Karnataka High Court Commissioner Of Income-Tax vs Sri Balaji And Co., D. Dasappa, ... on 5 January, 2000 Equivalent citations: 2000 246 ITR 750 KAR, 2000 246 ITR 750 Karn Author: V Singhal Bench: V Singhal, T Vallinayagam JUDGMENT V.K. Singhal, J. 1. In all these I. T. R. Cs. since the controversies are common, they are decided by this common order. The Income-tax Appellate Tribunal has referred the following questions of law : 2. In I. T. R. C. No. 4 of 1996, the following question of law has been referred : "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that 'kist' amount payable to the Government by the assessee could not be brought within the purview of the provisions of Section 43B of the Income-tax Act, 1961?" 3. In I. T. R. C. No. 5 of 1996, the following question of law has been referred : "Whether, on the facts and in the circumstances of the case, particularly having regard to the changed provisions in the Karnataka Excise Act, 1965, especially the provisions of Section 24 of the said Act, the Tribunal was right in law in holding that 'kist' amount payable to the Government by the assessee could not be brought within the purview of provisions of Section 43B of the Income-tax Act, 1961?" 4. In I. T. R. C. No. 32 of 1996, the following questions of law have been referred : "(1) Whether, on the facts and in the circumstances of the case, the Tribunal is right in holding that kist payable by the assessee cannot be considered to be coming within the ambit of the expression 'tax or duty' and, hence, the provisions of Section 43B would not apply to such payments ? (2) Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal is right in law in holding that the amendment brought to Section 43B by the Finance Act, 1988, by way of insertion of the expression 'cess or fee' in Clause (a) of the said section is only prospective in nature with effect from April 1, 1989, and would not have any retrospective effect from April 1, 1984 ?" 5. In I. T. R. C. No. 745 of 1998, the following questions of law have been referred : "(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding the loss return claiming refund as having not been filed under Section 237 of the Act, but actually having been filed under Section 139(4) of the Act, in support of the claim of refund of the assessee under Section 237 of the Act and, therefore, in concluding that the said return was a valid return notwithstanding the provisions of Section 139(10) of the Act ? (2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in upholding the disallowance of Rs. 22,71,792 claimed by the assessee in relation to vendor's salary, staff salary, high speed diesel and shop rent which included expenses of Rs. 11,26,788, under high speed diesel account ?" 6. In I. T. R. C. No. 791 of 1998, the following question of law has been referred : "Whether, on the facts and in the circumstances of the case, particularly having regard to the changed provisions in the Karnataka Excise Act, 1965, especially the provisions of Section 24 of the said Act, the Tribunal was right in law in holding that 'kist' amount payable to the Government by the assessee could not be brought within the purview of provisions of Section 43B of the Income-tax Act, 1961 ?" 7. In I. T. R. C. No. 859 of 1998, the following question of law has been referred : "Whether, on the facts and in the circumstances of the case, the Tribunal

was correct in law in holding that the 'kist' and 'interest on kist' could not be brought within the purview by Section 43B of the Income-tax Act, 1961 ?" 8. In I. T. R. C. No. 23 of 1998, the following question of law has been referred : "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that 'kist' amount payable to the Government by the assessee could not be treated as tax or duty and hence, the provisions of Section 43B would not be applicable to the same ?" 9. In I. T. R. C. No. 43 of 1998, the following question of law has been referred ; "Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the 'kist' amount payable to the Government by the assessee could not be brought within the purview of the provisions of Section 43B of the Income-tax Act, 1961 ?" 10. In I. T. R. C. No. 136 of 1998, the following question of law has been referred : "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that kist amount payable by an excise contractor cannot be treated as 'duty' for purpose of provisions of Section 43B?" . 11. In I. T. R. C. No. 342 of 1998, the following question of law has been referred : "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that 'kist' payable by the assessee to the State Government towards the agreement he had made for acquiring the right to vend arrack was not susceptible to the provisions of Section 43B being not 'tax' or 'duty' ?" 12. In I. T. R. C. Nos. 409 and 410 of 1998, the following questions of law has been referred : "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that 'kist' amount payable by an excise contractor under the State Excise Act cannot be treated as 'duty' for the purpose of the provisions of Section 43B of the Act ? Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that 'kist' amount payable by an excise contractor cannot be treated as 'duty' for the purpose of the provisions of Section 43B of the Act ?" 13. The facts of the case are, that, in respect of the assessment year 1984-85, the Income-tax Officer found that the rentals in respect of vending toddy/ arrack, have not been paid to the Government, of which, a deduction was claimed. In accordance with the provision of Section 43B, it was considered that the payment of rental under the Karnataka Excise Act, 1965, is a duty. The rentals are payable under Section 17 of the Act and under Section 24 of the Act, it was considered to be an excise duty. The provisions of Sections 17 and 24 of the Karnataka Excise Act, 1965, are as under : "17. Power to grant lease of right to manufacture, etc.–(1) The State Government may lease to any person, on such conditions and for such period as it may think fit, the exclusive or other right,– (a) of manufacturing or supplying by wholesale or of both ; or (b) of selling by wholesale or by retail ; or (c) of manufacturing or supplying" by wholesale, or of both and of selling by retail, any Indian liquor or intoxicating drug within any specified area." "24. Payment of fees for grant of lease.–Instead of or in addition to any excise duty or countervailing" duty leviable under Sections 22 and 23, the State Government may accept payment of a sum of levy such licence fee or privilege fees as may be prescribed, in consideration of grant of a lease or licence or both, by or under

this Act." 14. It was considered that the provision of Section 17 has considered the rentals as an excise duty and, therefore, Section 43B of the Income-tax Act is attracted. 15. The Appellate Assistant Commissioner found that in Nashirwar v. State of Madhya Pradesh, , the Supreme Court has pointed out that, the State has the exclusive right to manufacture and sell liquor and to sell the said right in order to raise revenue. The nature of the trade is such that the State confers the right to vend liquor by farming out either in auction or on private treaty. Rental is the consideration for the privilege granted by the Government for manufacturing or vending liquor. 16. In D. Cawasji and Co. v. State of Mysore, AIR 1969 Mys 23, it was observed by this court (pages 37, 38, 39) : "From the aforesaid two decisions of the Supreme Court, the propositions that emerge are, (i) that a tax on luxuries be imposed either on the person providing or giving luxuries or on the person receiving luxuries, or both ; and (ii) that the amount of tax on luxuries must be correlated to the value, quality, or quantity of luxuries and the tax should not be imposed for the privilege of carrying on any trade or calling providing luxuries. We shall now apply the aforesaid two propositions to determine whether shop rent can be regarded as a tax on luxuries. That the tax is levied on the vendor of liquors and not on the consumers of liquor, is not, by itself, a factor that militates against the tax being a tax on luxuries. But the material question is whether shop rent is imposed for the privilege of selling alcoholic liquors or whether it is correlated to the quality, quantity or value of liquors sold by the vendor. . . . In the light of the opinion expressed by the majority of the Bench in Shinde Brothers' case, , we must hold that shop rent is not correlated to the quality, quantity, value of luxuries, i.e., liquors but is imposed for the privilege of vending liquor, and hence it cannot be regarded as a tax on luxuries coming within entry 62 in List II of the Seventh Schedule to the Constitution, even if it is assumed that alcoholic liquors are articles of luxury and shop rent is a tax." "Disposal of the privilege to vend liquor is not purely a matter of contract. It is governed by the statute, namely, the Mysore Excise Act. Powers and obligations of the State and rights and liabilities of the licensees, are governed by the statute and rules thereunder. Further, Article 265 of the Constitution declares that no tax shall be levied or collected except by authority of law. A tax cannot be levied or collected by the State under a contract. A contract to pay a tax not levied by the authority of law, is inconsistent with Article 265 of the Constitution, and is in the same position as a contract which violates the Constitutional guarantee afforded by Article 311. Hence, the mere fact that before obtaining" licences to sell liquor, the petitioners had executed in favour of the State, contracts covenanting to pay education cess on certain items of excise revenue, would not render levy on education cess valid if such levy is without the authority of law." "Our conclusion may be summed up thus : (i) The Education Act does not impose the charge of education cess on arrack shop rent, toddy shop rent and beer shop rent, tree tax and tree rent ; (ii) Continuance of the levy of education cess in the old Mysore area of the new State of Mysore, has not been shown to offend Article 14 of the Constitution ; (iii) Shop rent is not a duty of excise and hence education cess cannot be levied on arrack shop rent, toddy shop rent or beer shop rent ; (iv)

