Delhi High Court All India Federation Of Tax ... vs Union Of India on 17 November, 1998 Equivalent citations: 1998 236 ITR 1 Delhi, 1998 101 TAXMAN 401 Delhi Author: Lahoti Bench: R Lahoti, C Mahajan JUDGMENT Lahoti, J. All India Federation of Tax Practitioners, the petitioner, is a registered body having individual members from all over the country and also represents many associations having the object of protecting the interests of tax payers and tax consultants and to ensure that the direct tax laws are just and f air and are administered justly and fairly. The association is aggrieved by Kar Vivad Samadhan Scheme, 1998 ("hereinafter referred to as the Scheme") and seeks to lay a challenge to its constitutional validity. 2. The Scheme is contained in sections 86 to 98 of the Finance (No. 2) Act, 1998. The object of the Scheme as explained by the Finance Minister of his speech is:- 2. The Scheme is contained in sections 86 to 98 of the Finance (No. 2) Act, 1998. The object of the Scheme as explained by the Finance Minister of his speech is:- " 95. Litigation has been the bane of both direct and indirect taxes. A lot of energy of the Revenue Department is being frittered in pursuing large number of litigations pending at different levels for long periods of time. Considerable revenue also gets locked up in such disputes. Deluging the system will not only incentive honest taxpayers, enable government to realise its reasonable dues much earlier but coupled with administrative measures, would also make the system more user-friendly. I, therefore, propose to introduce a new Scheme called 'Samadhan'. . . ." 3. We will shortly notice the grounds of challenge. At the outset, we may set out briefly the contents of the Scheme and extract and reproduced the relevant parts of the Scheme to the extent necessary to appreciate and adjudicate upon the grounds of challenge. 3. We will shortly notice the grounds of challenge. At the outset, we may set out briefly the contents of the Scheme and extract and reproduced the relevant parts of the Scheme to the extent necessary to appreciate and adjudicate upon the grounds of challenge. 4. Section 86 specifies that the Scheme may be called the Kar Vivad Samadhan. It shall come into force on 1-9-1998. 4. Section 86 specifies that the Scheme may be called the Kar Vivad Samadhan. It shall come into force on 1-9-1998. Section 87 defines a few terms unless the context otherwise requires. The relevant ones are -.- Disputed income', in relation to an assessment year, means the whole or so much of the total income as is relatable to the disputed tax; 'disputed tax' means the total tax determined and payable, in respect of an assessment year under any direct tax enactment but which remains unpaid as on the date of making the declaration under section 88; to (l)** 'tax arrears' means,- in relation to direct tax enactment, the amount of tax, penalty or interest determined on or before 31-3-1998 under that enactment in respect of an assessment year as modified in consequence of giving effect to an appellate order but remaining unpaid on the date of declaration: in relation to indirect tax enactment,- the amount of duties (including drawback of duty, credit of duty or any amount representing duty, cesses, interest, fine or penalty determined as due or payable under that enactment as on 31-3-1998 but remaining unpaid as on the date of making a declaration under section 88; or the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty which constitutes the subject

matter of a demand notice or a show-cause notice issued on or before 31-3-1998 under that enactment but remaining unpaid on the date of making a declaration under section 88, but does not include any demand relating to erroneous refund and where a show-cause notice is issued to the declarant in respect of seizure of goods and demand of duties, the tax arrear shall not include the duties on such seized goods where such duties on the seized goods have not been quantified. Explanation.-Where a declarant has already paid either voluntarily or under protest, any amount of duties, cesses, interest, fine or penalty specified in this sub-clause, on or before the date of making a declaration by him under section 88 which includes any deposit made by him pending any appeal or in pursuance of a court order in relation to such duties, cesses, interest, fine or penalty, such payment shall not be deemed to be the amount unpaid for the purposes of determining tax arrear under this sub-clause; Explanation.-Where a declarant has already paid either voluntarily or under protest, any amount of duties, cesses, interest, fine or penalty specified in this sub-clause, on or before the date of making a declaration by him under section 88 which includes any deposit made by him pending any appeal or in pursuance of a court order in relation to such duties, cesses, interest, fine or penalty, such payment shall not be deemed to be the amount unpaid for the purposes of determining tax arrear under this sub-clause; All other words and expressions used and not defined in this scheme but defined in any direct tax enactment or indirect tax enactment shall have the meanings respectively assigned to them in those enactments." Sections 89 and 90 deal with the manner in which declaration has to be made and the manner in which the payment of tax arrears is to be made. Section 91 provides that the designated authority shall, subject to the conditions provided in section 90, grant immunity from instituting any proceedings for prosecution for any offence under any direct tax enactment or indirect tax enactment or from the imposition of penalty under any of such enactments, in respect of matters covered in the declaration under section 86. The provisions of section 94 make explicitly clear that any benefit, concession or immunity to the declarant shall be available only for the year in which the declaration has been made. Further, section 95 specifies certain circumstances, cases, situations in which the benefit of the scheme shall not be available. Sections 90 to 94 are of relevance and hence are extracted and reproduced as under:- “90. (1) Time and manner of payment of tax arrears Within sixty days from the date of receipt of the declaration under section 91, the designated authority shall, by order, determine the amount payable by the declarant in accordance with the provisions of this scheme and grant a certificate in such form as may be prescribed to the declarant setting forth therein the particulars of the tax arrears and the sum payable after such determination towards full and final settlement of tax arrears: Provided that where any material particular furnished in the declaration is found to be false, by the designated authority at any stage, it shall be presumed as if the declaration was never made and all the consequences under the direct tax enactment or indirect tax enactment under which the proceedings against the declarant are or were pending shall be deemed to have been revived: Provided that where any material particular furnished in the declaration is found to be false, by the

designated authority at any stage, it shall be presumed as if the declaration was never made and all the consequences under the direct tax enactment or indirect tax enactment under which the proceedings against the declarant are or were pending shall be deemed to have been revived: Provided further that the designated authority may amend the certificate for reasons to be recorded in writing. Provided further that the designated authority may amend the certificate for reasons to be recorded in writing. (2) The declarant shall pay, the sum determined by the designated authority within thirty days of the passing of an order by the designated authority and intimate the fact of such payment of the designated authority along with proof thereof and the designated authority shall thereupon issue the certificate to the declarant. (3) Every order passed under sub-section (1), determining the sum payable under this scheme, shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the direct tax enactment or indirect tax enactment or under any other law for the time being in force. (4) Where the declarant has filed an appeal or reference or a reply to the show-cause notice against any order or notice giving rise to the tax arrear before any authority or Tribunal or court, then, notwithstanding anything contained in any other provisions of any law for the time being in force, such appeal or reference or reply shall be deemed to have been withdrawn on the day on which the order referred to in sub-section (2) is passed: Provided that where the declarant has filed a writ petition or appeal or reference before any High Court or the Supreme Court against any order in respect of the tax arrear, the declarant shall file an application before such High Court or the Supreme Court for withdrawing such writ petition, appeal or reference and after withdrawal of such writ petition, appeal or reference with the leave of the court, furnish proof of such withdrawal along with the intimation referred to in sub-section (2). Provided that where the declarant has filed a writ petition or appeal or reference before any High Court or the Supreme Court against any order in respect of the tax arrear, the declarant shall file an application before such High Court or the Supreme Court for withdrawing such writ petition, appeal or reference and after withdrawal of such writ petition, appeal or reference with the leave of the court, furnish proof of such withdrawal along with the intimation referred to in sub-section (2). 91. Immunity from the prosecution and imposition of penalty in certain cases The designated authority shall, subject to the conditions provided in section 90 grant immunity from instituting any proceeding for prosecution for any offence under any direct tax enactment or indirect tax enactment, or from the imposition of penalty under any of such enactment in respect of matters covered in the declaration under section 88. 92. Appellate authority not to proceed in certain cases No appellate authority shall proceed to decide any issue relating to the disputed chargeable expenditure, disputed chargeable interest, disputed income, disputed wealth, disputed value of gift or tax arrear specified in the declaration and in respect of which an order had been made under section 90 by the designated authority or the payment of the sum determined under that section : Provided that in case an appeal is filed by a department of the Central Government in respect of such issue relating to the disputed chargeable expenditure, disputed

