IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11 /3/2020

C O R A M

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

AND

THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

Writ Petition Nos.13331, 13114, 13118, 13337, 13377 and 13379 of 2019

a n d

W.M.P.Nos.13257, 13259, 13443, 13447 and 13486 of 2019

Qatalys Software Technologies Private Limited
rep. By its Director
Kharedehal Venkata Abhiram Krishna
S-16 Siddarth Thiru.Vi.Ka.Industrial Estate
Guindy
Chennai 600 032. ... Petitioner in W.P.Nos.13331, 13337 of 2019

Q Source Global Consulting Private Limited
rep. By its Director
Kharedehal Venkata Abhiram Krishna
S.16 Siddarth Thiru.Vi.Ka Industrial Estate
Guindy
Chennai 600 032. ... Petitioner in W.P.Nos. 13114, 13118 of 2019

Jeans Park (India) Private Limited
rep. By its Director
Kamal Kumar Chhajer
565 Anna Salai, Teynampet
Chennai 600 018. ... Petitioner in W.P.Nos. 13777 and 13379 of 2019

Vs

1. Union of India
   rep. By its Secretary (Revenue)
   Ministry of Finance
   128 A North Block
   New Delhi 110 001.

2. The Chairman
   Central Board of Direct Taxes
   North Block
   New Delhi 110 001.

3. The Principal Chief Commissioner of
   Income Tax – Chennai
   121 MG Road, Nungambakkam
   Chennai 600 034.

4. The Chief Commissioner of Income Tax
   (TDS) Chennai
   121 M G Road, Nungambakkam
   Chennai 600 034. ... Respondents 1 to 4
   in all the writ petitions

5. The Income Tax Officer
   TDS Ward 2 (1)
   Room No.108, 1st Floor, Tower – 1
   BSNL Building
   Greams Road
   Chennai 600 006. ... Fifth respondent in
   W.P.Nos.13331, 13114 of 2019

5. The Income Tax Officer
   TDS Ward 2 (2)
   Room No.109, 1st Floor, Tower – 1
   BSNL Building
   Greams Road
   Chennai 600 006. ... Fifth respondent in
   W.P.Nos.13377 and 13379 of 2019

Prayer in W.P.Nos.13331, 13118, 13377 of 2019:- Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of declaration to declare Section 234 E of the Income Tax Act, 1961 as ultra vires the Constitution.

Prayer in W.P.Nos.13114, 13337 and 13379 of 2019:- Petitions filed under Article 226 of the Constitution of India praying for the issuance of a writ of certiorari to call for the records relating to the impugned Demand Notice C.No.2/Arrear/2018-19/TDS Ward 2 (1)/85, C.No.2/Arrear/2018-19/TDS Ward 2 (1)/2 and C.No.2/Arrear/2018-19/TDS Ward 2 (2)/60, dated 25/2/2019 on the file of the fifth respondent and quash the same.

For petitioner ... Mr.Kabilan Manoharan

For respondents ... Mr.Karthick Ranganathan

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C O M M O N O R D E R

SUBRAMONIUM PRASAD,J

W.P.Nos.13331, 13118 and 13377 of 2019 have been filed by Qatalys Software Technologies Private Limited, QSource Global Consulting Private Limited and Jeans Park (India) Private Limited, challenging the vires of Section 234 E of the Income Tax Act, 1961.

2. W.P.Nos.13114, 13337 and 13379 of 2019 have been filed by QSource Global Consulting Private Limited, Qatalys Software Technologies Private Limited and Jeans Park (India) Private Limited, challenging the demand notices raised by the fifth respondent against them under Section 234 E along with Section 220 (2) and 201 (1) (A) of the Income Tax Act, 1961.

3. Section 234 E, the vires of which is under challenge:-

234 - E of the Income Tax Act reads thus:-

> **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 206 C,he shall be liable to pay, by way of fee, a sum of two hundred rupees for every day during which the failure continues.
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> (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.
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> (3). The amount of fee referred to in sub-Section 91) 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 206 C.
>
> (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 206 C 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.