Education cess on shop rent, is not a tax on trade as shop rent is not a tax on trade ; (v) Education cess can be levied and collected even in the absence of provisions creating a machinery for assessment and collection of education cess ; (vi) The levy of education cess on shop rent after the commencement of the Constitution, is not saved by Article 277 of the Constitution ; (vii) Shop rent not being a tax, is not a tax on luxuries ; and (viii) The petitioners can question the validity of the levy of education cess on shop rent, tree tax and tree rent in spite of their having agreed to pay education cess on those items." 17. In the light of the above decision of the Supreme Court, it was considered that the shop rent is neither excise duty nor tax. 18. Section 2(8) of the Karnataka Excise Act, 1965, has defined "excise duty" and "countervailing duty". Section 2(11) defines "excise revenue" which reads as under : " 'Excise revenue' means revenue derived or derivable from any duty, fee, tax, rent, fine or confiscation imposed or ordered under the provisions of this Act or any other law for the time being in force relating to liquor or intoxicating drugs ;" 19. Entry 51 of List II of the Seventh Schedule is as under : "51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India : (a) alcoholic liquors for human consumption ; (b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (b) of this entry." 20. Learned standing counsel for the Department has drawn our attention to the Budget Speech of the Finance Minister to the following effect (see [1983] 140 ITR (St.) 31) : "Several cases have come to notice where taxpayers do not discharge their statutory liability such as in respect of excise duty, employer's contribution to provident fund, employees' State insurance scheme, for long periods of time. For the purpose of their income-tax assessments, they nonetheless claim the liability as deduction even as they take resort to legal action, thus depriving the Government of its dues while enjoying the benefit of non-payment. To curb such practices I propose to provide that irrespective of the method of accounting followed by the taxpayer, a statutory liability will be allowed as a deduction in computing the taxable profits only in the year and to the extent it is actually paid. This would result in a revenue gain of Rs. 100 crores in a full year and Rs. 80 crores in 1983-84." "Several cases have come to notice where taxpayers do not discharge their statutory liability such as in respect of excise duty, employer's contribution to provident fund, employees' State insurance scheme, etc., for long periods of time, extending sometimes to several years. For the purpose of their income-tax assessments, they claim the liability as deduction on the ground that they maintain accounts on the mercantile or accrual basis. On the other hand, they dispute the liability and do not discharge the same. For some reason or the other undisputed liabilities also are not paid. To curb this practice, it is proposed to provide that deduction for any sum payable by the assessee by way of tax or duty under any law for the time being in force (irrespective of whether such tax or duty is disputed or not) or any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of

employees shall be allowed only in computing the income of that previous year in which such sum is actually paid by him." (see [1983] 140 ITR (St.) 160). Attention was also drawn to the circulars issued by the Central Board of Direct Taxes to the following effect : (see [1989] 176 ITR (St.) 154, 165) "21.2 The words 'tax' and 'duty' have been the subject-matter of judicial interpretation and there is a controversy as to whether they cover statutory levies like cess, fees, etc. Some appellate authorities have held that -such cess or fees cannot be covered by the expressions 'tax' or 'duty'. Such an interpretation is against the legislative intent and, therefore, by way of clarification, an amendment has been carried out to provide that cess or fees by whatever name called, which have been imposed by any statutory authority, including a local authority, will be allowed as a deduction only if these are actually paid." "This is against the legislative intent and, therefore, by way of inserting an Explanation it has been clarified that the words 'any sum payable' shall mean any sum, liability for which has been incurred by the taxpayer during the previous year irrespective of the date by which such sum is statutorily payable." 21. It is submitted that, the liability to pay rent is stated to be a statutory liability as was found in CIT v. Teesta Valley Co. Ltd. . 