chargeable interest, disputed income, disputed wealth, disputed value of gift or tax arrear (except where the tax arrear comprises only penalty, fine or interest), the appellate authority shall decide the appeal irrespective or such declaration. Provided that in case an appeal is filed by a department of the Central Government in respect of such issue relating to the disputed chargeable expenditure, disputed chargeable interest, disputed income, disputed wealth, disputed value of gift or tax arrear (except where the tax arrear comprises only penalty, fine or interest), the appellate authority shall decide the appeal irrespective or such declaration. 93. No refund of amount paid under the Scheme Any amount paid in pursuance of a declaration made under section 88 shall not be refundable under any circumstances. 94. Removal of doubts For the removal of doubts, it is hereby declared that, save as otherwise expressly provided in sub-section (3) of section 90, nothing contained in this scheme shall be construed as conferring any benefit, concession or immunity on the declarant in any assessment or proceedings other than those in relation to which the declaration has been made." For the removal of doubts, it is hereby declared that, save as otherwise expressly provided in sub-section (3) of section 90, nothing contained in this scheme shall be construed as conferring any benefit, concession or immunity on the declarant in any assessment or proceedings other than those in relation to which the declaration has been made." Section 88 provides for settlement of tax payable. Section 89 provides for particulars to be furnished in a declaration under section 88. 5. The Memorandum to Finance (No. 2) Bill, 1998 thus explains the scheme- 5. The Memorandum to Finance (No. 2) Bill, 1998 thus explains the scheme- "Kar Vivad Samadhan Scheme seeks to provide a quick and voluntary settlement of tax dues outstanding as on 31-3-1998, both in various direct tax enactments as well as indirect taxes enactments by offering waiver of a part of the arrear taxes and interest and providing immunity against institution of prosecution and imposition of penalty. The assessee on his part shall seek to withdraw appeals pending before various appellate authorities and Courts. The Scheme comes into force on the first day of September, 1998 and ends on 31-12-1998. It will have following salient features. The scheme is applicable to tax arrears outstanding as on 31-3-1998 under various direct tax enactments and indirect tax enactments. The amount payable by the applicants termed as declarants shall be determined as under:- (a) Direct Taxes The declarant shall be required to pay tax @30 per cent (35 per cent in the case of firms and companies) on the amount of income in dispute (in other than search and seizure cases). Where tax arrears include income-tax, interest payable or penalty levied, the amount payable shall be 30 per cent of the disputed income (35 per cent in the case of firms and companies). Where tax arrears comprise only interest payable or penalty levied, the amount payable shall be 50 per cent of the tax arrear. Where tax arrears include the tax, interest or penalty determined in any assessment on the basis of search and seizure proceedings under section 132 or section 132A of Income Tax Act, the amount payable shall be 40 per cent of the disputed income (45 per cent in the case of firms and companies). In respect of arrears under Wealth Tax Act, the amount payable shall be 1 per cent of disputed wealth where the tax arrears includes wealth-tax or interest

and penalty levied the addition to wealth tax. Where tax arrear is only interest payable or penalty levied, 50 per cent of such amount is to be paid. Where the tax arrears are determined on the basis of search and seizure proceedings under section 37A or 37B of Wealth Tax Act, the tax payable shall be @ 2 per cent of the disputed wealth. In respect of tax arrears payable under the Gift Tax Act the amount payable shall be 30 per cent of the disputed value of the gift where the tax arrears includes gift-tax or interest payable and penalty levied in addition to gift-tax. Where tax arrears is only interest payable or penalty levied, 50 per cent of such amount shall be paid. In respect of tax arrears payable under Expenditure Tax Act, the amount payable shall be 10 per cent of the disputed chargeable expenditure where the tax arrears is expenditure-tax or includes interest payable and penalty, in addition where the arrear is only in respect of interest or penalty, only 50 per cent of the arrear shall be payable. In respect of tax arrears payable under Interest Tax Act, the amount payable shall be @ 2 per cent of the disputed chargeable interest where tax arrear includes interest-tax or interest payable and penalty levied, in addition. If the tax arrears includes only interest or penalty, the amount payable will be 50 per cent of the tax arrear. (b) Indirect taxes Under indirect taxes the amount payable shall be 50 per cent of the tax arrear and including interest payable, fine or penalty levied."3. A person desiring to avail of the scheme is required to file a declaration in the prescribed form before the designated authority notified for this purpose. The designated authority shall pass an order within sixty days of the declaration determining the amount payable in accordance with the provisions of the Scheme and grant a certificate indicating the particulars of tax arrears and the sum payable and intimate the same to the declarant. The declarant will pay the sum payable as determined by designated authority within thirty days of the passing of such order. The order passed by the designated authority shall be conclusive and shall not be reopened in any other proceedings or under any law for the time being in force. Where the declarant has filed an appeal or reference before any authority, Tribunal or court, notwithstanding anything contained in any other provision of law for the time being in force, such appeal, reference or reply shall be deemed to have been withdrawn. Where writ petitions have been filed before the High Court or Supreme Court the declarant shall move an application for withdrawing such petitions and furnish the proof of the same along with the intimation. Any amount paid in pursuance of declaration made under the scheme shall not be refundable under any circumstances. 4. The designated authority shall subject to the conditions provided in the scheme grant immunity from prosecution or penalty under the relevant Acts in respect of matters covered in the declaration. The scheme shall not be applicable in respect of tax arrears in following cases: In respect of direct taxes,- In a case where prosecution for concealment has been launched under any direct tax enactment; in a case where Settlement Commission has passed the order on disputed income; in a case where no appeal or reference is pending before any appellate authority or court or revision application before the Commissioner. In respect of indirect tax enactments,- in a case where prosecution has been launched under any indirect tax enactment; in a case where show-cause notice or notice of demand under

