



W.P.(MD).Nos.11831 of 2019 etc., batch

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 30.11.2022

Pronounced on : 24.02.2023

CORAM

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

**W.P.(MD).Nos.11831 of 2019, 7939 of 2022, 8269,
8270 of 2017, 8344 and 8351 of 2021**

and

**W.M.P.(MD).Nos.6322,6324, 6325, 6321 of 2021, 6338 of 2017,
5956, 5958 of 2022, 8950, 8951 of 2019 and 6337 of 2017**

W.P.(MD).No.11831 of 2019

Vedanta Limited
(Successor of Sterlite Industries (India) Ltd.)
No.20, Sesa Ghor, EDC Complex,
Patto, Panaji, Goa 403 001
Represented by Authorised Signatory

... Petitioner

Vs.

1.The Deputy Commissioner of Income Tax (International Taxation),
Room No.207,
VP Rathinasamy Nadar Road,
C.R.Building, Bibikulam,
Madurai 625 002.

2.The Commissioner of Income Tax (International Taxation)
4th Floor,
BSNL Building, Tower I,
Greaves Road,
Chennai 600 006.

... Respondents



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Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, quashing the order dated 28.03.2019 for AY 2012-13 passed by the respondent No.1.

For Petitioner : Mr.R.V.Easwar
Senior Counsel
Assisted by Mr.Rohit Garg for
Mr.V.Meenakshisundaram

For Respondents : Mr.N.Dilip Kumar
Senior Standing Counsel

COMMON ORDER

Two questions arise for consideration in this batch of writ petitions viz.,

a. Whether in the absence of limitation being prescribed for the purpose of passing orders under Section 201(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") deeming a person to be an *"assessee in default"* in view of failure to deduct the whole or any part of the tax in relation to payments made to a non-resident it is permissible for the Court to determine the limitation for passing such orders.

b. If the answer to the above question is in the affirmative, a further question arises as to what would constitute reasonable period for passing such orders.



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2. Brief Facts:

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a. At the outset, it may be relevant to note that both the counsel for the Petitioner and the Respondents would submit that the facts and issues that arise for consideration are common in all the six writ petitions. The petitioner in this batch of writ petitions viz., Vedanta Limited is the successor entity of Sterlite Industries (India) Ltd. The petitioner company is engaged in the business of mining and exploration of metals and exploration of oil and natural gas. For the relevant period viz., Financial Years 2009-2010 to 2014-2015, the petitioner company entered into two agreements with Vedanta Resources Public Limited Company (hereinafter referred to as "*VR PLC*") viz., Consultancy Agreement and Representative Office Agreement on 29.03.2005. Under the said agreement "*VR PLC*" provided legal advice, marketing and IT support to the petitioner. In lieu of these services, "*VR PLC*" was remunerated on a cost-plus basis. The remuneration paid by the petitioner was disclosed through Form No.15CA/CB filed for the relevant financial year to the Respondents/Income Tax Department.

b. "*VR PLC*" being a non-resident, petitioner was under an obligation to deduct tax at source on payments made to "*VR PLC*". Petitioner failed to deduct tax at source. Failure to discharge the obligation to deduct taxes at source would result in the petitioner being deemed to be an "*assessee in default*" in terms of Section 201(1) of the Act. There is no limitation prescribed



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for passing an order under Section 201(1) of the Act, deeming a person to be an “assessee in default” for failure to deduct tax at source (hereinafter referred to as “TDS”) on payments to non-residents.

c. The respondent issued Show Cause Notice under Section 201(1) of the Act for failure on the part of the petitioner to deduct TDS in respect of the payments made to VR PLC/non-resident by the petitioner for the assessment years 2010-11 to 2015-16. Thereafter, the respondent passed the impugned orders under Section 201(1) of the Act for the Financial years 2009-2010 to 2014-2015 i.e, assessment years 2010-11 to 2015-16, deeming the petitioner to be an “assessee in default” and levying consequential interest under Section 201 (1-A) of the Act.

3. The ground of challenge in these writ petitions is limited to impugned proceedings under Section 201(1) of the Act being barred by limitation on the premise that it is made beyond “*reasonable period*”. The year-wise summary of the relevant dates are as follows:

<i>Financial year</i>	<i>W.P.No.</i>	<i>Date of SCN</i>	<i>Date of Order</i>
01.04.2009-31.03.2010	8269/2017	14.03.2017	31.03.2017
01.04.2010-31.03.2011	8270/2017	08.02.2017	31.03.2017
01.04.2011-31.03.2012	11831/2019	31.01.2018	28.03.2019
01.04.2012-31.03.2013	8344/2021	31.01.2018	22.03.2021
01.04.2013-31.03.2014	8351/2021	01.03.2021	27.03.2021
01.04.2014-31.03.2015	7939/2022	01.03.2021	30.03.2022



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4. Case of the petitioner:

