IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31/1/2020

C O R A M

THE HON'BLE MR.A.P.SAHI, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

Writ Petition No.18314 of 2018

K.Nirai Mathi Azhagan ... Petitioner

Vs

1. The Union of India
   rep. By its Secretary
   Ministry of Finance
   Government of India
   North Block, Cabinet Secretariat
   Raisina Hill
   New Delhi 110 001.

2. Central Board of Direct Taxes
   9th Floor, Lok Nayak Bhawan
   Khan Market
   New Delhi 110 003. ... Respondents

Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of declaration, to declare Section 234 F of the Income Tax Act, 1961 inserted by the Finance Act, 2017 is in violation of Article 14 of the Constitution of India.

For petitioner ... Mr.S.Santhosh

For respondents ... Mr.G.Rajagopalan
Additional Solicitor General of India
assisted by Mr.G.Karthikeyan
Assistant Solicitor General of India
Ms.Hema Muralikrishnan for R2

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O R D E R

SUBRAMONIUM PRASAD,J

Instant writ petition challenges the vires of Section 234 (F) of the Income Tax Act, 1961.

2. Section **234 (F) of the Income Tax Act, 1961,** reads as under:-

> "Fees for default in furnishing return of income – (1) Without prejudice to the provisions of this Act, where a person required to furnish a return of income under Section 139, fails to do so within the time prescribed in sub-Section (1) of said Section, he shall pay, by way of fee, a sum of -
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> (a) five thousand rupees, if the return is furnished on or before the 31st day of December of the assessment year;
> (b). ten thousand rupees in any other case.
> Provided that if the total income of the person does not exceed five lakh rupees, the fee payable under this Section shall not exceed one thousand rupees.
> (2). The provisions of this section shall apply in respect of return of income required to be furnished for the assessment year commencing on or after the 1st day of April, 2018."

3. The above said Section is sought to be challenged on the ground that it is a penalty guised as a fee and secondly, there is no service provided for by the authorities and therefore, fee is not leviable for the

simple reason that for levy of fee, there should be an element of ***quid pro quo***. Petitioner, relies on a judgment of the Hon'ble Supreme Court in ***KUNNATHAT THATEHUNNI MOOPIL NAIR, ETC., Vs. STATE OF KERALA AND ANOTHER {(1961) 3 SCR - 77}***, more particularly, paragraph 8, and the same reads as under:-

> "It is common ground that the tax, assuming that the Act is really a taxing statute and not a confiscatory measure, as contended on behalf of the petitioners, has no reference to income, either actual or potential, from the property sought to be taxed. Hence, it may be rightly remarked that the Act obliges every person who holds lands to pay the tax at the flat rate prescribed, whether or not he makes any income out of the property, or whether or not the property is capable of yielding any income. The Act, in terms, claims to be "a general revenue settlement of the State" (Section 3). Ordinarily, a tax on land or land revenue is assessed on the actual or the potential productivity of the land sought to be taxed. In other words, the tax has reference to the income actually made, or which could have been made, with due diligence, and, therefore, is levied with due regard to the incidence of the taxation. Under the Act in question, we shall take a hypothetical case of a number of persons owning and possessing the same area of land. One makes nothing out of the land, because it is arid desert. The second one does not make any income, but could raise some croup after a disproportionately large investment of labour and capital. A third one, in due course of husbandry, is making the land yield just enough to pay for the incidental expenses and labour charges besides land tax or revenue. The fourth is making large profits, because the land is very fertile and capable of yielding good crops. Under the Act, it is manifest that the fourth category, in our illustration, would easily be able to bear the burden of the tax. The third one may be able to bear the tax. The first and the second one will have to pay from their own pockets, if they could afford the tax. If they cannot afford the tax, the property is liable to be sold, in due process of law, for realisation of the public demand. It is clear, therefore, that inequality is writ large on the Act and is inherent in the very provisions of the taxing Section. It is also clear that there is no attempt at classification in the provisions of the Act. Hence, no more need be said as to what could have been the basis for a valid

classification. It is one of those cases where the lack of classification creates inequality. It is, therefore, clearly hit by the prohibition to deny equality before the law contained in Article 14 of the Constitution. Furthermore, Section 7 of the Act, quoted above, particularly, the latter part, which vests the Government with the power wholly or partially to exempt any land from the provisions of the Act, is clearly discriminatory in its effect and, therefore, infringes Article 14 of the Constitution. The Act does not lay down any principle or policy for the guidance of the exercise of discretion by the Government in respect of the selection contemplated by Section 7. This Court has examined the cases decided by it with reference to the provisions of Article 14 of the Constitution, in the case of Shri Ram Krishna Dalmia Vs. Shri Justice S.r.Dendolkar – S.R.Das, C.J., speaking for the Court had deduced a number of propositions from those decisions. The present case is within the mischief of the third proposition laid down at pp.299 and 300 of the Report, the relevant portion of which is in these terms:

> "A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny, the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that therefore, the discrimination is inherent in the statute itself."" (p.299 of the report)

The observations quoted above from the unanimous judgment of this Court apply with full force to the provisions of the Act. It has therefore, to be struck down as unconstitutional. There is no

question of severability arising in this case, because both the charging sections, Section 4 and Section 7, authorising the Government to grant exemptions from the provisions of the Act, are the main provisions of the Statute, which has to be declared unconstitutional."