Customs Act or the Central Excise Act has not been issued. In respect of a person against whom prosecution for any offence punishable under Ch. IX and Ch. XVII of the Indian Penal Code, Narcotics Drugs and Psychotropic Act, 1985 the Terrorist and Disruptive Activities Prevention Act, 1987 or Prevention of Corruption Act, 1988 has been instituted. In respect of a person against whom an order of detention has been made under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. In respect of a person notified under sub-section (2) of section 3 of Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992. 6.Where the declarant has filed an appeal or reference or reply to the show-cause notice against any order or notice giving rise to tax arrear before any authority or Tribunal, such appeal or reference or reply shall be deemed to have been withdrawn. No appellate authority or court shall try in a suit or issue relating to arrear of tax specified in the declaration." 6. On behalf of the petitioners it is submitted that the entire scheme falls foul of article 14 and Entry 82 in List I of Seventh Schedule to the Constitution. The grounds of challenge laid in the petition are very many. However, Mr. G.C. Sharma, the learned senior counsel for the petitioner, in his usual style of which lucidity and brevity arc the hallmark, submitted that the petitioners propose to canvass the following contentions for the consideration of this court which only need to be adjudicated upon. Entry 82 of List-1 Union List - in Schedule VII to the Constitution provides for taxes on income other than agricultural income. Firstly, the scheme treats with hostile discrimination by meting out discriminatory treatment to different assessees though falling into one class i.e., several assessees falling into one class are treated unequally. Secondly, artificial categories have been brought into existence and treated with difference i.e., out of the assessees falling into one category, some have been brought in and same have been left out of the Scheme without their being any intelligible differentia. The object of the scheme is two fold: (i) reducing the tax arrears, and (ii) reducing the tax litigation'. The categories of the assessees should have been so carved out as to achieve the twin objective. The categorisation as evidenced by the scheme frustrates the very objective. 6. On behalf of the petitioners it is submitted that the entire scheme falls foul of article 14 and Entry 82 in List I of Seventh Schedule to the Constitution. The grounds of challenge laid in the petition are very many. However, Mr. G.C. Sharma, the learned senior counsel for the petitioner, in his usual style of which lucidity and brevity arc the hallmark, submitted that the petitioners propose to canvass the following contentions for the consideration of this court which only need to be adjudicated upon. Entry 82 of List-1 Union List - in Schedule VII to the Constitution provides for taxes on income other than agricultural income. Firstly, the scheme treats with hostile discrimination by meting out discriminatory treatment to different assessees though falling into one class i.e., several assessees falling into one class are treated unequally. Secondly, artificial categories have been brought into existence and treated with difference i.e., out of the assessees falling into one category, some have been brought in and same have been left out of the Scheme without their being any intelligible differentia. The object of the scheme is two fold: (i) reducing the tax arrears, and (ii) reducing the tax litigation'. The

categories of the assessees should have been so carved out as to achieve the twin objective. The categorisation as evidenced by the scheme frustrates the very objective. The learned senior counsel for the petitioner gave an illustration in the form of a table to demonstrate the validity of his contention which is as under:- Cases Cases Cases Total income determined as per assessment and disputed on 31st March, 98 Total income determined as per assessment and disputed on 31st March, 98 Total income determined as per assessment and disputed on 31st March, 98 Tax Paya-ble Tax Paya-ble Tax Paya-ble Tax paid on or after 31-3-1998 Tax paid on or after 31-3-1998 Tax paid on or after 31-3-1998 Disputed Tax (unpaid on the date of declaration as per s. 87(l) Disputed Tax (unpaid on the date of declaration as per s. 87(l) Disputed Tax (unpaid on the date of declaration as per s. 87(l) Dispute income as per s.87(e) Dispute income as per s.87(e) Dispute income as per s.87(e) Tax payable under the scheme (as per section 88(ii) Tax payable under the scheme (as per section 88(ii) Tax payable under the scheme (as per section 88(ii) Total incidence of tax Total incidence of tax Total incidence of tax Amount written off Amount written off Amount written off A A 50(100 X 20/40) 50(100 X 20/40) B. B. 75 (100 X 30/40) 75 (100 X 30/40) 22.5 22.5 32.5 32.5 7.5 7.5 C C 100(100X40/40) 100(100X40/40) D. D. - - (Artificially although whole disputed) (Artificially although whole disputed) The learned counsel submitted that there is no intelligible differentia to distinguish the cases of A, B and C. They all fall under the scheme but the impact of the scheme on the assessees falling in each of the 3 categories is different. Though each of the assessees is liable to pay the tax of Rs. 40 each, the incidence of tax is eliminated at different rates solely by reference to the factum of the tax having been actually paid or not on or after 31-3-1998. This is violative of Entry 82 above said. The assessees falling under Category D are deprived of the benefit of the Scheme merely because they have been honest and candid enough to pay the tax in its entirety though after 31-3-1998. Out of the assessees who have incurred the same amount of liability to pay the tax, a distinction cannot be drawn amongst themselves by formulating classes solely by finding out whether the tax has been paid or not paid and if paid then to what extent. Such a classification is without any intelligible differentia. 7. Developing the arguments further, the learned senior counsel Shri G.C. Sharma put forth the following contentions :- 7. Developing the arguments further, the learned senior counsel Shri G.C. Sharma put forth the following contentions :- The provisions of section 95(i)(c) of the Act read with the objects as declared by the Finance Minister in para 95 of his speech clearly show that the object of the scheme is to reduce the volume of litigation pending before the appellate authorities established under Income Tax Act and the courts which has been pending since long as a result of which considerable revenue has been locked up in the disputes. These disputes may be resolved either in favour of the assessee or in favour of the revenue. This would result either enforcing the recovery of balance outstanding tax demands or in refunds where taxes have been recovered more than what is determined on the final settlement of disputes. This would be the final outcome of all disputes pending before the Appellate Authorities or the court. To accelerate the process of arriving at such outcome the scheme has

been brought into force but the denial to the person who has paid the entire tax to arrive at such an outcome is discriminatory under the scheme. Thus a well defined class of persons under the scheme is a tax litigant who has raised a tax dispute before the appellate authorities or a court with regard to determination of his tax liability. The further classification between the well defined class clearly identified making a division between those who have paid their tax fully or partly, although still disputed, and others who have not paid tax at all, although likewise disputed is discriminatory, arbitrary, unreasonable and violative of article 14 of the Constitution on the ground that there is no intelligible difference between the said sub-divided classes having regard to the object of the scheme. The definition of 'disputed tax' as enacted in section 87(f) which means only unpaid tax but still disputed and excluding tax paid, which is also disputed and is likely to be refunded wholly or partly on the result of appellate decision or court's judgment and orders is ultra virus the very concept of taxes on income per Entry 82 of the List I of the Constitution, apart from being in conflict with the objects of the schemes and section 95(i)(c) of the Act. If the scheme applies only to litigant - it must be equal to all of them imposition of taxes on income under Entry 82 of the Constitution does not permit inequality of any kind in this respect. No taxation laws can be held to be constitutional unless it fulfills this test. The inequality is glaring and obvious inasmuch as an assessee who succeeded before Income Tax Appellate Tribunal or a High Court on a certain question of law relating to an assessment year being 1995-96 having a certain tax impact of Y, but has to lose finally on the basis of law laid down by the Supreme Court- the department having carried forward the dispute till the end- shall have to pay the tax X, whereas another assessee who has failed till today on the question of imposition of X amount of tax in respect of the same assessment year 1995-96 and is bound to fail till the end to which the dispute is taken can escape with the lesser burden of tax @) 30 per cent of the disputed income. This is unequal imposition of tax on the two assessees falling into same class. The object of the scheme is to reduce tax arrears. For writing off tax arrears for any class of assessees no legislation is necessary. But here the writing off is conditioned by the assessee withdrawing his appeal against the demand of tax levied on him. In substance, therefore, the scheme is for speedy recovery which ultimately results in an unequal imposition of tax on person identically situated. 'This offends the principle of equality enshrined in the Constitution under article 14. In its final analysis, it will be observed, that the scheme imposes a higher incidence of taxation on one assessee and a lesser incidence of taxation on another assessee although both of them possess the same characteristics. That is to say, that both have disputed the assessments of their total income with respect to the same amount of tax liable for the same assessment year. The scheme attributes a further quality to the taxpayer of having not paid fully or partly the amount demanded and reduces thereby the incidence of tax falling on such an assessee. The question is - can the entry 82 in List I of Seventh Schedule to the constitution which imposes taxes on income permit the Legislature to vary the incidence of taxation retrospectively dependent only upon the amount of taxes not paid. 8. Shri Madan Lokur, the learned Additional