4. The petitioner contends that Section 234 E of the Income Tax Act is penalty in the shape of a fee. It is submitted that prior to the introduction of Section 234 E, penalty for non-filing of the TDS statements was Rs.100/- per day as provided for under Section 272 A (2) (K) of the Act. It is submitted that Section 234 E deals with the fee payable for default in filing TDS statement on 1/7/2012. According to the petitioner, the prescribed form for filing TDS statement did not have a provision for payment of fine for default and the fee under Section 234 E of the Act can be collected only from 1/6/2015. It is submitted that Section 200 A of the Act was amended by insertion of Clause (c) to enable collection of fee under Section 234 in the form prescribed under Section 200 (3) and processed under Section 200 (A) of the Act.

5. The petitioners have given a tabular chart to demonstrate as to how Section 234 E is a penalty disguised as a fee.

Sl.	*Section*	*Relating to*	*Inserted w.e.f.*	*Remarks*
1	200(3)	Filing of TDS statement	01.04.2005	Penalty u/s 272A(2)(k)

Sl.	*Section*	*Relating to*	*Inserted w.e.f.*	*Remarks*
				inserted at the same time Rs.100/Day
2	200A	Processing of TDS statement	01.04.2010	Contains NO reference to fee payable u/s 234 E at this point of time.
3	234E	Levying fee of Rs.200/day for each day of default in filing TDS statement	01.07.2012	Inserted for Liability
4	271H	Penalty for default in filing TDS statement. (Rs.10,000/- to Rs.1,00,000/- No penalty for upto 1 year Delay)	01.07.2012	Proviso to Sec.272A inserted stating no penalty under the Section after 01.07.2012 probably because 271 H was introduced
5	200A(1)- (a) to (f)	Fee u/s 234 E to be computed at the time of processing TDS statement	01.06.2015	Inserted for Mode and Enforceability.

6. It is stated that the above table demonstrates that the penalty provisions under Section 272A(2)(k) for delayed TDS return is now been levied as fee under Section 234 E for the same default. It is therefore stated that Section 234 E is nothing but a penalty disguised as a fee for which no order is to be passed and no opportunity for

hearing need be given.

7. According to the petitioner, 234 (E) is an unreasonable restriction on trading business and thus violates Article 19 (1) (g) of the Constitution of India. It is also stated that fee can be levied only for the service rendered as a compensatory fee or for any privilege that conferred which is in the nature of regulatory fee. 234 E which levies a fee on delayed payment of TDS statement is neither compensatory fee nor is a regulatory fee. It is also submitted that there is no relationship between levy of fee and the service that is sought to be rendered on the contrary it is submited that since no service has been rendered, fee should not be leviable at all. Petitioner also states that fee has no correlation to the benefit conferred and any way, as stated above, it could not have been applied retrospectively.

8. Petitioner states that the present Section 234 E as a fee for default in furnishing TDS statements with an incrementally increasing fee for every continuing day in default is not justifiable and as stated

above Section 234 (E) is in fact a "penalty" in the guise of a fee. The challenge is inter alia on following grounds:

(a). Section 234 E is a verbatim transformation of an earlier applicable/existing penalty provision (Section 272 A (2) (k) and its proviso.

(b). Section 234 E has the very same characteristics seen only in other penalty provisions under the same Act (Income Tax Act, 1961) like Section 271 FA, 271 FB, 271 GB and Section 272 A (2);

(c). Section 234 E has been purportedly inserted under Finance Bill, 2012 for "Deterrence" which is not a purpose recognised by either the Constitution or the law laid down by the Hon'ble Supreme Court;

(d). Section 234 E is being described as a Fee for Default in filing TDS statement" as seen in Section Heading which is in direct conflict with the laws of criminal jurisprudence;

(e). The fee that is sought to be collected under Section 234 E is not connected to any service rendered or benefit/licence/privilege conferred; and

(f). The fee levied under Section 234 E is not justifiable in the context of no increasing/additional service being rendered to demand an incrementally increasing fee for every additional day of continuing to be in default.

9. Petitioner relies on a judgment of the Hon'ble Supreme Court, in ***OM PRAKASH AGARWAL AND OTHERS Vs. GIRI RAJ KISHORI AND OTHERS {1986 (1) SCC -722}***, wherein, the Hon'ble Supreme Court has held that:-

> "It is Constitutionally impermissible for any State Government to collect any amount which is not strictly of the nature of a Fee in the Guise of a Fee. If in the Guise of a Fee the Legislature imposes a tax, it is for the Court on a scrutiny of the scheme of the levy to determine its real character.