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a) Shri.R.V.Easwar, learned Senior Advocate appearing for the petitioner would submit that all the six impugned orders have been passed under Section 201(1) of the Act, treating the petitioner as “*assessee in default*”, for failure to deduct tax at source with regard to payments made to “*VR PLC*” towards Consultancy Agreement and Representative Office Agreement under which legal advice, marketing and IT support was provided to the petitioner. The impugned orders also levied interest in terms of Section 201(1-A) of the Act. There is no limitation prescribed under Section 201 of the Act to pass orders deeming a person to be an “*assessee in default*” for failure to deduct TDS on payments to non-residents. In the absence of a limitation prescribed /stipulated under the Act for passing orders, the same ought to be done within a reasonable period. It has been held that four years would constitute a reasonable period for passing orders under Section 201 (1) of the Act, in case of failure to deduct tax at source in respect of payments to non-residents, by various High Courts, some of them being:-

- i. Commissioner of Income-Tax v. NHK Japan Broadcasting Corporation, 2008 (305) ITR 137 (Delhi)
- ii. Bharti Airtel Ltd. v. UOI, (2017) 291 CTR 254,
- iii. Vodafone Essar Mobile Services Limited v. Union of India,



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(2016) 385 ITR 436 (Del).

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iv. CIT vs. Hutchison Essar Telecom Ltd., (2010) 323 ITR 230 (Delhi)

v. Director of Income Tax vs. Mahindra and Mahindra Limited [2014] 365 ITR 560 (Bom.)

vi. CIT v. U.B. Electronic Instruments Ltd 92015) 371 ITR 314 (AP)

vii. CIT v. Bharat Hotels Ltd (2016) 384 ITR 77 (Kar.)

viii. CIT (TDS) v. Anagram Wellington Assets Management Co. Ltd (2016) 389 ITR 654 (Guj.)

Relying upon the above judgments, it was submitted that the reasonable period for passing orders deeming a person to be an “assessee in default” for failure to deduct TDS on payments to non-residents is four years from the end of the financial year in which payment is made or credit is given. The impugned proceedings are barred by limitation and a nullity inasmuch as it has been passed beyond 4 years from the end of the financial year in which payment is made or credit is given.

b) Originally, there was no provision prescribing any limitation for passing an order under Section 201(1) of the Act deeming a person to be an “assessee in default”, for failure to deduct TDS on payments to both residents as well as non-residents. Subsequently, sub-section (3) to Section 201 of the



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Act was inserted vide Finance (No.2) Act, 2009 w.e.f. 01.04.2010 providing

that order under Section 201(1) of the Act, shall be passed deeming a person to be an “assessee in default” for failure to deduct TDS on payments to residents within four years from the end of the financial year in which payment is made or credit is given. Thereafter, such limitation was extended vide Finance Act, 2012, w.r.e.f. 01.04.2010 to six years and later to seven years from the end of the financial year in which payment is made or credit is given, vide Finance (No.2) Act, 2014 w.e.f. From 01.10.2014. Despite successive amendments made post 2009 fixing/stipulating and extending limitation for passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct TDS on payments to residents, Parliament has chosen not to prescribe any limitation deeming a person to be an “assessee in default” for failure to deduct TDS on payments made to non-residents. It was thus submitted that Parliament must be understood to have intended not to disturb the period of four years determined by Courts in the judgments referred above as constituting reasonable period for the purpose of passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents. The impugned orders having been passed beyond four years from the end of the Financial Year in which payment is made or credit is given is thus beyond



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reasonable period and thus barred by limitation and a nullity.

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5. Case of the Respondents:

It was submitted by Shri. Dilip Kumar, learned Senior Standing Counsel for the Respondents that the writ petitions ought not to be entertained inasmuch as the petitioner has an alternative remedy under Section 246 of the Act.

5.1. In any view, the submission of the petitioner that the impugned orders are barred by limitation needs to be rejected for the following reasons:

a) It is not permissible to read reasonable time/period when the Legislature has chosen not to stipulate/ prescribe, limitation for passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents.

b) Assuming that orders under Section 201 of the Act ought to be made within reasonable time/ period it cannot be less than the period prescribed in relation to residents.

c) Mere filing of Form 15CA and 15CB by the petitioner would not amount to compliance of the Act. The conclusions arrived by the Transfer Pricing Officer related to Arm's Length price of transaction with respect to Cost Recovery and Corporate Guarantee, whereas the present proceedings are on foreign remittances made in the nature of fees for Technical Services and



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applicability of TDS on foreign remittance transaction.

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d) The Doctrine of "Reasonable Time Period" will not attract to an action under Section 201(1) of the Act as no right gets vested in favour of the petitioner/assessee and it is only an enabling provision authorizing the Revenue to seek compensation for the wrongful loss caused to the Revenue by failure of the assessee to deduct tax upon payment made to the non-resident.

6. Discussion:

To resolve the above controversy, it may be necessary to trace the legislative and judicial history.

i) Section 201 of the Act, as it originally stood did not prescribe any limitation for passing an order under Section 201 of the Act.

ii) Subsequently, vide Finance (No.2) Act, 2009 w.e.f. 01.04.2010 sub- section (3) to Section 201 of the Act was inserted thereby providing limitation for passing an order under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to residents. The relevant provision reads as under:-

"(3) No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure deduct the whole or any part of the tax to from a person resident in India, at any time after the expiry of

(i) two years from the end of the financial year in which the statement is filed in a case where the statement referred to in section 200 has been filed;

(ii) four years from the end of the financial year in which payment is



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made or credit is given, in any other case :

Provided that such order for a financial year commencing on or before the 1st day of April, 2007 may be passed any time on or before the 31st day of March, 2011"

6.1. Thereafter, vide Finance Act, 2012, the limitation of four years was extended to six years for passing orders deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to residents with retrospective effect from 01.04.2010.

