

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 6255 of 2014

Date of Decision: 14.8.2015

Dr. Amrit Lal Mangal and others

....Petitioners.

Versus

The Union of India and others

...Respondents.

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MR. JUSTICE RAMENDRA JAIN.**

PRESENT: Mr. Vishal Gupta, Advocate for the petitioners.

Mr. Yogesh Putney, Advocate for the respondents.

AJAY KUMAR MITTAL, J.

1. In this writ petition filed under Articles 226/227 of the Constitution of India, the petitioners have prayed for issuance of a writ in the nature of certiorari for quashing the provisions of Section 234E of the Income Tax Act, 1961 (in short "the Act") as incorporated vide Finance Act, 2012. Further, prayer has been made for quashing the assessment orders (Annexure P-2 Colly) passed under Section 200A read with Section 234E of the Act whereby late filing fee under Section 234E of the Act has been levied upon the petitioners.

2. Briefly stated, the facts necessary for adjudication of the instant petition as narrated therein may be noticed. The petitioners are challenging the vires of Section 234E of the Act inserted vide Finance Act, 2012 w.e.f. 1.7.2012. Under Section 200 (3) of the Act read with Rule 31A of the Income Tax Rules, 1962 (hereinafter referred to as

“1962 Rules”), the duty has been cast upon the person deducting the tax at source to furnish return of the tax so deducted in the manner prescribed. Section 200A of the Act deals with the processing of statement of tax deducted at source. The scope of this Section did not cover the levy of fee under Section 234E of the Act. In the year 2012-13, the petitioners filed their Tax Deducted at Source (TDS) returns (Annexure P-1 Colly) with the respondents as per Section 200 of the Act with some delay. The respondents without issuing any show cause notice and without affording an opportunity of hearing to the petitioners passed the orders (Annexure P-2 Colly) under Section 200A of the Act by levying late filing fee amounting to ₹ 46,400/- upon petitioner No.1, ₹ 24,000/- upon petitioner No.2, ₹ 26,400/- upon petitioner No.3 and ₹ 32,650/- upon petitioner No.4 under Section 234E of the Act. Hence, the present writ petition.

3. Upon notice of motion having been issued, respondents No.1 to 3 contested the writ petition by filing a written statement. It was pleaded that the provision of Section 234E of the Act is intra vires inasmuch as Article 265 of the Constitution of India mandates that no tax shall be levied or collected except by the authority of law. The tax proposed to be levied must be with the legislative competence of the legislatures imposing the tax. However, there is no such allegation in the writ petition that the said provision has been enacted without there being any legislative competence of the legislature imposing the tax. The petitioners while challenging the provision of Section 234E of the Act that the fee could be levied only for rendering of service but they have lost sight of the fact that the tax is a compulsory exaction made under the enactment. The word 'Tax' includes all money raised by the taxation

including the tax levied by Union and State Legislatures, rates and other charges, levied by local authorities under the statutory powers. The fee is being imposed on a late filer of the TDS statements because the late filing has serious consequences wherein the credibility of a tax administration is at stake and the common taxpayer faces hardship. The other averments made in the writ petition were denied and a prayer for dismissal of the same was made. The petitioners controverted the averments made in the written statement by filing replication and reiterated that of the averments made in the writ petition.

4. Learned counsel for the petitioners, *inter alia*, submitted that the fee cannot be equated with the tax and is always charged for rendering services. It was further submitted that the provision is violative of principles of natural justice as no opportunity of being heard is provided before demand of fee under Section 234E of the Act can be raised. In other words, no power has been conferred on the Assessing Officer to condone the delay and even no remedy of appeal has been provided to challenge the imposition of such fee. In support of the said contentions, learned counsel for the petitioners has placed reliance upon the following judgments:-

- (i) Jindal Stainless Ltd. and another v. State of Haryana and others, AIR 2006 SC 2550;**
- (ii) Rajesh Kumar and others v. D.C.I.T. and others, AIR 2007 SC 181;**
- (iii) Sahara India (Firm), Lucknow Versus Commissioner of Income Tax, Central – I and another, (2008) 14 SCC 151;**
- (iv) Bidhannagar (Salt Lake) Welfare**

Association v. Central Valuation Board and others, AIR 2007 SC 2276;

(v) Raja Jagannath Baksh Singh Versus State of U.P. and another, AIR 1962 SC 1563;

(vi) Hardeo Motor Transport v. State of M.P. and others, AIR 2007 SC 839;

(vii) M/s MSK Projects(I) (JV) Ltd. Versus State of Rajasthan and another, AIR 2011 SC 2979; and

(viii) Commissioner of Income Tax, New Delhi v. M/s Eli Lilli and Company (India) P. Ltd., AIR 2009 SC(Supp) 333.

5. On the other hand, learned counsel for the respondents submitted that the issue is no longer *res integra* and the vires of Section 234E of the Act have been upheld by the Bombay High Court in **Rashmikant Kundalia and another v. Union of India and others (2015) 373 ITR 268 (Bom)** and also by the Karnataka High Court in **M/s Lakshminirman Bangalore Pvt. Ltd. v. The Deputy Commissioner of Income Tax, Ghaziabad and another, Writ Petition No. 26589 of 2014** decided on 12.6.2015.

6. After hearing learned counsel for parties, we do not find any substance in contentions of learned counsel for the petitioners.

7. It would be advantageous to refer to Section 234E of the Act incorporated vide Finance Act, 2012 with effect from 1st July, 2012, which reads as under:-

“Section 234E- Fee for defaults in furnishing statements, in the following terms:-

(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.”