22. It is submitted that the rent amount required to be paid under Section 17 read with Section 24 of the Excise Act could be treated as fee as was considered in the case of Cooverjee B. Bharucha v. Excise Commissioner and Chief Commissioner, , which reads (page 224) : "The next contention that the charge of fee by public auction is excessive and is not in the nature of a fee but a tax ignores the fact that that licence fee described as a licence fee is more in the nature of a tax than a licence fee. One of the purposes of the regulation is to raise revenue. By the provisions of Section 24, duties can be imposed on the manufacture, import, export and transport of liquor and other excisable articles. Revenue is also collected by the grant of contracts to carry on trade in liquors and these contracts are sold by auction. The grantee is given a licence on payment of the auction price. The regulation specifically authorises this. It is not a fee levied without authority of law as was the situation in Rashid Ahmed v. Municipal Board of Kairana, ." 23. On behalf of the respondent, it is submitted that in Shinde Brothers v. Deputy Commissioner, , it was held that (headnote) : "The payment of shop rent or kist is a payment for obtaining the exclusive privilege of selling toddy or arrack from certain shops by bidding at auctions in pursuance of Government notifications. The taxable event is not the manufacture or production of goods but the acceptance of the licence to sell. In other words, the levy is in respect of the business of carrying on the sale of toddy. There is no connection of any part of the levy with any manufacture or production of any goods. The meaning of excise duty cannot include a levy which has close relation to the sale of excisable goods." 24. In the case of State of Mysore v. D. Cawasji and Co., , it was considered that the shop rent paid by an excise contractor is not excise revenue, within the meaning" of entry 51 of List II of the Seventh Schedule to the Constitution of India. 25. In Har Shankar v. Deputy Excise and Taxation Commissioner, , the distinction between the characteristics of tax fee and excise duty was explained and it was observed (page 1133) : "The distinction which

the Constitution makes for legislative purposes between a 'tax' and a 'fee' and the characteristics of these two as also of 'excise duty' are well known. 'A tax is a compulsory exaction of money by a public authority for public purposes enforceable by law and is not a payment for services rendered'. Per Latham C. J. in Mathews v. Chickory Marketing Board (60 CLR 263, 276). A fee is a charge for special services rendered to individuals by some governmental agency and such a charge has an element in it of a quid pro quo. Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt . Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. Guruswamy and Co. v. State of Mysore . The amounts charged to the licensees in the instant case are, evidently, neither in the nature of a tax nor of excise duty. But then, the 'licence fee' which the State Government charged to the licensees through the medium of auctions or the 'fixed fee' which it charged to the vendors of foreign liquor holding licences in forms L-3, L-4 and L-5 need bear no quid pro quo to the services rendered to the licensees. The word 'fee1 is not used in the Act or the Rules in the technical sense of the expression. By 'licence fee' or 'fixed fee' is meant the price or consideration which the Government charges to the licensees for parting with its privileges and granting them to the licensees. As the State can carry on a trade or business, such a charge is the normal incident of a trading or business transaction." 26. In Om Parkash Agarwal v. Giri Raj Kishori , it was observed that, tax is a compulsory exaction of money by a public authority for public purposes enforceable at law and not a payment for services rendered. 27. It was further observed (page 384) : "This definition brings out, in our opinion, the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law. . . . The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of quid pro quo between the taxpayer and the public authority. Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay. The three principal characteristics of a tax noticed by Mukherjea J. in the above passage are : (i) that it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law ; (ii) that it is an imposition made for public purposes without reference to any special benefit to be conferred on the payer of the tax ; and (iii) that it is a part of the common burden, the quantum of imposition upon the taxpayer depending generally upon the capacity of the taxpayer to pay. As regards fees, Mukherjea J. observed in the above decision thus (at p. 295 of AIR) : 'Coming now to fees, a "fee" is generally defined to be a charge for a special service rendered to individuals by some governmental agency.