6.2. Subsequently, another amendment was brought in vide Finance (No.2) Act, 2014, whereby limitation was further extended from six years to seven years in sub-section (3) to Section 201 of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to residents. The amended provision reads as under:

"(3) No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of seven years from the end of the financial year in which payment is made or credit is given."

From the above, it is clear that prior to the year 2009, there was no time limit prescribed for passing an order under Section 201(1) of the Act irrespective of whether or not the recipient of the payment is a resident or non-resident. Importantly, even after successive amendments made post the year 2009 introducing and extending limitation for passing orders under Section



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201(1) of the Act, deeming a person to be an “assessee in default” for failure to deduct TDS on payments to residents, no limitation was however prescribed insofar as passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents.

7. It is trite law that in the absence of statutory prescription of limitation for passing an order, the same ought to be passed within a reasonable period.

In this regard, it may be relevant to refer to the following judgments:

i. S.B. Gurbaksh Singh v. Union of India (1976) 2 SCC 181:

"15... It may well be that for an exercise of the suo motu power of revision also, the revisional authority has to initiate the proceeding within a reasonable time. Any unreasonable delay in exercise may affect its validity. What is a reasonable time, however, will depend upon the facts of each case."

ii. J.M. Baxi & CO v. UOI – 2016 (336) ELT 285 (Mad):

"17. .. Though the statute does not prescribe a period of limitation for passing an order of adjudication, the law is well settled that anything in respect of which no period of limitation is prescribed, should be done at least within a reasonable time. What is reasonable time, would depend upon the facts and circumstances of each case...."

iii. Santosh- kumar Shivgonda Patil v. Balasaheb Tukaram Shevale, 2009 (9) SCC 352:

"Thus, we can safely say that the law is well settled that when there is no period of limitation prescribed for taking action under any provision of law, the same should be taken within a reasonable period, which would depend upon the facts of the case and the provisions of the Act under which action has to be taken. This is necessary, also because if any right has accrued in favour of a person or party by passage of time, same cannot be unsettled by a statutory authority at any time or



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after an indefinite period, as the same would amount to unsettling a settled position, which can only be done within a reasonable period, and not at any time in the future after an unlimited period.”

iv. J. Sheik Parith v. Commissioner of Customs reported in 2020 SCC OnLine Mad 15651:

"As regards what would construe a reasonable period for completion of proceedings where no time period or limitation had been set out in the relevant statute, Courts have held that such proceedings should be completed within a reasonable period, also taking note of the scheme of limitation prescribed in other provisions in that statute, where relevant.

(emphasis supplied)

8. It is thus clear that orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents, must be passed within a reasonable period in the absence of any limitation provided under the Act. The question that now arises for consideration in this batch of writ petitions is whether this Court in exercise of its jurisdiction under Article 226 of the Constitution of India can determine as to what would constitute reasonable period for passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents or should it be left to the assessing authorities to decide in individual cases depending on the facts of each case. To answer the above question it would be useful to refer to the judgment of the Hon'ble Supreme Court in the case of *State of Punjab v. Bhatinda District Coop. Milk Producers Union Ltd.*, reported



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in (2007) 11 SCC 363, wherein question arose as to what would constitute a "reasonable period" for exercising revisional jurisdiction in the absence of limitation provided under the Act and whether it could be left to the statutory authorities to decide the same. It was held the authorities under the Act being creatures of the statute would not be able to determine the same. Thus, it is for this Court in exercise of its plenary jurisdiction under Article 226 of the Constitution of India, to determine what would constitute reasonable period for passing orders under Section 201(1) of the Act deeming a person to be an "assessee in default" for failure to deduct tax at source in respect of payments to non-residents. In this regard, it may be relevant to refer to the judgment of the Hon'ble Supreme Court in **Bhatinda**¹, wherein it was held as under:

"17. A bare reading of Section 21 of the Act would reveal that although no period of limitation has been prescribed therefore, the same would not mean that the suo motu power can be exercised at any time.

18. It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors.

19. Reasonable period, keeping in view the discussions made hereinbefore, must be found out from the statutory scheme.

.....

25. We are, however, not oblivious of the fact that ordinarily the writ court would not entertain the writ application questioning validity of a notice only, particularly, when the writ petitioner would have an effective remedy under the Act itself. This case, however, poses a different question. The revisional authority, being a creature of the statute, while exercising its revisional jurisdiction, would not be able to determine as to what would be the

¹ State of Punjab v. Bhatinda District Coop. Milk Producers Union Ltd., (2007) 11 SCC 363



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reasonable period for exercising the revisional jurisdiction in terms of Section 21(1) of the Act. The High Court, furthermore in its judgment, has referred to some binding precedents which have been operating in the field. The High Court, therefore, cannot be said to have committed any jurisdictional error in passing the impugned judgment.

(emphasis supplied)

8.1. It is for this reason, that these writ petitions are entertained albeit for the limited purpose of examining the question as to what would constitute reasonable period for the purpose of passing order under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents.

