of doubt that it violates the provisions of the Constitution of India. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view

must always be preferred. The Court must therefore make every effort to uphold the constitutional validity of a statute, even if it requires giving the statutory provision a strained meaning, or a narrower or wider meaning, than what appears on the face of it. It is only when all efforts to do so fail should the Court declare a statute to be unconstitutional.

20. It is equally well settled that a statute relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, freedom of religion etc. As regards economic and other regulatory legislation it is imperative that the Court exercises judicial restraint and grants greater latitude to the legislature whilst judging the constitutional validity of such a statute. This is for the simple reason that the Court does not consists of economic and administrative experts and has no expertise in these matters.

21. These well settled principles have been very succinctly set out in the judgment of the Supreme Court in the case of ***Government of Andhra Pradesh and Others versus P. Laxmi Devi (Smt)***[4]*,* and more particularly, paragraphs 46, 67, 68, 78, 79 and 80 thereof, which read thus:-

4 (2008) 4 SCC 720

"46. *In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways e.g. if a State Legislature makes a law which only Parliament can make under List I to the Seventh Schedule, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope vide* ***Rt. Rev. Msgr. Mark Netto v.State of Kerala*** *[(1979) 1 SCC 23 : AIR 1979 SC 83] SCC para 6 : AIR para 6. Also, it is none of the concern of the court whether the legislation in its opinion is wise or unwise.*

67. *Hence if two views are possible, one making the provision in the statute constitutional, and the other making it unconstitutional, the former should be preferred vide* ***Kedar Nath Singh v. State of Bihar*** *[AIR 1962 SC 955] . Also, if it is necessary to uphold the constitutionality of a statute to construe its general words narrowly or widely, the court should do so vide* ***G.P. Singh's Principles of Statutory Interpretation****, 9th Edn., 2004, p. 497. Thus the word "property" in the Hindu Women's Right to Property Act, 1937 was construed by the Federal Court in* ***Hindu Women's Rights to Property Act, 1937, In re*** *[AIR 1941 FC 72] to mean "property other than agricultural land", otherwise the Act would have become unconstitutional.*

68. *The court must, therefore, make every effort to uphold the constitutional validity of a statute, even if that requires giving the statutory provision a strained meaning, or narrower or wider meaning, than what appears on the face of it. It is only when all efforts to do so fail should the court declare a statute to be unconstitutional.*

78. *In para 8 of the Constitution Bench decision in* ***R.K. Garg case*** *[****R.K. Garg v. Union of India****, (1981) 4 SCC 675 : 1982 SCC (Tax) 30] it was observed (as quoted above) that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, freedom of religion, etc. Thus, the Constitution Bench decision in* ***R.K. Garg case*** *[(1981) 4 SCC 675 : 1982 SCC (Tax) 30] is an authority for the proposition which has been stated herein, namely, when a law of the legislature encroaches on the*

civil rights and civil liberties of the people mentioned in Part III of the Constitution (the fundamental rights), such as freedom of speech, freedom of movement, equality before law, liberty, freedom of religion, etc., the Court will not grant such latitude to the legislature as in the case of economic measures, but will carefully scrutinise whether the legislation on these subjects is violative of the rights and liberties of the citizens, and its approach must be to uphold those rights and liberties, for which it may sometimes even have to declare a statute to be unconstitutional.

79. *Some scholars regarded it a paradox in the judgments of Holmes, J. (who, as we have already stated above, was a disciple of Thayer) that while he urged tolerance and deference to legislative judgment in broad areas of law-making challenged as unconstitutional, he seemed willing to reverse the presumption of constitutionality when laws inhibiting civil liberties were before the court.*

80. *However, we find no paradox at all. As regards economic and other regulatory legislation judicial restraint must be observed by the court and greater latitude must be given to the legislature while adjudging the constitutionality of the statute because the court does not consist of economic or administrative experts. It has no expertise in these matters, and in this age of specialisation when policies have to be laid down with great care after consulting the specialists in the field, it will be wholly unwise for the court to encroach into the domain of the executive or legislative (sic legislature) and try to enforce its own views and perceptions.***"**

22. Therefore even looking at it from the perspective as set out in the aforesaid judgment, we are of the clear view that Section 234E of the Income Tax Act, 1961 does not violate any provision of the Constitution and is therefore intra vires, Constitution of India.

23. In view of the aforesaid discussion in this judgment, we find no merit in this Writ Petition and the same is hereby dismissed. Rule is

discharged. However, in the facts and circumstances of the case, we leave the parties to bear their own costs.

CHIEF JUSTICE

B.P. COLABAWALLA, J.