Solicitor General assisted by Shri R.C. Pandey and Ms. Premlata Bansal for the respondents disputed the validity of submissions made on behalf of the petitioners. The learned Additional Solicitor General brought to the notice of the court the following statistics showing pendency of litigations at several stages as shown in the chart: 8. Shri Madan Lokur, the learned Additional Solicitor General assisted by Shri R.C. Pandey and Ms. Premlata Bansal for the respondents disputed the validity of submissions made on behalf of the petitioners. The learned Additional Solicitor General brought to the notice of the court the following statistics showing pendency of litigations at several stages as shown in the chart: Pendency of appeaIs A. A. Direct taxes Direct taxes Filed by department Filed by department Filed by department Filed by assessee Filed by assessee Filed by assessee
(i) Before DCIT/CIT (A) (as on 31-3-1997) (i) Before DCIT/CIT (A) (as on 31-3-1997) 2,15,313 2,15,313
(ii) Before ITAT (as on 31-3-1997) (ii) Before ITAT (as on 31-3-1997) 1,54,874 1,54,874 3,06,690 3,06,690
(iii) Before High Court (as on 31-3-1998) (iii) Before High Court (as on 31-3-1998) 40,959 40,959 13,437 13,437
(iv) Before Supreme Court (as on 31-3-1998) (iv) Before Supreme Court (as on 31-3-1998) 7,068 7,068 B. B. Indirect taxes Indirect taxes Total number of cases pending in adjudication at various stages Total number of cases pending in adjudication at various stages 1,35,000 1,35,000 Tax arrears involved in disputes Tax arrears involved in disputes Realisation Realisation A. Direct taxes A. Direct taxes 42,947 crore 42,947 crore 38,000 crore 38,000 crore B. Indirect taxes B. Indirect taxes 12,000 crore 12,000 crore (It was pointed out by the learned Additional Silicitor General that the sources of above said statistics are CAG's report, and report of the departmental Committee). 9. The learned Additional Solicitor General submitted that the scheme is neither discriminatory nor violative of fundamental rights. The scheme seeks to address the twin problem of large number of tax disputes and mounting tax arrears defying realisation. The scheme is open to such assessees who have disputes pending as well as tax arrears linked to those disputes. This is well defined category and a reasonable classification tailored to achieve the twin objective of the scheme. 9. The learned Additional Solicitor General submitted that the scheme is neither discriminatory nor violative of fundamental rights. The scheme seeks to address the twin problem of large number of tax disputes and mounting tax arrears defying realisation. The scheme is open to such assessees who have disputes pending as well as tax arrears linked to those disputes. This is well defined category and a reasonable classification tailored to achieve the twin objective of the scheme. The learned Additional Solicitor General further submitted that if the submission of the learned counsel for the petitioner was to be accepted then the government would end up refunding the tax collected realised if the assessees who have paid the taxes and, hence, had ceased to be in arrears were to be included in the Scheme solely because they were keeping alive their disputes and that would defeat the very objective sought to be achieved.The assessees who have disputes pending but no tax arrears pending could be due to a number

of reasons, viz., (i) lost in appeal before the competent authority; (ii) no stay granted by the competent authority and, thus, left with no alternative but to pay; (iii) any arrears recovered by process of recovery; (iv) payments made to avoid penalty and interest; (v) voluntary payments, etc. Payment made or not is a relevant factor as the objective of the Scheme is to realise the tax arrears along with reducing the litigation and not reducing the tax litigation merely. The two qualifications taken together make one and it is incorrect to attempt at treating the twin object as two objects to be seen in isolation with each other or to assign one ingredient more weight than the other. As to the cut off dates having been assigned as on 31-3-1998 for determining the tax in arrears and the date of declaration on or after 1-9-1998 but on or before 31-12-1998 for the arrears having remained unpaid, so as to be eligible to take benefit of the scheme, it was submitted by the learned Additional Solicitor General that they have been so appointed as no other alternative was practical or possible. A tax paid or realised though disputed could not be included in the scheme solely on account of being disputed. lt was submitted that the target of the scheme was not all litigating assessees but the litigating assessees with outstanding arrears. Such a classification is fully justified and is reasonable one. It has been carved out keeping in view the ground realities and as a rational nexus with the objective sought to be achieved by the Scheme. The learned Additional Solicitor General pointed out that the realisation of tax by ordinary methods in the year 1997-98 was Rs. 38,000 approximately while the disputed arrears were Rs. 43,000 crore approximately and that shows the magnitude of the problem of arrears persuading the government to frame the scheme. As to the plea of Entry 82 having been contravened and the arbitrariness allegedly flowing into the Scheme by reference thereto it was submitted by the learned Additional Solicitor General that the incidence of the tax on the assessee shown as categories A, B, C and D in the illustration given by the learned senior counsel for the petitioner remains the same; what is altered is the extent of realisation guided by the factor of the tax having not been realised inspite of the lapse of time and the need for collection felt by the state. lt was submitted that the Parliament is well within its rights granting relief to certain assessees from recovering the tax by enacting a formula which would tempt or incentives the defaulters into clearing of the arrears. This has nothing to do with the aspect of taxability of, income. 10. Before proceeding further, we may place on record that looking at the wide implications which the scheme has and the consequences which are likely to flow on the public exchequer depending on the challenge being upheld or turned down, Mr. M.S. Syali and Mr. J.R. Goel, the two learned advocates practicing on taxation side sought leave of the court for addressing it which was allowed. The contentions raised by Mr. Syali deserve appropriately to be taken note here itself. We would revert to the plea raised by Shri Goel, a little later. 10. Before proceeding further, we may place on record that looking at the wide implications which the scheme has and the consequences which are likely to flow on the public exchequer depending on the challenge being upheld or turned down, Mr. M.S. Syali and Mr. J.R. Goel, the two learned advocates practicing on taxation side sought leave of the court for addressing it which was allowed.