8.2. The second reason which necessitates fixing a reasonable period in the absence of legislative prescription is also in view of the fact that, in fiscal matters, certainty and finality are important and assessee’s cannot be put in a situation where the liability would remain hanging on his head for all times to come.

8.3. Yet another reason for entertaining these writ petitions is the fact that different views had been expressed by different High Courts, on this issue while some High Courts had proceeded to determine the reasonable period for passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct TDS on payments to non-residents to be four years. Few other Courts have taken a view that reasonable period



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cannot be fixed but would depend on the facts of each case. The cleavage of judicial opinion is another compelling factor for entertaining the present writ petitions. For the above reasons, it is for this Court to determine as to what would constitute reasonable period for passing orders under Section 201(1) of the Act, deeming a person to be an “assessee in default” for failure to deduct TDS on payments to non-residents in exercise of its jurisdiction under Article 226 of the Constitution of India.

9. Precedents on the issue:

The question as to what would constitute a "reasonable period" for the purpose of passing an order under Section 201(1) of the Act, deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents was considered on more than one occasion by various High Courts and as stated above different views have been expressed. In the following judgments, it has been held that four years from the end of the relevant Financial Year would be a reasonable period for the purpose of passing orders under Section 201 of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents viz.,

- i. Commissioner of Income-Tax v. NHK Japan Broadcasting



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Corporation, 2008 (305) ITR 137 (Delhi)

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- ii. Bharti Airtel Ltd. v. UOI, (2017) 291 CTR 254,
- iii. Vodafone Essar Mobile Services Limited v. Union of India, (2016) 385 ITR 436 (Del).
- iv. CIT vs. Hutchison Essar Telecom Ltd., (2010) 323 ITR 230 (Delhi)
- v. Director of Income Tax vs. Mahindra and Mahindra Limited [2014] 365 ITR 560 (Bom)
- vi. CIT v. U.B. Electronic Instruments Ltd 92015) 371 ITR 314 (AP)
- vii. CIT v. Bharat Hotels Ltd (2016) 384 ITR 77 (kar)
- viii. CIT (TDS) v. Anagram Wellington Assets Management Co. Ltd (2016) 389 ITR 654 (Guj).

9.1. It may also be relevant to note that the SLP filed by the Revenue against the judgment of the Delhi High Court in *Vodafone Essar*, was dismissed by the Hon'ble Supreme Court.

9.2. On the other hand while dealing with the question as to what would constitute “reasonable period” for the purpose of passing orders under Section 201(1) of the Act, deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents, it was held that one cannot read limitation in the absence of any prescription by the



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legislature and what would constitute a reasonable period ought to be decided

on the facts of each case in the following judgments:

- a. Mass Awash (P) Ltd. v. CIT, (2017) 397 ITR 305 (Allahabad)
- b. Bhura Exports Ltd. v. Income-tax, (2014) 365 ITR 548 (Calcutta)
- c. Income Tax v. H.M.T. Ltd., (2012) 340 ITR 219 (Punjab and Haryana)

9.3.Both sets of cases referred above dealt with periods prior to 2010 i.e., when no limitation was stipulated for passing orders under Section 201(1) of the Act in respect of default in deducting TDS in respect of payments made to residents as well as non-residents. Though in *Bharti Airtel* one of the Financial years under challenge related to the Financial year 2010-2011 i.e., after introduction of limitation for residents. The Delhi High Court in *Bharti Airtel* followed the judgments in the case of *NHK Japan and Vodafone Essar*, both of which were concerned with orders passed under Section 201 of the Act in relation to periods prior to introduction of limitation even in respect of residents. The impact of the amendment introducing limitation vide sub-section (3) to Section 201 of the Act albeit with reference to residents and the subsequent amendments made thereto, in determining the limitation for passing orders deeming a person to be an “assessee in default” for failure to deduct



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TDS on payments to non-residents was not examined. Thus the judgment of the Delhi High Court in *Bharti Airtel case* would not constitute a precedent in respect of the issue on hand i.e., what would constitute reasonable period for passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents in view of the “*Doctrine of sub-silentio*” which has been explained by the Hon'ble Supreme Court in the case of *Municipal Corpn. of Delhi v. Gurnam Kaur*, reported in (1989) 1 SCC 101, the relevant portions of the order reads as under:

"11Professor P.J. Fitzgerald, editor of the *Salmond on Jurisprudence*, 12th Edn. explains the concept of *sub silentio* at p. 153 in these words:

A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."

9.4. From the judgments referred above, it would be clear that four years was determined as a reasonable period for the purpose of passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents prior to



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introduction of limitation for passing orders deeming a person to be an “assessee in default” for failure to deduct TDS on payments to both residents as well as non-residents. Importantly, after the judgment of the Delhi High Court in *NHK Japan*, Parliament had vide Finance (No.2) Act, 2009 inserted subsection (3) to Section 201 of the Act w.e.f. 01.04.2010 thereby providing limitation of 4 years for passing an order under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to resident. Thus, the limitation of 4 years which was determined judicially to constitute a reasonable period for deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents was granted legislative recognition by incorporation or adoption of the same for passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to residents. However soon thereafter vide Finance Act, 2012, the limitation of four years was extended to six years w.r.e.f. 01.04.2010. Subsequently, another amendment was brought in vide Finance (No.2) Act, 2014 whereby the limitation was further extended from six to seven years.