4. Respondents have filed a counter stating that there is an obligation on the Income-tax Department to process an income-tax return within specified period from the date of filing. The timely processing of returns is the bedrock of an efficient tax administration system. The fee under Section 234 F of the Act is a fixed charge for the extra service which the Department has to provide due to the late filing of the return. In fact, the return which is filed beyond prescribed time limit is regulated upon payment of the fee as set out in Section 234 F.

5. It is stated that in view of the fact that returns are accepted even if the prescribed date would show that it is a privilege conferred to the individual giving liberty to file his return even after the prescribed date.

6. Heard Mr.S.Santhosh, learned counsel for the petitioner, Mr.G.Rajagopalan, learned Additional Solicitor General of India and

Ms.Hema Muralikrishnan, learned counsel for the second respondent.

7. The Income Tax Act is a complete code in itself. It prescribes time limit for payment of tax, processing of returns and refunds. As late payment of tax attracts penalty, delay in refunds attracts interest. The Act facilitates delay in payment of tax beyond the prescribed time limit, which is nothing but a service or a benefit extended to the assessee.

8. It is well settled that it is not necessary that there must be mathematical precision between the fee paid and service rendered. All that is necessary is a reasonable relationship between fee charged and the services rendered. The Hon'ble Supreme Court in ***SONA CHANDI OAL COMMITTEE Vs. STATE OF MAHARASHTRA {(2005) 2 SCC 345***, wherein at paragraph No.22, held thus:-

> **"22.**A three-Judge Bench of this Court in*B.S.E. Brokers' Forumv.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 U.P.*[(1997) 2 SCC 715] ,*Research Foundation for Science, Technology & Ecology*v.*Ministry of Agriculture*[(1999) 1 SCC 655] and*Secunderabad 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.

9. Permitting filing of returns after the date is a privilege. The authorities have to correlate the returns of various assessment in order to finalise the refunds and for that it has to deploy personnel. It cannot be said that no services is rendered accepting the returns

after the due date. Revenue is correct when it contends that fulfillment of tax responsibilities includes filing of return of income in time. A legal compulsion imposed by a statute calls upon an assessee to be not complacent and file a return timely. A burden of fee for an additional exercise by the revenue compels the assessee to exercise promptitude or otherwise pay an additional fee. The legislature intent is not to arbitrarily burden the assessee by realising something extra but to call upon the assessee to share the burden of extra exercise due to delay on his part. The department is correct in contending that the acts of an assessee in discharging his entire tax liability to the Government by way of Advance Tax, TDS, self assessment, etc., is set at naught if the same is not intimated to the Government in time by filing of return of income in order to enable to cross verify the same and complete the assessment within the period of limitation and in order to ensure that such acts of an assessee in discharging his entire tax liability bear fruits, a regulatory mechanism in the form of Section 234 F has been inserted in the statute book and the same cannot be termed as illogical or harsh.

10. A provision can be held unconstitutional only when the legislature was incompetent to bring out the legislation or that it offends some provision of the Constitution or when it is manifestly arbitrary. The Hon'ble Supreme Court in ***GOVERNMENT OF ANDHRA PRADESH Vs. SMT.P.LAXMI DEVI {(2008) 4 SCC - 720}***, wherein, the Hon'ble Supreme Court has observed as under:-

> "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, etc., if a State legislature makes a law which only the 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 Vs. State of Kerala 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 Kedarnath Singh vs. State of Bihar. 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 Edition, 2004 page 497. Thus ... 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.

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."

11. The Parliament is competent to pass legislation on Taxes in Income under Entry 82 of the List I to the Seventh Schedule. Section 234 F

is not violative of any of the other provisions of Income Tax Act or the Constitution of India. Nothing has been shown as to how the Section is manifestly arbitrary for it to be struck down.