10. Petitioner further states that all assessees can file their assessment only by April first at the earliest (when there has been No TDS to their credit in the last quarter Jan-March) or by June 1st (if there has been TDS to their credit in the last quarter Jan-March) after providing for the time until which the Deductor has to file the TDS Statement (March 31st or May 31st depending on whether TDS has been deducted in the last quarter Jan-March to the credit of the Assessee/Deductee). Petitioner states that the delayed filing of TDS statement which is any way filed either by March 31st or May 31st (depending on whether TDS has been deducted in the last quarter Jan-March to the credit of the Assessee/Deductee) can cause no Difficulty in determining the tax liability of Assessees and thus when there is no difficulty caused to the Income Tax Department/Revenue, there can be no service that Income Tax can render to the deductor who was in default of filing TDS statement within prescribed time but has filed the same well within the time before which Assessees/Deductees can file their assessment for tax liability and tax refund. It is submitted that even with failure to file TDS statement within prescribed time, there will be cases that will cause difficulty to IT/Revenue (when the

delayed filing is not completed before March 31st or May 31st depending on whether TDS has been deducted in the last quarter) and in those cases there will be no difficulty to Income Tax Department /Revenue and therefore it cannot be said that service is being provided for accepting belated returns. It is therefore stated that the fee is nothing but a penalty in the guise of a fee.

11. Petitioner further points out that with no penalty payable for the delay in filing TDS statement within the expiry of one year from prescribed period, a fee to enable filing within that one year period (i.e., after the prescribed period and within one year from trhe prescribed period) cannot be said to confer a privilege which in any case already existed (ability to file TDS statement without any penalty even when there could be difficulty caused to IT/Revenue) and thus there is no privilege conferred on the petitioner/deductee for which the fee under Section 234 E is purportedly collected.

12. It is further submitted that with an existing penalty for delay in filing TDS statement u/s 271H, Section 234 E being a mere verbatim

transformation of an earlier existing penalty u/s 271 A(2)(k) now under a different nomenclature of Fee and thus a penalty disguised as a Fee making it in effect a double penalty (in addition to Sec.271H) for the same default, in violation of Article 20(2) of the Constitution.

13. It is submitted that the levy u/s 234 E as an incrementally increasing Fee is not proportionate to the extent of the privilege conferred on the deductor (by payment of this Fee) for the delayed filing of TDS statement when the Deductor does not even have to pay a penalty until one year of delay in filing TDS statement (u/s 271H) and can file it before or after one year along with interest payable (u/s 220(2)) and as such no privilege in bestowed on the Deductor for filing delayed TDS statement with the Fee u/s 234 E and thus there is no rational nexus.

14. The revenue contends that Section 200 of the Act casts duty on a person deducting tax at source to pay the same within a prescribed time, the sum so deducted to the credit of the Central Government. Tax Deduction at Source (TDS) is one of the modes of

collection of taxes, under which a certain percentage of amounts are required to be deducted by a payer (the deductor) at the time of making/crediting certain specified payment to a payee (the deductee). The deducted sum i.e., TDS is required to be deposited to the credit of the Central Government within the prescribed time period. The deductee gets the credit of the amount so deducted against his tax liability on the basis of the information furnished by the deductor to the Income-tax department in the TDS statement. TDS as the very name implies aims at collection of revenue at the very source of income.

15. It is the contention of the respondents that Section 234 (E) of the Act, was introduced on 1/7/2012, to ensure that quarterly segments are filed promptly within the prescribed period of time. It is stated by the respondents that this fee is levied for the reason that the assessee is allowed to file TDS statement beyond the prescribed period of time and this fee regularises the late filing of TDS. It is contended that Section 234 of the Act, is only for accepting the TDS statement beyond the period of time and Section 271 (H) imposes the

penalty of such late filing of statements. Section 271 (H) has been introduced to prevent belated filing whereas Section 234 (E) is to regularise late payment of fee.

16. It is further submitted that there can be two provisions, one imposing a penalty and the other imposing a fee. Under Section 271 (H) of the Act, penalty is not less than Rs.10,000/- which may be extended upto Rs.1 lakh. Section 271 (H) (3) provides that no penalty shall be levied if the person proves that after paying tax deducted or collected along with fee and interest if any to the credit of the Central Government, he had delivered the statement referred to in sub-Section 3 of Section 200 or the provisio to sub-Section (3) of Section 206 (C) before the expiry of a period of one year. It is therefore, submitted that principles of natural justice is inbuilt in Section 271 (H) of the Act whereas 234 (E) of the Act only provides for a late fee of Rs.200/- per day till the statement is filed.