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10. It is the case of the petitioner that the Courts having determined the reasonable period for passing orders under Section 201(1) of the Act at four years deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents and Parliament having not stipulated any limitation for passing orders under Section 201(1) of the Act, deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents. The above limitation determined by various High Courts should continue to govern in the absence of any limitation having been provided deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents. On the other hand, it is the case of the revenue that in the absence of any limitation having been provided for passing orders under Section 201 of the Act for failure to deduct tax in respect of payments to non-residents it is impermissible to fix any limitation, in any view, the limitation should not be less than the period provided for residents.

11. Keeping in view the above background, I am of the opinion that the submission of the respondents that the limitation for passing orders under Section 201(1) of the Act with regard to non-residents must not be less than what is provided for residents, has merit for the following reasons viz.,



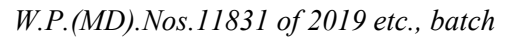
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I. Plea of Parity in treatment in fixing limitation for passing orders under Section 201(1) of the Act between residents and non-residents:

It is the case of the revenue that in the absence of any limitation having been provided for passing orders under Section 201 of the Act for failure to deduct tax in respect of payments to non-residents it is impermissible to fix any limitation, in any view the limitation should not be less than the period provided for residents. Interestingly, the assessee before the Delhi High Court i.e., in *Bharti Airtel case* also submitted that there is a need for parity in treatment between residents and non-residents in respect of the period within which orders must be passed under Section 201(1) of the Act. This Court is conscious of the fact that the above statement/submission would not bind the petitioner nor the revenue but is being referred only to show that both the revenue and assessee's have sought for parity in treatment between residents and non-residents insofar as limitation for passing orders under Section 201(1) of the Act. The extracts from orders of assessments and written submissions filed by the revenue and the recording of submission in *Bharti Airtel case* is relevant in this regard:

i) Order of Assessment:

"3. Hence, the reasonable time period as of now is seven years from the end of the financial year in which the payment is made to non-residents as well for the purpose of passing order u/s 201 (1) of the Act, even though the Act does not prescribe any time limit for initiation of such action in relation to

ii) Written Submission of the Respondents:

The observation in the case of *Bharati Airtel vs. Union of India*, reads as under:

II. The object behind TDS is common for both residents as well as non-residents:

The object behind any TDS provisions be it with reference to residents/non-residents is to secure the taxes or a portion of it at the earliest. TDS provisions are useful in two ways. They ensure that the Revenue Department can collect taxes in advance, that is, before the final assessment and this is helpful in meeting their urgent requirement for money. TDS provisions are essentially meant to ensure easier collection of taxes. The logic is that certain sums, though taxable in the hands of the payee might escape tax because of problems in enforcement machinery in the case of payees, the problem becomes more acute where the payee is a non-resident. Hence, those sums should be deducted by the payer, from whom they can be recovered more

2 at Page 3 paragraph 3 of Assessment order



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easily. Chapter XVII provides for collection and recovery of tax under the Act.

These provisions are enacted for the purpose of easy collection of taxes and to avoid evasion thereof by suitably tailoring the account.³

The object of TDS being common for payments both to residents and non-residents, I am of the opinion that the limitation prescribed by the legislature to pass orders under Section 201 (1) of the Act, deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to residents should be applied in respect of passing orders deeming a person to be an “assessee in default” for failure to deduct tax at source even in respect of payments to non-residents.

III. Presumption of Reasonableness vis-a-vis legislative action:

The third reason which compels me to think that the limitation prescribed vide amendments made to Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to residents must be applied to non-residents as constituting a “reasonable period” for passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct TDS on payments to non-

³ United Breweries Ltd. vs. Assistant Commissioner of Income Tax and Ors., [1995] 211 ITR 256 (KAR); Commissioner of Income Tax, New Delhi vs. Eli Lilly and Company (India) Pvt. Ltd. [2009] 312 ITR 225 (SC); Vodafone Essar Mobile Services Limited v. Union of India, (2016) 385 ITR 436 (Del); Transmission Corporation of A.P. Ltd. v. CIT, [1999] 239 ITR 587 at 594.



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residents, is in view of the fact that legislative actions are presumed to be reasonable and there is also a presumption that the legislature enacts laws that are directed to problems which are made manifest by experience and that legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. In this regard, it may be relevant to refer to the following judgments:

i) Hamdard Dawakhana v. Union of India (AIR 1960 SC 554):

"Another principle which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment."

ii) Bharat Petroleum Corpn. Ltd. v. Maddula Ratnavalli, (2007) 6 SCC 81

22. Parliament moreover is presumed to have enacted a reasonable statute [see Breyer, Stephen (2005): Active Liberty: Interpreting Our Democratic Constitution, Knopf (Chapter on Statutory Interpretation, p. 99 for "Reasonable Legislator Presumption")].

iii) Delhi Subordinate Services Selection Board v. Praveen Kumar, (2017) 11 SCC 283:

"Presumption of constitutionality and reasonableness ordinarily attached to legislative enactment, applies to statutory rules also. In P.V. Mani v. Union of India [P.V. Mani v. Union of India, 1985 SCC OnLine Ker 92 : AIR 1986 Ker 86] a Full Bench of the Kerala High Court observed as under: (SCC OnLine Ker para 18)



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iv) *Orient Paper and Industries Ltd. v. State of Orissa, 1991 Supp (1) SCC 81 at page 102:*

"34. ... These measures are undoubtedly well within the province of the legislature and reasonably and rationally adapted to the end sought. The legislative findings and the subject matter of the legislation; the area of its operation; its purpose and intent; its legislative history; the objects and reasons for the amendments made consequent on judicial decisions; the vice that is sought to be remedied; the legislative response to compelling necessities; all this lends support to the presumption in favour of reasonableness, legality and constitutionality of the legislative actions in question...