12. It is well settled that if it is a charge for service rendered by the commercial agency and the amount of fee levied is based on the expenses incurred by the Government rendering the fee. Unlike the tax which is compulsory extraction of money, enforceable by law and not in return of any services rendered. The distinction between the tax and the fee is that tax is levied as a part of common burden while fee is payment for a special benefit of privilege. Fee confers some advantage and is a return of consideration for services rendered. The Hon'ble Supreme Court in ***Jindal Stainless Steel v. State of Haryana*** ***{(2006) 145 STC 544 (SC),*** while laying down the parameters of the judicially evolved concept of 'compensatory tax' vis-a-vis Article 301 has explained the difference between a tax, a fee and a compensatory tax in the following manner:

> "42. To sum up, the basis of every levy is the controlling factor. In the case of "a tax", the levy is a part of common burden based on the principle of ability or capacity to pay. In the case of "a fee", the basis is the special benefit to the payer (individual as such) based on the principle of equivalence. When the tax is imposed as a part of regulation or as a part of regulatory

measure, its basis shifts from the concept of "burden" to the concept of measurable/quantifiable benefit and then it becomes "a compensatory tax" and its payment is then not for revenue but as reimbursement/recompense to the service/facility provider. It is then a tax on recompense, Compensatory tax is by nature hybrid but it is more closer to fees than to tax as both fees and compensatory taxes are based on the principle of equivalence and on the basis of reimbursement/recompense. If the impugned law chooses an activity like trade and commerce as the criterion of its operation and if the effect of the operation of the enactment is to impede trade and commerce then Article 301 is violated".

13. In ***SREENIVASA GENERAL TRADERS v. State of Andhra Pradesh*** ***{(1983) 3 SCC - 353***, and it came to be held by the Hon'ble Apex Court as under:

"31. The traditional view that there must be actual quid pro quo for a fee has undergone a sea change in the subsequent decisions. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. If the, element of revenue for general purpose of the State predominates, the levy becomes a tax. In regard to fees there is, and must always be, correlation between the fee collected and the service intended to be rendered. In determining whether a levy is a fee, the true test must be whether its primary and essential purpose is to render specific services to a specified area or class; it may be of

no consequence that the State may ultimately and indirectly be benefited by it The power of any legislature to levy a fee is conditioned by the fact that it must be "by and large" a quid pro quo for the services rendered. However, correlationship between the levy and the services rendered (sic or) expected is one of general character and not of Mathematical exactitude. All that is necessary is that there should be a reasonable "relationship" between levy of the fee, and the services rendered; If authority is needed for this pro position, it is to be found in the several decisions of this Court drawing a distinction between 'tax' and 'fee'. See: *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, supra; *H.H. Sundhundra Thirtha Swamiar* v. *Commissioner for Hindu Religious & Charitable Endowments, Mysore*, *The Hingir-Rampur Coal Co. Ltd.* v. *State of Orissa*; *H.H. Shri Swamiji of Shri Admar Mutt* v. *Commissioner, Hindu Religious & Charitable Endowments Department*; *Southern Pharmaceuticals & Chemicals, Trichur etc.* v. *State of Kerala etc.*, and *Municipal Corporation of Delhi* v. *Mohd. Yasin*.

32. There is no generic difference between a tax and a fee. Both are compulsory exactions of money by public authorities. Compulsion lies in the fact that payment is enforceable by law against a person inspite of his unwillingness or want of consent. A levy in the nature of a fee does not cease to be of that character 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 direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the

service. It is now increasingly realized that merely because the collections for the services rendered or grant of a privilege or licence are taken to the consolidated fund of the State and not separately appropriated towards the expenditure for rendering the service is not by itself decisive. Presumably, the attention of the Court in the Shirur Mutt case was not drawn to Art. 266 of the Constitution. The Constitution nowhere contemplates it to be an essential element of fee that it should be credited to a separate fund and not to the consolidated fund. It is also increasingly realized that the element of quid pro quo in the strict sense is not always a sine qua non for a fee. It is needless to stress that the element of quid pro quo is not necessarily absent in every tax: *Constitutional Law of India* by H.M. Seervai, Vol. 2, Second Edn., p. 1252, paras 22, 39."

14. The element of ***quid pro quo strict senso*** is not always a sine qua non of a fee. Nonetheless, the fee under Section 234 F is charged for delay in submitting the return of income beyond the prescribed time, which is privilege to allow late filing of the return.

15. The revenue is justified in holding that the object of the provision is thus intended to ensure proper and timely filing of return. The gravamen of the offence is failure to submit the return within a stipulated time. So far as these persons are concerned, they form a class by themselves. Whether a person is richer comparatively than the other has no relevance to this classification. Therefore, the classification of all such defaulters as one class is a reasonable classification and does not offend Article 14 of the Constitution of India.

16. In view of the above, **writ petition fails and accordingly, the same is dismissed.** No costs. Consequently, the connected Miscellaneous Petition No.21628 of 2018 is closed.

(A.P.S., CJ.) (S.P.,J.)
31/1/2020

Index: Yes/No
Internet: yes/No
Speaking/Non-speaking order

mvs/pkn.

THE HON'BLE CHIEF JUSTICE
and
SUBRAMONIUM PRASAD, J.

mvs/pkn.

Pre-delivery order in
Writ Petition No.18314 of 2018

31/1/2020