The amount of fee levied is supposed to be based on the expenses incurred by the government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases . . . If, as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be correlated to the expenses incurred by the Government in rendering the services'." 28. The Calcutta High Court in CIT v. Varas International (P.) Ltd. , after referring to various decisions of the apex court, observed that (page 838) : "All the aforesaid judgments were considered by the Supreme Court in State of U. P. v. Sheopat Rai, AIR 1994 SC 813, where it was held that the periodical licence for retail vend of foreign liquor granted on the basis of a 'fixed fee' or 'licence fee' connote and mean consideration received by the Government for parting with its exclusive privilege to deal in intoxicants and such fee is neither a tax nor a fee nor an excise duty nor cess and the same can only be levied under entry 8 of List 2 of Schedule VII to the Constitution. In that view of the matter, it now stands concluded that the fee or charges received by the Government for parting with its exclusive right to manufacture or vend intoxicants is neither a tax nor a duty nor a fee nor a cess." 29. In State of U. P. v. Sheopat Rai, AIR 1994 SC 813, after considering various decisions of the apex court, it was observed (page 821) : "The term 'licence fee' and the term 'fixed fee' in the context of the U. P. Excise Act, the Ordinance and the Excise (Amendment) Rules being the consideration which the Government receives from a private party to part in the latter's favour with its exclusive privilege or right to vend foreign liquor in specified shops of any locality in the U. P. State under a contract–by way of shop licence (Form FL-4) or (Form FL-5), it is held by us, to be not 'fee' at all, falling in line with the view expressed in this regard by a Constitution Bench of this court in Har Shankar's case, , and other decisions adverted to. If that be so, the 'licence fee' or 'fixed fee' cannot partake of the character of either 'regulatory fee' or 'compensatory fee' so as to regard it as 'fee'. Thus neither the 'licence fee' nor 'fixed fee' realisable from a private party for granting the privilege or, right to sell or vend foreign liquor to such party can fall within the ambit of the subject 'fee' in the entry to List II of the Seventh Schedule to the Constitution. Then, the 'licence fee' or the 'fixed fee' under consideration cannot be regarded as 'tax' since the characteristics of tax, namely, its levy being compulsive in nature, its burden being common, it being payable according to the varying abilities of the person to be charged are wholly absent, in both of them. As 'duty' or 'cess' stand on the same footing as 'tax', the 'licence fee' or 'fixed fee' under consideration cannot be regarded either as 'duty' or 'cess'. Hence, the terms the 'licence fee' or the 'fixed fee' used in the context of the U. P. excise law, under our consideration fall outside the entries in List II of the Seventh Schedule to our Constitution which enables the making of legislation for imposition of tax, duty or cess." 30. It was held that the periodic licence for retail vend of

foreign liquor could be granted on the basis of "auction system" or "fixed fee system" and connotes and means consideration received by the Government for the exclusive privilege to deal in intoxicants and as such, is neither a tax nor a fee nor an excise duty and the same can only be levied under entry 8, List II of the Seventh Schedule to the Constitution. 31. The Calcutta High Court in Varas International's case came to the conclusion that the charge or price paid to the State Government for obtaining licence/contract for manufacture of country liquor is neither tax nor duty, cess or fee and deduction under Section 43B is allowable without even actual payment. 32. Rule 15 of the General Conditions of the Karnataka Excise Licences (General Conditions) Rules, 1967, provides for payment of rent. The payment of rent has been treated to be a liability by virtue of Section 24 of the Karnataka Excise Act, in the nature of excise duty ; but it has been held by the apex court that it is not an excise duty, in order for the matter to fall under the provisions of Section 43B, the actual payment is contemplated to tax, duty, cess or fee by whatever name called. The word "by whatever name called" refers to tax, duty, cess, or fee and, therefore, the payment must be in the nature of tax, duty, cess or fee. It has been held in the judgments referred to above that the rent/kist is neither tax nor duty nor fee. Similarly, it cannot be called as "cess". 33. The provisions of Section 17 of the Karnataka Excise Act, 1965, have referred to the power to grant lease of the right to manufacture. Section 24 has conferred the additional power on the State Government to accept payment of a sum or levy such licence fee or privilege fee as may be prescribed, in consideration of grant of lease or licence or both, by or under this Act. This power is in addition to any excise duty or countervailing duty leviable under Sections 22 and 23. If the Legislature has used specific language then it cannot be stretched to include certain sums which are not in the nature of payment mentioned by the Legislature. Payment of lease money/rental may be a statutory liability but however any statutory liability does not come within the purview of Section 43B. It is only that statutory liability which is in the nature of tax, duty, cess or fee to which the provisions of Section 43B are attracted. Since the kist/rental could not be considered to be falling under either of the items, the provisions of Section 43B cannot be attracted and as such we are of the view that the Tribunal was justified in law in holding that the kist amount payable to the Government by the assessee could not be brought within the purview of the provisions of Section 43B of the Income-tax Act, 1961. It is a different matter that the licensees are not paying the rent in time for which it is only the Legislature which could intervene and not the courts. 34. Reference is accordingly answered in favour of the assessee and against the Revenue.