(emphasis supplied)

Reasonableness forms the foundation on which Courts would determine limitation in the absence of a legislative prescription for passing orders / taking action. The period prescribed under Section 201 (3) of the Act with regard to residents would constitute reasonable period inasmuch as there is a presumption of reasonableness with regard to legislative action as would be clear from the judgments referred above. The above limitation is thus adopted/applied in determining what would constitute reasonable period for passing orders under Section 201(1) of the Act even in respect of non-residents. Yet another reason for adopting/applying the period prescribed for passing orders under Section 201(1) of the Act with regard to payment to residents to non-residents is in view of the position that while determining as to what would constitute a reasonable period for passing an order deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments



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to non-residents, the same ought to be determined keeping the legislative

Scheme in mind. If the above exercise is carried out, the most proximate if not analogous provision would be Section 201(3) of the Act which prescribes a limitation for passing an order under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to residents. The legislature having prescribed the limitation for passing order under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to residents, the above prescription of limitation is instructive and would serve as a guide to the Courts in determining what would constitute a reasonable period under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents. Thus the limitation prescribed for passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to residents would constitute reasonable period in the absence of a legislative prescription of limitation for passing orders under Section 201(1) of the Act, deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents as well.



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IV. Reasonableness – not a static concept:

WEB COPY The attempt by the petitioner to submit that reasonable period for passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents having been held by Courts to be four years, the same ought not to be disturbed. The above submission cannot be countenanced inasmuch as reasonableness is not a static concept but dynamic/ progressive and must keep pace with the changing times. It must be related to the adjustments necessary to solve the problem which surfaces with the changing times. Greater leverage/latitude must be extended to the concept of reasonableness when tested in the context of a fiscal/ tax enactment.

Keeping the above principles in mind, though Courts have held four years to be a reasonable period for the purpose of passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents, one cannot lose sight or be unmindful to the legislative action in fixing the limitation for passing orders under Section 201 (1) of the Act in respect of resident. Sub-section (3) to Section 201 of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to residents is instructive, serves as a guide and provides the indicia in determining what



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would constitute reasonable period for passing orders deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents. Thus the limitation introduced vide Section 201(3) of the Act while passing orders deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to residents which was originally fixed at four years and amended subsequently extending the limitation to six years with retrospective effect and thereafter to seven years, serves as a reflection of the legislature's recognition of the need for a longer period of limitation to make the provision effective. The need for reparation by way of successive amendments extending the limitation for deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to residents within a short period, is an outcome and result of experience. Thus, the above legislative action by way of extended period of limitation is indicative of the need to revisit the question as to what would constitute reasonable period for deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents and to provide for a longer period. In the circumstances, I am of the view that it is imperative to adopt the period of limitation prescribed by the legislature for passing order under Section 201(1) of the Act as constituting the reasonable period for passing orders under Section 201(1) of the Act deeming a person to



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be an “assessee in default” for failure to deduct tax at source in respect of payments to non-residents.

V. Fiscal laws - Result of Trial and Error:

Importantly, in the context of economic and tax matters judicial deference ought to be shown to legislative wisdom in view of the fact that Courts lack the expertise and familiarity with the problem, necessary for making a wise decision with respect to raising and disposing public revenue. It is trite law that fiscal legislations are a matter and result of trial and error. That the limitation for passing orders under Section 201(1) of the Act in respect of residents was amended in view of the problems manifested by experience and the Legislature's attempt/resolve to remedy/address the mischief by bringing about two amendments in quick succession after its introduction vide Finance (No. 2) of 2010 extending the period of limitation is indicative of the need for reparation / correction in prescribing the limitation at 4 years originally. Apparently, Parliament after providing the limitation at 4 years for passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct tax at source in respect of payments to residents has on realizing the inadequacy of the period extended the limitation to six years and thereafter to 7 years. The reason for the above amendments is the



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legislature's recognition of the need for a larger period of limitation to pass orders under Section 201(1) of the Act to make the provision effective. In this regard, it may be relevant to refer to the following judgments for the position that allowance must be made for trial and error by the legislature in economic / fiscal enactments:

i) State of Kerala vs. Builders Association of India reported in (1997) 2 SCC 183 :

"9.It must also be remembered that in the field of taxation, the legislature must be allowed greater "play in the joints", as it is called. Allowance must also be made for "trial and error" by the legislature....."

ii) Swiss Ribbons Pvt. Ltd. vs. Union of India reported in (2019) 4 SCC 17

" 120. ..., in terms of legislations having failed, "trial" having led to repeated "errors", ultimately led to the enactment of the Code. The fexperiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. "

iii) R.K. Garg v. Union of India, (1981) 4 SCC 675 :