The contentions raised by Mr. Syali deserve appropriately to be taken note here itself. We would revert to the plea raised by Shri Goel, a little later. 11. Mr. Syali submitted that the scheme subclassifics the largest class of litigating assessees into two by reference to the following factors: 11. Mr. Syali submitted that the scheme subclassifics the largest class of litigating assessees into two by reference to the following factors: Whether the tax was or was not in arrears as on 31-3-1998; Whether the arrears have continued to remain so till the date of making declaration or were cleared by them. Mr. Syali further submitted that the dividing line drawn by the above said classification is between a litigant in arrears and a litigant not in arrears. The learned counsel further submitted that, a litigant though capable of being classified into a category of 'litigant' in arrears has been further artificially sub-classified into two a litigation attacking or prosecuting and a litigant in defense. Artificially a distinction has been drawn within the class of assessee litigating before a competent forum by trying to find out whether the litigation is being pursued by the assessee or by the department though in both such sub-classifications the assessee satisfies the principal twin test of being a litigant and also in arrears. The learned counsel submitted that this is violative of article 14 of the Constitution. The learned counsel further submitted that there arc several modes by which the tax though levied cases to be in arrears. There may be (i) a voluntary payment, which may either be unconditional or under protest, (ii) a recovery made by department by resorting to coercive methods (section 222), and (iii) a recovery made by adjusting the amount of tax in arrears from out of the amount liable to be refunded by the department to the assessee by reference to section 245 of the Income Tax Act, 1961. It was submitted that coercive recovery and adjustment are acts of the department. Assuming that voluntary payment of tax by the assessee deprives him of availing the benefit of the Scheme, it is his own voluntary act which he cannot plead for availing a benefit to himself. But, there is no justification for denying the benefit of the scheme to the assessee who was in arrears of tax on 31-3-1998 but the arrears have stood wiped out by an act of the department by affecting the recovery resorting to coercive steps or by making an adjustment, exercising the powers statutorily conferred on the revenue by sections 222 and 245 of the Income Tax Act in which cases the free will or voluntary act of the assesses does not come into play at all. Such a situation suffers from the vice of unjustness of unfairness and irrationality. 12. Before we may deal with merits of the contentions advanced, we would like to refer to the Constitutional Bench decision in R.K. Garg v. Union of India(1981) 4 SCC 675, the leading authority on the subject, which has been referred to invariably in subsequent cases raising similar issues. Challenge was laid to the constitutional validity of the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981, later on repealed by an Act of identical description. The test of classification by reference to article 14 was laid down as under – 12. Before we may deal with merits of the contentions advanced, we would like to refer to the Constitutional Bench decision in R.K. Garg v. Union of India(1981) 4 SCC 675, the leading authority on the subject, which has been referred to invariably in subsequent cases raising similar issues. Challenge was laid to the constitutional validity of the Special

Bearer Bonds (Immunities and Exemptions) Ordinance, 1981, later on repealed by an Act of identical description. The test of classification by reference to article 14 was laid down as under – "The clarification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfillled, namely, (1) that the classification must be founded on an intelligible differentia, which distinguishes those that are grouped together from others, and (2) that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense abovementioned. It is clear that article 14 does not forbid reasonable classification of persons, objects and transactions by the Legislature for the purpose of attaining specific ends. What is necessary in order to pass. The test of permissible classification under article 14 is that the classification must not be, 'arbitrary, artificial or evasive' but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the Legislature." Their lordships stated certain well established principles evolved by the courts as rules of guidance in discharge of the constitutional function of judicial review by the courts :- "The first rule is that there is always a presumption in favour of the constitutionality of a statute and burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the Legislature understands and correctly appreciates the needs of its own people, its law are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed too strong that in order to sustain it, the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes, J. that the Legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the Legislature. The court should feel more inclined to give judicial difference to legislative judgment in the field of economic regulation

than in other areas where fundamental human rights are involved." 13. A few other decisions which were relied on by the learned Additional Solicitor General may also be noticed. 13. A few other decisions which were relied on by the learned Additional Solicitor General may also be noticed. In Shankarlal v. I T O(1998) 230 ITR 536 (AP) and United Credit & Investments v. Director of Income Tax (1998) 231 ITR 660 (Karn) vires of Voluntary Disclosure of Income Scheme introduced by section 64 of the Finance Act, 1997 were challenged. The object of the scheme was to give concessional rate of tax and immunity in respect of disclosure of concealed income, though the benefit was not available if the concealed income was already detected before making a disclosure. The classification was held to be valid and appropriate for the purpose of the scheme. In Hari Krishna Bhargava v. Union of lndia (1966) 59 ITR 243 (SC), the annuity deposit as an alternative to paying income-tax and means to reduction in the amount of income was held to be intra vires. Their Lordships further held that merely because the scheme applied to upper income groups only was not discriminatory. In D. Kumara Siddanna v. First ITO (1986) 161 ITR 642 (Karn), the classification of tax payers with current income above Rs. 15,000 who were in economically superior position and making compulsory deposits resulted into mobilisation of private savings for public purposes and imposition curbs on the inflationary trend in the economy of the country. The scheme was held to be valid. The exclusion of tax payers with current income not above Rs. 15,000 was held not to be discriminatory. 14. We now proceed to deal with the issues arising for decision. 14. We now proceed to deal with the issues arising for decision. Whether the impugned legislation, i.e., the Scheme is violative of Entry 82 List I Schedule Seven of the Constitution?] 15. The plea raised on behalf of the petitioners suffers from a fallacy. It is one thing to say that different assessees liable to pay tax are being taxed at different rates or differently though similarly situated. Such is not the case here. And it is another thing to say that though by reference to a legislation framed under Entry 82 above said persons identically situated have been taxed identically and have incurred an identical tax liability but in the matter of realisation of tax the revenue has come out with a legislation to waive the recovery in part so as to incentives the recovery of the balance. Such is the case at hand. 15. The plea raised on behalf of the petitioners suffers from a fallacy. It is one thing to say that different assessees liable to pay tax are being taxed at different rates or differently though similarly situated. Such is not the case here. And it is another thing to say that though by reference to a legislation framed under Entry 82 above said persons identically situated have been taxed identically and have incurred an identical tax liability but in the matter of realisation of tax the revenue has come out with a legislation to waive the recovery in part so as to incentives the recovery of the balance. Such is the case at hand. 16. The components which enter into concept of a tax are: (i) the character of the imposition known by its nature which prescribe the taxable event attracting the levy; (ii) a clear indication of the person on whom the levy is imposed resulting into obligation to pay the tax, (iii) the rate of tax, and (iv) the measure or value to which the rate will be applied for computing the tax liability Vide Govind Saran Ganga Saran v.