17. It is further submitted that under the Income Tax Act, there is an obligation on the Income-Tax Department to process an income-

tax return within specified period from the date of the filing. The department can process the income tax return of a person on whose behalf tax has been deducted only when the information relating to the details of tax deducted is furnished by the deductor in a TDS statement within the prescribed time. The timely processing of returns is the bedrock of an efficient tax administration system. The Courts through various judgments have also called upon the department to look into the aspect of timely processing of returns and issue refunds.

18. It is further submitted that the timely submission of TDS statement containing the details of person on whose behalf tax is deducted becomes very crucial. Unless and until the department receives the details of tax deduction through the TDS statement, timely processing of income tax returns having claim of TDS is not possible. In case, the department goes ahead and processes the income tax return of the assessee having claim of TDS without giving credit for TDS due to non-filing of TDS details by the deductor, then the grievance of the deductee would be increased. It is stated that

non-filing of the TDS returns by the deductor on time has multitude effects eroding the credibility of an efficient tax administration system.

19. It is further submitted that as per the existing provisions of the Income-Tax Act, a person responsible for deduction of tax is required to furnish periodical TDS Statement (quarterly) containing the details of deduction of tax made during the quarter by the prescribed due date. It was noticed that a substantial number of the deductors were not furnishing their TDS statement resulted in delay in granting of credit of TDS to the person on whose behalf tax was deducted and consequently led to delay in issue of refunds to the deductee or raising of infructuous demand against the deductee and thereby increasing the workload of the department. It is submitted that timely furnishing of TDS statement is critical for processing of income-tax return of the assessee having TDS claim because credit for tax deducted on behalf of the deductee is granted to him only on the basis of information furnished by the deductor in the TDS statement. It is therefore the contention of the Revenue that if there is a delay in grant of credit

then it will result in granting refund of the tax deducted on behalf of the deductee by the deductor along with interest at the rate of half a percent every month which is a loss of revenue to the department on account of the lapse of filing the statements by the deductor.

20. Section 234 (E) of the Act provides that where a person fails to deliver a statement within the time prescribed, then he shall be liable to pay by way of a fee, a sum of Rs.200/- for every day during which the failure continues. The Act therefore, provides that late submission of fee is regularised by paying a fee of Rs.200/- per day.

21. The distinction between Sections 234 (E) and 271 (H) of the Act is that Section 234 (E) is not in lieu of penalty. Both are independent levies. Section 271 (H) of the Act provides that penalty would not be levied if the tax with fee and interest is paid and statement is filed within one year from the due on date. Section 234 (E) provides for payment at the rate of Rs.200/- per day for every day's delay. Section 234 (E) cannot be called as a penalty for which there is a separate provision. The legislature has power to levy fee for services

provided and to levy penalty is a deterrent. The prompt submission of statements makes it easier for the tax authorities to correlate the returns of other persons, on whose behalf tax has been deducted at source.

22. It is submitted that unless and until the Department receives the details of tax deduction through TDS statements, timely processing of Income Tax returns, having claim of TDS, is not possible. The authorities are facing difficulties when they process IT returns of the assessees having claim of TDS without giving credit for TDS because delay in filing statement. This resulted in refunds becoming due and payment of interest.

23. A Hon'ble Division Bench of High Court of Bombay, in ***RASHMIKANT KUNDALIA Vs. UNION OF INDIA {(2015) 54 TAXMANN.COM 200 (Bombay)*** while dealing with the issue as to whether the fee levied under Section 234 (E) of the Act, is in fact tax or not, observed as under:-

"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 VRD 9 of 19 WP771/14 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) VRD 10 of 19 WP771/14 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 VRD 11 of 19 WP771/14 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 VRD 12 of 19 WP771/14 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."

(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 Maharashtra3, 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 VRD 13 of 19 WP771/14 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 VRD 14 of 19 WP771/14 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."