"19..... That would depend upon diverse fiscal and economic considerations based on practical necessity and administrative expediency and would also involve a certain amount of experimentation on which the Court would be least fitted to pronounce. The Court would not have the necessary competence and expertise to adjudicate upon such an economic issue. The Court cannot possibly assess or evaluate what would be the impact of a particular immunity or exemption and whether it would serve the purpose in view or not. There are so many imponderables that would enter into the determination that it would be wise for the Court not to hazard an opinion where even economists may differ. The Court must while examining the constitutional validity of a legislation of this kind, "be resilient, not rigid, forward looking, not static, liberal, not verbal" and the Court must always bear in mind the constitutional proposition enunciated by the Supreme Court of the United States in Munn v. Illinois [94 US 13] , namely, "that courts do not substitute their social and economic beliefs for the judgment of legislative



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bodies”. The Court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary. The Court should constantly remind itself of what the Supreme Court of the United States said in Metropolis Theater Company v. City of Chicago [57 L Ed 730 : 228 US 61 (1912)] :

The limitation for passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct TDS on payments to residents has been extended in view of the inadequacy of the original period of limitation which was fixed at 4 years as a result of trial and error. The above legislative action providing and extending the limitation for passing orders under Section 201(1) of the Act with regard to residents as stated above is instructive and serves as a guide in determining the “*reasonable period*” for passing orders under Section 201 (1) of the Act deeming a person to be an “assessee in default” for failure to deduct TDS on payments to non-residents. The limitation for passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct TDS on payments to residents must thus be adopted and treated as constituting “*reasonable period*” for the purpose of passing orders under Section 201(1) of the Act deeming a person to be an “assessee in default” for failure to deduct TDS on payments to non-residents.



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VI. Impact of amendment vide the Finance Act 2014 extending period of limitation for passing orders under Section 201 of the Act, in respect of residents:

Limitation for passing orders under Section 201(1) of the Act governing residents would constitute "*reasonable period*" for passing orders under Section 201(1) of the Act in respect of payments to non-residents. Question would thus arise as to whether the extended period of limitation of seven years introduced vide the Finance Act, 2014 would govern the periods prior to the amendment. Limitation is procedural/adjectival law and would have retrospective operation, the only exception being that it would not revive a dead claim. Secondly, if limitation is with reference to passing orders then again the extended period would be available and it is immaterial if the period for assessment or reassessment as it existed before the amendment had expired.

The following judgments are relevant in this regard:

a. *Union of India v. Uttam Steel Ltd.*, (2015) 13 SCC 209 :

"10. We have heard the learned counsel for the parties and Shri Bagaria, the learned amicus curiae at some length. There is no doubt whatsoever that a period of limitation being procedural or adjectival law would ordinarily be retrospective in nature. This, however, is with one proviso super added which is that the claim made under the amended provision should not itself have been a dead claim in the sense that it was time-barred before an amending Act with a larger period of limitation comes into force. A number of judgments of this Court have recognised the aforesaid proposition:

10.1. Thus, in S.S. Gadgil v. Lal and Co. [AIR 1965 SC 171] , this Court stated: (AIR p. 177, para 13)

"13. It is true that under the amending Act by Section 18 of the Finance Act.



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1956, authority was conferred upon the Income Tax Officer to assess a person as an agent of a foreign party under Section 43 within two years from the end of the year of assessment. But authority of the Income Tax Officer under the Act before it was amended by the Finance Act of 1956 having already come to an end, the amending provision will not assist him to commence a proceeding even though at the date when he issued the notice it is within the period provided by that amending Act..”

10.2. To similar effect is the judgment in *ITO v. Induprasad Devshanker Bhatt* [AIR 1969 SC 778] . The Court held: (AIR p. 783, para 6)

“6. In our opinion, the principle of this decision applies in the present case and it must be held that on a proper construction of Section 297(2)(d)(ii) of the new Act, the Income Tax Officer cannot issue a notice under Section 148 in order to reopen the assessment of an assessee in a case where the right to reopen the assessment was barred under the old Act at the date when the new Act came into force. It follows therefore that the notices dated 13-11-1963 and 9-1-1964 issued by the Income Tax Officer, Ahmedabad were illegal and ultra vires and were rightly quashed by the Gujarat High Court [*Induprasad Devshanker Bhatt v. J.P. Jani*, 1964 SCC OnLine Guj 18 : (1965) 58 ITR 559] by the grant of a writ.”

10.3. In *New India Insurance Co. Ltd. v. Shanti Misra* [(1975) 2 SCC 840] , this Court said: (SCC p. 846, para 7)

“7. ... ‘(2) ... The new law of limitation providing a longer period cannot revive a dead remedy. Nor can it suddenly extinguish vested right of action by providing for a shorter period of limitation.’”