CST (1985) 60 STC 1. Recovery or realisation of tax is not an essential component of the concept of tax and, hence, validity of a tax legislation would not be decided by keeping in view the realiseability of tax. 16. The components which enter into concept of a tax are: (i) the character of the imposition known by its nature which prescribe the taxable event attracting the levy; (ii) a clear indication of the person on whom the levy is imposed resulting into obligation to pay the tax, (iii) the rate of tax, and (iv) the measure or value to which the rate will be applied for computing the tax liability Vide Govind Saran Ganga Saran v. CST (1985) 60 STC 1. Recovery or realisation of tax is not an essential component of the concept of tax and, hence, validity of a tax legislation would not be decided by keeping in view the realiseability of tax. 17. In J.K. Spg. & Wvg. Mills Ltd v. Union of India (1987) 32 ELT 234 (SC), their Lordship have said (vide pr. 10) there is a distinction between levy and collection of duty. In Federation of Hotel & Restaurant Association of India v. Union of India (1989) 3 SCC 634 it has been held that subject of tax is different from the measure of levy. The measure of the tax is not determinative of its essential character or of the competence of the Legislature. Flexibility in the modes of effectuating a tax in view of innate complexities in the fiscal adjustment of diverse economic factors inherent in the formulation of a policy of taxation and variety of policy options open to the state is permissible. 17. In J.K. Spg. & Wvg. Mills Ltd v. Union of India (1987) 32 ELT 234 (SC), their Lordship have said (vide pr. 10) there is a distinction between levy and collection of duty. In Federation of Hotel & Restaurant Association of India v. Union of India (1989) 3 SCC 634 it has been held that subject of tax is different from the measure of levy. The measure of the tax is not determinative of its essential character or of the competence of the Legislature. Flexibility in the modes of effectuating a tax in view of innate complexities in the fiscal adjustment of diverse economic factors inherent in the formulation of a policy of taxation and variety of policy options open to the state is permissible. 18.Merely because the scheme permits waiver of recovery of tax partially and by adopting a certain formula which in its application will result in different quantum of relief being allowed to different litigants in different percentage depending on quantum of arrears of tax does not render the scheme falling foul of the Entry 82 above said or article 14. 18.Merely because the scheme permits waiver of recovery of tax partially and by adopting a certain formula which in its application will result in different quantum of relief being allowed to different litigants in different percentage depending on quantum of arrears of tax does not render the scheme falling foul of the Entry 82 above said or article 14. Whether the impugned classification between the 'assessee litigating and also in arrears' is discriminatory as it denies benefit of the scheme to such assessees from whom recovery was effected either by coercive methods or by making adjustments ? 19. The main plank of attack is that the scheme places an honest and peace-loving assessee in a position more worse than a dishonest and/or belligerent assessee. It was submitted that an honest and peace-loving assessee though disputing his liability to pay the tax still makes the payment but continues his legal battle in the hope of succeeding in a manner known to law. Planking his hopes on a favourable decision by a Tribunal or court. On the

other hand, an unscrupulous assessee plays every possible card in his deck to resist the demand for payment of tax and so he continues to be in arrears; and like a windfall get the benefit of the scheme. The first category of assessee succumbs to pressure of the department which is after enforcing the recovery. He does not wish to face the attachment, etc., as coercive process for recovery always creates an unpleasant situation for the assessee. So also, an assessee who had paid surplus tax to the department and who could not or did not post haste realise his dues from the department also suffers denial of the benefit of the scheme because his tax arrears are adjusted by the department out of the amount of refund due to him. 19. The main plank of attack is that the scheme places an honest and peace-loving assessee in a position more worse than a dishonest and/or belligerent assessee. It was submitted that an honest and peace-loving assessee though disputing his liability to pay the tax still makes the payment but continues his legal battle in the hope of succeeding in a manner known to law. Planking his hopes on a favourable decision by a Tribunal or court. On the other hand, an unscrupulous assessee plays every possible card in his deck to resist the demand for payment of tax and so he continues to be in arrears; and like a windfall get the benefit of the scheme. The first category of assessee succumbs to pressure of the department which is after enforcing the recovery. He does not wish to face the attachment, etc., as coercive process for recovery always creates an unpleasant situation for the assessee. So also, an assessee who had paid surplus tax to the department and who could not or did not post haste realise his dues from the department also suffers denial of the benefit of the scheme because his tax arrears are adjusted by the department out of the amount of refund due to him. 20. The classification between persons who are having unaccounted money and honest tax payers was held to be not unreasonable in All India Federation of Tax Practitioners v. Union of India (1997) 228 ITR 68 (Bom) by the High Court of Bombay as the object sought to be achieved was unearthing unaccounted money by giving some inducement and immunities to such persons. Bombay High Court decision has been upheld by the Supreme Court in the appeal preferred by the petitioners and is as All India Federation of Tax Practitioners v. Union of India (1998) 231 ITR 24 (SC). 20. The classification between persons who are having unaccounted money and honest tax payers was held to be not unreasonable in All India Federation of Tax Practitioners v. Union of India (1997) 228 ITR 68 (Bom) by the High Court of Bombay as the object sought to be achieved was unearthing unaccounted money by giving some inducement and immunities to such persons. Bombay High Court decision has been upheld by the Supreme Court in the appeal preferred by the petitioners and is as All India Federation of Tax Practitioners v. Union of India (1998) 231 ITR 24 (SC). 21. In R.K. Garg's case (supra) their lordships have also held that in economic matters legislation cannot be struck down on account of crudities, inequities and even possibility of abuse. Immorality by itself cannot also be a ground of constitutional challenge unless the immorality be so seeking as to condemn the legislation as arbitrary or irrational and hence violative of article 14. 21. In R.K. Garg's case (supra) their lordships have also held that in economic matters legislation cannot be struck down on account of crudities,

inequities and even possibility of abuse. Immorality by itself cannot also be a ground of constitutional challenge unless the immorality be so seeking as to condemn the legislation as arbitrary or irrational and hence violative of article 14. 22. The validity of classification has to be decided and judged in the light of the object sought to be achieved. The objective is twofold. While judging the validity of the classification we have to keep both the limbs of the object in view. The learned Additional Solicitor General has very rightly pointed out that allowing the benefit of the scheme to such litigating assessees from whom the revenue has succeeded in effecting recovery even by adopting coercive methods or by making adjustments would have been destructive of the very objective sought to be achieved. It is immaterial whether the tax was paid voluntarily by the assessee or realised involuntarily by the department resorting to coercive means of recovery or by making adjustment; the fact remains that the assessee ceases to be in arrears. By giving benefit of the scheme to such class of assessees the revenue does not stand to gain anything rather it stand to lose inasmuch as what has been realised shall have to be refunded. In our opinion, the basis of classification adopted by the scheme to this extent is guided by the objective sought to be achieved by the legislation and, therefore, cannot be held to be arbitrary or unreasonable. 22. The validity of classification has to be decided and judged in the light of the object sought to be achieved. The objective is twofold. While judging the validity of the classification we have to keep both the limbs of the object in view. The learned Additional Solicitor General has very rightly pointed out that allowing the benefit of the scheme to such litigating assessees from whom the revenue has succeeded in effecting recovery even by adopting coercive methods or by making adjustments would have been destructive of the very objective sought to be achieved. It is immaterial whether the tax was paid voluntarily by the assessee or realised involuntarily by the department resorting to coercive means of recovery or by making adjustment; the fact remains that the assessee ceases to be in arrears. By giving benefit of the scheme to such class of assessees the revenue does not stand to gain anything rather it stand to lose inasmuch as what has been realised shall have to be refunded. In our opinion, the basis of classification adopted by the scheme to this extent is guided by the objective sought to be achieved by the legislation and, therefore, cannot be held to be arbitrary or unreasonable. Whether the classification between the assessee litigating as appellant/petitioner and the assessee litigating as respondents was in defense can be said to be arbitrary or unreal ? 23. To test the submission so made we would immediately give an example. 23. To test the submission so made we would immediately give an example. There are two assessees A and B identically situated in all respects in the matter of nature of income quantum of taxable income and the category of tax but they are situated at two different places, say X and Y respectively. Two assessing officers finalising their assessments at X and Y find their incomes and taxable incomes identical and levy an identical amount of tax on the two. Both file appeals before the Commissioner (Appeals). The legal plea raised by A before the Commissioner at X find favour with him and the appeal is allowed. The Commissioner at Y does not agree with the same plea raised by B as an appellant and dismisses the appeal. B