24. We are in complete agreement with the aforesaid judgment. As stated by the Hon'ble Supreme Court, in ***SONA CHANDI OAL COMMITTEE AND OTHERS Vs. STATE OF MAHARASHTRA {(2005) 2 SCC - 345***, levy does not cease to be a fee merely because there is an element of compulsion or coerciveness present in or not, 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.

25. It is also well settled that there need not be a mathematical precision between the fee levied and the service rendered. A similar issue arose in Delhi High Court. A Division Bench of Delhi High Court in ***BISWAJIT DAS Vs. Union of India {(2019) 103 TAXMANN.COM 290 (DELHI)***, while dealing with the constitutionality of the said Section, upheld Section 238 (E) of the Act. Relevant paragraphs are extracted

hereunder:-

> **"27.** Upon a conspectus of the above, it is clear that the fee imposed under Section 234E is levied towards regularisation of the delay in filing of a TDS return or statement, since the Income Tax Department has to expend extra effort and resources for processing delayed TDS returns or statements; and possibly also incurs the additional burden of interest to be paid to the assessee on whose account tax deduction has been made.
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> **28.** We further hold that describing the levy under Section 234E as a 'fee' does not invalidate the imposition made. We may also point-out the overarching principle that the manner of description of a levy, in this case, calling the levy made under Section 234E of the Act a 'fee', cannot be the sole basis of judging the true nature or validity of the levy. Section 234E affords a person deducting tax at source the evident benefit of relaxation of timelines for furnishing a statement of the tax so deducted. The fee imposed under Section 234E of the Act is for all intents and purposes a 'late fee' payable for accepting the TDS statement/return at a belated point in time.
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> **29.** As a sequitur to the foregoing discussion, we hold that the provisions of Section 234E of the Act imposing a fee for delayed filing of statement of tax deducted at source are not *ultravires* the provisions of the Constitution."

26. The constitutional authority has also been upheld by the High Court of Karnataka in ***LAKSHMINIRMAN BANGALORE (P) LTD Vs. DEPUTY COMMISSIONER OF INCOME TAX, GHAZIABAD {(2015) 60 TAXMANN.COM 144 (Karnataka)***, and the relevant paragraphs are extracted hereunder:-

"13. The main thrust of the arguments addressed by the Learned Advocates appearing on behalf of the petitioners as noticed hereinabove is that the levy of fee under Section 234E for default in furnishing the statements is in the guise of penalty and there is no nexus to the services rendered by the department. In order to examine as to whether the fee charged under Section 234E is in fact fee or penalty or compensatory tax, it could be seen from Section 199 of the Act that any deduction made in accordance with Section 200 to Section 206 would be treated as a payment of tax on behalf of the person from whose income the deduction was made. An assessee while computing his income for being assessed under self assessment as provided under Section 140A will construe the deductions made on his behalf as a component in his return of income for claiming deduction in the payment of tax. A bare perusal of Section 244A of the Act would indicate that where refund of any amount becomes due to the assessee under the Act, such assessee would be entitled to receive in addition to the amount of refund of tax, simple interest at the rate of one-half percent for every month or part of a month comprised in the period from the 1st day of April of the assessment year to the date on which refund is granted as indicated in sub-Section (1)(a) of the Act. A bare perusal of Section 271H which came to be inserted by Finance Act, 2012 with effect from 01.07.2012 would indicate it provides for levy of penalty for failure to furnish statements of tax deducted at source under Section 200(3) or under proviso to Section 206C or for furnishing incorrect information. As per sub-Section (2), penalty will be not less than Rs. 10,000/- and it may extend upto Rs. 1,00,000/-. Section 273B indicates that no penalty shall be imposable on the person or the assessee for any failure referred to in the said provision if he proves that there was reasonable cause for such failure. Section 273B has also been amended by adding Section 271H and as already noticed under Section 271H(2)(k) penalty can be imposed for failure to furnish statement within prescribed time. However, by incorporating Section 271H in Section 273B, it would indicate that penalty need not be imposed under Section 271H if reasonable cause is shown. The contention of the assessee is that there is no similar provision in the impugned provision namely Section 234E and as such it takes away the valuable right of the assessee. The said contention does not hold water

inasmuch as Section 119(2)(a) enables the Board to issue general or special orders in respect of any class of incomes or class of cases from time to time, which includes sub-Section (1A) of Section 201 and as such no hardship would be caused to the assessees. As such contention raised in this regard cannot be accepted.