8. According to sub-section (1), a person is liable to

pay a sum of ₹ 200/- per day by way of fee in case he defaults to deliver or cause to be delivered a statement within the time prescribed in Section 200(3) or the proviso to Section 206C(3). Sub-section (2) of Section 234E of the Act prescribes the maximum amount of fee under Section 234E(1) which shall not exceed the amount of tax deductible or collectible as the case may be. A mandate has been laid down under sub-section (3) whereby it has been stipulated that the amount of fee under Section 234E(1) shall be paid before delivering or causing to be delivered a statement in accordance with Section 200(3) or the proviso to Section 206C(3). Section 234E(4) enacts whereby these provisions shall apply to statement referred to in Section 200(3) or the proviso to Section 206C(3) which is to be delivered or caused to be delivered for tax deducted at source or the tax collected at source, as the case may be after 1.7.2012.

9. It would also be expedient to notice the legislative intent in enacting Section 234E of the Act. The respondents in their written statement have enumerated the purpose of introducing this provision in the following words:-

“As per the existing provisions of the Act, a person responsible for deduction of tax (‘the deductor’) 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 within the prescribed due date. Delay in furnishing of TDS statement resulted in delay in granting of credit of TDS to the person on whose behalf tax was deducted ('the deductee') and consequently led to delay in issue of refunds to the deductee or raising of infructuous demand against the deductee. Timely furnishing of TDS statement is *sine qua non* 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. Before insertion of section 234E in the Act, a penalty of ₹ 100 per day was leviable for delay in furnishing of TDS statement. The said penalty was not proved to be effective in reducing or eliminating defaults relating to late furnishing of TDS statement. This was mainly because the TDS statements were processed in the computerized environment and it was not practical to levy penalty for delay in furnishing of TDS statement in such automated environment. Therefore, in order to provide effective deterrence against delay in furnishing of TDS

statement, the Finance Act, 2012 inserted Section 234E in the Act to provide for levy of fee of ₹ 200 per day for late furnishing of TDS statement from the due date of furnishing of TDS statement to the date of furnishing of TDS statement. It has also been provided that the total amount of fee shall not exceed the total amount of tax deductible during the period for which the TDS statement is delayed. Further, the Finance Act, 2012 has also inserted Section 271H in the Act which provides for penalty ranging from ₹ 10,000/- to ₹ 1,00,000/- for late filing of TDS statement. Sub-section (3) of Section 271H provides that no penalty under Section 271H shall be levied if the deductor furnishes the TDS statement before the expiry of one year from the prescribed due date along with the fee payable under section 234E. Therefore, a privilege has been provided to the deductor to the effect that the deductor shall not be liable to pay penalty for late furnishing of TDS statement, if he pays the requisite fee and file the TDS statement within the extended period of one year.”

10. It further gives reason to demonstrate that the provision relates to collection of a fee and not tax. The

relevant portion of the reply reads thus:-

“That the marginal heading of section 234E reads – ***‘Fee for defaults in furnishing statements’***. The title per se indicates that the section is regarding collection of fee. This is not a penal provision, but a fee for defaults in furnishing statements in TDS. The late submission of TDS statement creates additional work for the Income-tax department. The department has to revise the assessment order already passed in the case of the deductee for determining his correct tax liability in the light of belated information furnished by the deductor. Moreover, in case of income-tax return having 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 result 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 statutorily is bound to furnish within the prescribed time. The fee levied u/s 234E is not of penal nature but merely on account for the additional work burden and monetary loss due to payment of

extra interest suffered by the department due to late filing of TDS statement by the deductor.”

11. A challenge was laid before the Division Bench of Bombay High Court to the vires of Section 234E of the Act in **Rashmikant Kundalia's case (supra)** on similar grounds. While elaborately discussing the contentions of the parties, the said provision was held to be intravires. It was concluded that Section 234E of the Act is not punitive and is in the nature of fees and not a tax. It is levied as a fixed charge for the extra services which are required to be provided by the department to the deductee. If the TDS statement is filed within time by the deductor then there is no additional work which arises for the department whereas in case of default in timely filing of TDS statement, the department is to undertake extra work of revising the assessment of the deductee. It was noticed as under:-

“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.

Further, the provision of Section 234E of the Act was held to be constitutionally valid with the following observations:-

“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.

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 [2008] 4 SCC 720, and more particularly, paragraphs 46, 67, 68, 78, 79 and 80 thereof, which read thus:-

“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 paragraph 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; [1982] 133 ITR 239 (SC) 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; [1982] 133 ITR 239 (SC)] 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.”

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.”

12. The Karnataka High Court in **Lakshminirman Bangalore Pvt. Ltd's case (supra)**, in view of the aforesaid enunciation, had held Section 234E of the Act to be valid with the under noted conclusion:-

“24. Thus, view from any angle it cannot be held that Section 234E of the Income Tax Act, 1961 suffers from any vices for being declared to be ultra vires of the Constitution. In other words it has to be held that the impugned Section i.e., 234E of the Income Tax Act, 1961 is intra vires of the Constitution.”

13. With reference to the judgments relied upon by learned counsel for the petitioners, suffice it to notice that the principles of law enunciated therein are well recognized but in view of pronouncements of Bombay High Court in **Rashmikant Kundalia's case (supra)** and Karnataka High Court in **Lakshminirman Bangalore Pvt. Ltd's case (supra)**, with which we express our concurrence where Section 234E of the Act has been held to be intra vires, no benefit can be derived by the petitioners from such enunciations. Further, all

the pronouncements relied upon by the petitioners are prior to incorporation of Section 234E of the Act by the Finance Act, 2012 with effect from 1.7.2012.

14. In view of the above, we find that the provisions of Section 234E of the Act are neither ultra vires nor unconstitutional and, thus, finding no merit in the instant writ petition, the same is hereby dismissed.

(AJAY KUMAR MITTAL)
JUDGE

August 14, 2015
gbs

(RAMENDRA JAIN)
JUDGE