10.4. Similarly in *T. Kaliampurthi v. Five Gori Thaikkal Wakf* [(2008) 9 SCC 306] , this Court said: (SCC p. 322, para 40)

“40. In this background, let us now see whether this section has any retrospective effect. It is well settled that no statute shall be construed to have a retrospective operation until its language is such that would require such conclusion. The exception to this rule is enactments dealing with procedure. This would mean that the law of limitation, being a procedural law, is retrospective in operation in the sense that it will also apply to proceedings pending at the time of the enactment as also to proceedings commenced thereafter, notwithstanding that the cause of action may have arisen before the new provisions came into force. However, it must be noted that there is an important exception to this rule also. Where the right of suit is barred under the law of limitation in force before the new provision came into operation and a vested right has accrued to another, the new provision cannot revive the barred right or take away the accrued vested right.”

(emphasis supplied)



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b. The above position was reiterated in the case of *B.K. Educational*

Services (P) Ltd. v. Parag Gupta & Associates reported in (2019) 11 SCC 633

wherein it was held as under:

"(2) Even though by and large the law of limitation has been held to be a procedural law, there are exceptions to this principle. Generally the law of limitation which is in vogue on the date of the commencement of the action governs it. But there are certain exceptions to this principle. The new law of limitation providing a longer period cannot revive a dead remedy. Nor can it suddenly extinguish vested right of action by providing for a shorter period of limitation."

In the case of *Additional Commissioner vs. Jyothi Traders* reported in (1999) 2 SCC 77 while dealing with provisions wherein limitation was provided with reference to passing of orders, it was held that an amendment extending the period of limitation would be applicable even though the period of assessment/ re-assessment which was originally available had expired. In this regard, the following observations made in the above judgment are relevant:

"25. Sub-section (2) provided that except as otherwise provided in this section, no order for any assessment year shall be made after the expiry of 4 years from the end of such year. However, after the amendment, a proviso was added to sub-section (2) under which the Commissioner of Sales Tax authorises the assessing authority to make assessment or reassessment before the expiration of 8 years from the end of such year notwithstanding that such assessment or reassessment may involve a change of opinion. The proviso came into force w.e.f. 19-2-1991. We do not think that sub-section (2) and the proviso added to it leave anyone in doubt that as on the date when the proviso came into force, the Commissioner of Sales Tax could authorise making of assessment or reassessment before the expiration of 8 years from the end of that particular assessment year. It is immaterial if a period for



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assessment or reassessment under sub-section (2) of Section 21 before the addition of the said proviso had expired. Here, it is the completion of assessment or reassessment under Section 21 which is to be done before the expiration of 8 years of that particular assessment year. Read as it is, these provisions would mean that the assessment for the year 1985-86 could be reopened up to 31-3-1994. Authorisation by the Commissioner of Sales Tax and completion of assessment or reassessment under sub-section (1) of Section 21 have to be completed within 8 years of the particular assessment year.

Notice to the assessee follows the authorisation by the Commissioner of Sales Tax, its service on the assessee is not a condition precedent to reopen the assessment. It is not disputed that a fiscal statute can have retrospective operation. If we accept the interpretation given by the respondents, the proviso added to sub-section (2) of Section 21 of the Act becomes redundant. Commencement of the Act can be different than the operation of the Act though sometimes, both may be the same. The proviso now added to sub-section (2) of Section 21 of the Act does not put any embargo on the Commissioner of Sales Tax not to reopen the assessment if the period, as prescribed earlier, had expired before the proviso came into operation. One has to see the language of the provision. If it is clear, it has to be given its full effect. To reassure oneself, one may go into the intention of the legislature in enacting such provision. The date of commencement of the proviso to Section 21(2) of the Act does not control its retrospective operation.

Earlier the assessment/reassessment could have been completed within four years of that particular assessment year and now by the amendment adding the proviso to Section 21(2) of the Act it is eight years.

The only safeguard being that it is after the satisfaction of the Commissioner of Sales Tax.

The proviso is operative from 19-2-1991 and a bare reading of the proviso shows that the operation of this proviso relates and encompasses back to the previous eight assessment years.

Applying the law laid down by the Hon'ble Supreme Court in the above judgments it is beyond the cavil of any doubt that the extended period of limitation of 7 years would be available for passing orders under Section 201(1) of the Act deeming a person to be an "assessee in default" for failure to deduct taxes in respect of payments to residents. The sequitur is that the "reasonable



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period" for passing orders under Section 201(1) of the Act deeming a person to be an "*assessee in default*" for failure to deduct taxes in respect of payments to non-residents shall also be 7 years from the end of the Financial year in which the payment is made or credit given w.e.f. 1.4.2010.

12. As the challenge in these writ petitions were limited to the aspect of limitation which is clarified, it is left open to the petitioner to file appeals challenging the order on merits. If the petitioner raises the plea of limitation, the same shall be decided by the appellate authority in accordance with legal position clarified by this Court and it would also be open to the respondents to rely upon the Taxation and other Laws (Relaxation of Certain Provisions) Ordinance, 2020 No.2 of 2020 (TOLO) and the judgment of the Hon'ble Supreme Court in exercise of *suo moto* power Cognizance for Extension of Limitation, (2020) 19 SCC 10.

13. If the petitioner chooses to file an appeal, the time spent in these writ petitions shall stand excluded while reckoning limitation and the same shall be decided in accordance with law.



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14. With the above observations, the writ petitions are disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

24.02.2023

Index: Yes/No
Speaking (or) Non-Speaking Order
Neutral Citation: Yes/No
shk/mka

To:

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MOHAMMED SHAFFIQ, J.

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order in

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24.02.2023