20. There cannot be any dispute to the fact that assessee is required to file e-returns to Central Processing Centre – CPC for processing of statements of tax deducted at source vide Section 200A, which provision is in para materia with Section 143(1). While processing the return of income under Section 143(1)(a) no personal hearing is provided to an assessee and as such the same is also not provided under Section 200A. Thus, the doctrine of principles of natural justice is given a go by under impugned provision or its violation thereof would not be a ground available to the petitioners to challenge the impugned provision on this ground. Hence, contention raised in this regard is without merit and stands rejected.

21. A person responsible for deduction of tax namely deductor is required to furnish periodical statements containing the details of deduction of tax within the prescribed due date. Any delay in furnishing TDS statements would result in perennial problems being faced by the department while processing the return of income filed by the assessees. When a return of income is filed by an assessee a statutory obligation is cast on the department to process the said return of income within the specified period from the date of filing. If for want of details such return of income not being processed or assessment order not being framed or would be stalled or in other words the return of income filed by an assessee on whose behalf the tax has already been deducted by the deductor is not furnished within the prescribed time by such deductor, it would consequently have cascading effect namely, it would stall the processing of the return of income filed by the deductee. In a given case, there might be instances of where the assessee would be entitled to refund and on account of delay occurring due to non delivery of TDS statements by the deductors, it would result in delay in extending the credit of TDS to the person on whose behalf tax is deducted and consequently it would result in delayed issuance of refunds to the deductee or raising of consequential demands against the deductee which otherwise would not have been raised. In this lengthy and

> unwarranted process it may erode the confidence reposed by the tax payer on the department. Last but not the least, it would result in financial burden to the Government namely on account of late payment of refund interest is to be paid on such refunds and it would also result in cash flow crunch, especially for business entities.

27. Similarly, High Court of Kerala in ***GURU SMARAKA SANGAM UPPER PRIMARY SCHOOL Vs. Union of India {(2017) 77 TAXMANN.COM 244 (Kerala)*** has upheld the constitutional validity of Section 200 of the Act, by relying on the judgment of ***RASHMIKANT KUNDALIA Vs. UNION OF INDIA {(2015) 54 TAXMANN.COM 200 (Bombay) and LAKSHMINIRMAN BANGALORE (P) LTD Vs. DEPUTY COMMISSIONER OF INCOME TAX, GHAZIABAD {(2015) 60 TAXMANN.COM 144 (Karnataka).***

29. 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.

30. 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?.*

31. It is also noted that a Hon'ble Division Bench of High Court of Punjab, in ***Dr.AMRIT LAL MANGAL Vs. UNION OF INDIA {(2015) 62 TAXMANN.COM 310 (PUNJAB & HARYANA)***, and a Hon'ble Division Bench of High Court of Rajasthan in ***DUNDLOD SHIKSHAN SANSTHAN Vs. UNION OF INDIA {(2015) 63 TAXMANN.COM 243 (RAJASTHAN)*** has also upheld the validity of Section 234 (E) of the Act.

32. Revenue is right in contending that Section 234 (E) of the Act is not a penalty. Penalty is levied under Section 271 (H) and is not automatic. Penalty is levied only when tax is deducted at source along with interest fee is not deposited and statement is not filed within one year. If the above two conditions are satisfied, then penalty is not leviable. On the other hand, Section 234 (E) of the Act is only a late fee at the rate of Rs.200/- per day. As held in the judgments relied above, Section 234 (E) of the Act is purely compensatory and is a special benefit to the advantage of the assessee as well for belatedly filing the TDS statement. The revenue is right in contending that Section 234 (E) of the Act is meant to ensure that assessee files the

statement in time, so that the Department can clear the returns of the persons connected with the assessee, i.e., from whom tax has been deducted at source without any delay and accurately with increasing or overloading the burden of the department.

33. 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.?

34. 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.

35. **In view of the above, W.P.Nos.13331, 13118 and 13377 of 2019 fail** and are hereby dismissed. **Since the levy is constitutional, the challenge to the demand notices also fail.**

Accordingly, W.P.Nos.13114, 13337 and 13379 of 2019 are also dismissed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

(A.P.S., CJ.) (S.P.,J.)
11/3/2020

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 common order in
Writ Petition Nos.13331, 13114, 13118,
13337, 13377 and 13379 of 2019

11/3/2020