prefers his appeal before the Tribunal. In the case of A the department comes up in appeal to the Tribunal. The appeals are pending on the date of coming into force of the scheme. The Tribunal would take the same view on the legal issue arising for decision in the two appeals and, therefore, the decision would be the same in both the appeals. B is covered by the scheme and may take benefit thereof where after his appeal shall not be decided by the Tribunal. A cannot take the benefit of the Scheme for he will not be treated as in arrears. The appeal preferred by the department shall be heard and decided on merits on account of proviso enacted to section 92. A and B both are litigating assessees. Both are in arrears of tax. From none of the two the revenue has realised the amount of tax. The case of the two are ought to be distinguished solely by applying the distinguishing feature of who is the appellant. Here, the distinction between the two becomes unreal and artificial and in any case arbitrary, In our opinion, both the cases should have been covered by the scheme. In both the cases the Legislature would achieve the twin object: the litigation would come to an end and the arrears of tax will be realised in the same quantity from the two assessees. In fact, the revenue, should show more inclination in favour of the assessee A who in spite of having succeeded at one stage of the litigation is still prepared to give up his fight though by way of defense and is prepared to accept his liability to pay the tax which was quantified at one stage. 24. The learned Additional Solicitor- General submitted that even here the distinction is well defined and intelligible. As against B, his having lost in the tax litigation, the amount of tax levied on income would be treated to be in arrears by the revenue, as it is not realised. In the case of A, his having succeeded in appeal before the Commissioner, the tax ceases to be in arrears and it would assume the character of arrears only on the appeal by the Tribunal being decided favourably to the revenue. Therefore, where the department is the appellant, an assessee though litigating cannot be treated to be in arrears. We find it difficult to agree. 24. The learned Additional Solicitor- General submitted that even here the distinction is well defined and intelligible. As against B, his having lost in the tax litigation, the amount of tax levied on income would be treated to be in arrears by the revenue, as it is not realised. In the case of A, his having succeeded in appeal before the Commissioner, the tax ceases to be in arrears and it would assume the character of arrears only on the appeal by the Tribunal being decided favourably to the revenue. Therefore, where the department is the appellant, an assessee though litigating cannot be treated to be in arrears. We find it difficult to agree. 25. The above said submission puts a narrow and too rigid a meaning on arrears which does not fit in the context. The term arrears means an amount or quantity which still needs to be paid. It refers to money that is owned. Wharton's Law Lexicon (Fourteenth Edition) defines 'arrear' to mean - 'money unpaid at the due time: as sent behind; ... money in the hands of an accounting party. It is true that 'tax arrears' has been defined as the amount of tax, penalty or interest 'determined' on or before 31-3-1998 under clause (m) of section 87. Still it cannot be denied in the illustration given hereinabove that at one point of time the tax was determined though such determination was reversed in appeal by the Commissioner (Appeals). The determination is sought

to be restored in the appeal preferred by the department before the Tribunal. Once the appeal is allowed, the determination would relate back to the date of original determination. Under the Scheme of Income Tax Act, it is well known that a determination of liability to pay tax does not necessarily call for an order of adjudication. Take the cases of self -assessment, payment of advance tax, deduction of tax at source and so on. Several provisions prescribe for penalty or interest which liability is incurred automatically and by operation of law even when an order of adjudication has not been made though there may be need for quantification which may be a mathematical exercise merely. The provision of section 90(1) throws light on this aspect. On declaration being made, the designated authority shall determine the amount payable by the declarant. The previous 'determination' which is sought to be restored in appeal by department may be finalised by the designated authority. 25. The above said submission puts a narrow and too rigid a meaning on arrears which does not fit in the context. The term arrears means an amount or quantity which still needs to be paid. It refers to money that is owned. Wharton's Law Lexicon (Fourteenth Edition) defines 'arrear' to mean - 'money unpaid at the due time: as sent behind; ... money in the hands of an accounting party. It is true that 'tax arrears' has been defined as the amount of tax, penalty or interest 'determined' on or before 31-3-1998 under clause (m) of section 87. Still it cannot be denied in the illustration given hereinabove that at one point of time the tax was determined though such determination was reversed in appeal by the Commissioner (Appeals). The determination is sought to be restored in the appeal preferred by the department before the Tribunal. Once the appeal is allowed, the determination would relate back to the date of original determination. Under the Scheme of Income Tax Act, it is well known that a determination of liability to pay tax does not necessarily call for an order of adjudication. Take the cases of self -assessment, payment of advance tax, deduction of tax at source and so on. Several provisions prescribe for penalty or interest which liability is incurred automatically and by operation of law even when an order of adjudication has not been made though there may be need for quantification which may be a mathematical exercise merely. The provision of section 90(1) throws light on this aspect. On declaration being made, the designated authority shall determine the amount payable by the declarant. The previous 'determination' which is sought to be restored in appeal by department may be finalised by the designated authority. 26. In our opinion, no sub-classification can therefore, be made in the class of litigating assessees in arrears merely by reference to the fact whether they are prosecuting the litigation or defending themselves. In our opinion, once a liability to pay the tax was incurred and determined on or before 31-3-1998, the assessee would be treated to be in arrears in spite of his having succeeded at one stage of litigation if the revenue has chosen to continue with litigation and there is no reason why the benefit of the scheme should be denied to him. To this extent, the scheme is discriminatory and violative of article 14. All the assessees litigating and in arrears belong to one class. Any attempt at carrying out further classes by reference to who is the prosecutor/ appellant/ applicant in the pending litigation is void as based on no intelligible differentia.

It is arbitrary irrational and evasive. It will have no rational relation to the object sought to be achieved by the Act. The twin test laid down in R.K. Garg's case (supra) would fail. On the other hand keeping them in one class would enable the twin objective of legislation being achieved (i) the reduction of litigation, and (ii) the realisation of revenue. 26. In our opinion, no sub-classification can therefore, be made in the class of litigating assessees in arrears merely by reference to the fact whether they are prosecuting the litigation or defending themselves. In our opinion, once a liability to pay the tax was incurred and determined on or before 31-3-1998, the assessee would be treated to be in arrears in spite of his having succeeded at one stage of litigation if the revenue has chosen to continue with litigation and there is no reason why the benefit of the scheme should be denied to him. To this extent, the scheme is discriminatory and violative of article 14. All the assessees litigating and in arrears belong to one class. Any attempt at carrying out further classes by reference to who is the prosecutor/ appellant/ applicant in the pending litigation is void as based on no intelligible differentia. It is arbitrary irrational and evasive. It will have no rational relation to the object sought to be achieved by the Act. The twin test laid down in R.K. Garg's case (supra) would fail. On the other hand keeping them in one class would enable the twin objective of legislation being achieved (i) the reduction of litigation, and (ii) the realisation of revenue. 27. In the view we have taken hereinabove we are fortified by the principle laid down by the Supreme Court in the case of Shashikant Laxman Kale v. Union of India (1990) 185 ITR 104(SC). Their Lordships have held : 27. In the view we have taken hereinabove we are fortified by the principle laid down by the Supreme Court in the case of Shashikant Laxman Kale v. Union of India (1990) 185 ITR 104(SC). Their Lordships have held : "In order to see whether classification in a particular taxing provision is valid, the court must look beyond the ostensible classification and to the purpose of the law and apply the test of 'palpable arbitrariness' in the context of the felt needs of the times and societal exigencies informed by experience to determine the reasonableness of the classification." 28. Where a plan literal interpretation of a statutory provision creates a manifestly unjust result which could never have been intended by the Legislature the court might modify the language used by the Legislature so as to achieve the intention of the Legislature and produce a rationale construction CIT v. J.A. Gotla AIR 1985 SC 1698 para. 46. 28. Where a plan literal interpretation of a statutory provision creates a manifestly unjust result which could never have been intended by the Legislature the court might modify the language used by the Legislature so as to achieve the intention of the Legislature and produce a rationale construction CIT v. J.A. Gotla AIR 1985 SC 1698 para. 46. 29. It is the stand of the respondents themselves before us that the objective of the scheme is to reduce the litigation and strengthen the coffers of the state by realising tax. The interpretation which we propose to place on the definition of 'tax arrears' would better achieve the legislative intent and object of the scheme. It would avoid the charge of hostile discrimination based on an attempted artificial division of assessees belonging to one class and would produce a rational result. 29. It is the stand of the respondents themselves before us that the objective of

the scheme is to reduce the litigation and strengthen the coffers of the state by realising tax. The interpretation which we propose to place on the definition of 'tax arrears' would better achieve the legislative intent and object of the scheme. It would avoid the charge of hostile discrimination based on an attempted artificial division of assessees belonging to one class and would produce a rational result. 30. Having formed an opinion as above said, is it necessary to strike down the definition of 'tax arrears' as occurring in sub-clause (i) of clause (m) of section 87 and the proviso enacted to section 92 ? In our opinion the object sought to be achieved can be so done by striking out the proviso to section 92 and reading down the definition of 'tax arrears' in clause (m) of section 87. 30. Having formed an opinion as above said, is it necessary to strike down the definition of 'tax arrears' as occurring in sub-clause (i) of clause (m) of section 87 and the proviso enacted to section 92 ? In our opinion the object sought to be achieved can be so done by striking out the proviso to section 92 and reading down the definition of 'tax arrears' in clause (m) of section 87. 31. The theory of reading down is a rule of interpretation resorted by the court where a provision read literally seems to offend a fundamental right or falls outside the competence of a particular Legislature. Reading down meaning of words with loose lexical amplitude is permissible as part of the judicial process - A. Sanyasi Rao v. Government of Andhra Pradesh (1989) 178 ITR 31 (AP). 31. The theory of reading down is a rule of interpretation resorted by the court where a provision read literally seems to offend a fundamental right or falls outside the competence of a particular Legislature. Reading down meaning of words with loose lexical amplitude is permissible as part of the judicial process - A. Sanyasi Rao v. Government of Andhra Pradesh (1989) 178 ITR 31 (AP). 32. Shri J.R. Goel, advocate submitted that the Scheme is unworkable under section 92. Take an example. An assessee disputing his liability to pay a tax suffers determination of a levy of Rs. 10,000. He pays Rs. 4,000 and does not pay Rs. 6,000. He pursues the disputes in litigation. The benefit of scheme is available to him to the extent of Rs. 6,000 but not to the extent of Rs. 4,000 being the tax paid or realised. In the appeal, preferred by the assessee the dispute involved is tax of Rs. 10,000. Once the assessee chooses to take the advantage of the scheme to the extent of Rs. 6,000 which only is permissible, what will happen to the amount of Rs. 4,000 which has been paid or realised? The amount cannot be refunded unless the issue is decided. And the issue will not be decided because of section 92. 32. Shri J.R. Goel, advocate submitted that the Scheme is unworkable under section 92. Take an example. An assessee disputing his liability to pay a tax suffers determination of a levy of Rs. 10,000. He pays Rs. 4,000 and does not pay Rs. 6,000. He pursues the disputes in litigation. The benefit of scheme is available to him to the extent of Rs. 6,000 but not to the extent of Rs. 4,000 being the tax paid or realised. In the appeal, preferred by the assessee the dispute involved is tax of Rs. 10,000. Once the assessee chooses to take the advantage of the scheme to the extent of Rs. 6,000 which only is permissible, what will happen to the amount of Rs. 4,000 which has been paid or realised? The amount cannot be refunded unless the issue is decided. And the issue will not be decided because of section 92. The learned Additional Solicitor General

submitted that the plea suffers from a fallacy. The Scheme is optional and not compulsory. The assessee who is disputing the tax liability of Rs. 10,000 knows well that tax in arrears is Rs. 6,000 only and that his availing of the scheme to the extent of Rs. 6,000 would result in excluding his right to have the issue 'decided to the extent of entire of Rs. 10,000. Keeping this factor in view he may opt for the scheme or he may not. Nobody compels him to do so. He is the master of his own discretion. In our opinion, the learned Additional Solicitor General is right. There is yet another way of looking at the riddle. In the fact situation as demonstrated hereinabove section 92 can be so read as to hold that the issue though common to Rs. 6,000 and Rs. 4,000 both, would not be available for decision to the extent of Rs. 6,000 covered by the scheme and shall not be decided or deemed to have been decided to that extent. But it would not have any effect by virtue of section 92 on the amount of tax to the extent of Rs. 4,000. We do not propose to express any final opinion on this plea in this judgment and leave the same to be determined in an appropriate and concrete case. This we say for two reasons. Firstly, we do not have a specific case before us. Secondly, the plea has been raised not in the petition but only by way of intervention of the hearing. For the purpose of this case suffice it to observe that the scheme is not render unworkable on account of section 92. 33. To sum up our conclusions are: (1)The proviso to section 92 is ultra vires article 14 as it results into creating two artificial classes between the same class of assessees, i.e., the litigating assessees in arrears : (2) the definition of 'tax arrears' in clause (m) of section 87 should be so read as to mean the amount of tax, penalty or interest determined by any competent authority on or before 31-3-1998 though such determination might have been set aside at a later stage if such setting aside has not been accepted by the department and continues to remain under challenge before a court or Tribunal. (3) The rest of the scheme is intra vires the Constitution. 33. To sum up our conclusions are: (1)The proviso to section 92 is ultra vires article 14 as it results into creating two artificial classes between the same class of assessees, i.e., the litigating assessees in arrears : (2) the definition of 'tax arrears' in clause (m) of section 87 should be so read as to mean the amount of tax, penalty or interest determined by any competent authority on or before 31-3-1998 though such determination might have been set aside at a later stage if such setting aside has not been accepted by the department and continues to remain under challenge before a court or Tribunal. (3) The rest of the scheme is intra vires the Constitution. 34. We would like to place on record that the entire case before us was argued solely by reference to the provisions of the Income Tax Act, and due judgments deals with the submission so made. 34. We would like to place on record that the entire case before us was argued solely by reference to the provisions of the Income Tax Act, and due judgments deals with the submission so made. 35.The petition as allowed in part. The proviso to section 92 of the Finance (No. 2) Act is struck down as violative of article 14. Rest of the scheme is held to be intra vires the Constitution subject to reading down the definition of tax arrears as indicated hereinabove. No order as to costs. 35.The petition as allowed in part. The proviso to section 92 of the Finance (No. 2) Act is struck down as violative of article 14. Rest of the

scheme is held to be intra vires the Constitution subject to reading down the definition of tax arrears as indicated hereinabove. No order as to costs. OPEN