

(1986) 04 RAJ CK 0015

In the Rajasthan High Court

Case No : Civil Writ Petition No's. 562, 725, 726, 727, 747, 979, 997, 998, 2014, 2015 and 2083 of 1985

Abhay Kumar and Co., Mehta Vegetables Product, Jagannath
Ramgopal and Co., Kailash Mal Chitarmal, Luna Trading Co.,
Daulat Raj Shyam Sunder, Prasan Chand Sukhraj Mehta,
Lunawat Dal Mill, Baktarwar Mal Govind Ram, Chainsukh
Parveen Kumar and Padam Chand Mutha and Co.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 14-04-1986

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)

Income Tax Act, 1961 — Section 139, 139(1), 139(2), 142(2A), 271B

Citation : (1986) 54 CTR 188 : (1987) 164 ITR 148 : (1986) 63 STC 203

Hon'ble Judges : A.K. Mathur, J

Bench : Single Bench

Advocate : Vineet Kothari, for the Appellant; R. Krishna Murthy and B.R. Arora, for the Respondent

Judgement

A.K. Mathur, J.—In all this batch of writ petitions, a common question of law and fact has been raised. Therefore, they are disposed of by a single order.

2. In these writ petitions, principal submissions have been made, one regarding the validity of Section 44AB and Section 271B of the Income Tax Act and second, regarding interpretation of 44AB and 271B of the Income Tax Act. Sections 44AB and 271B were introduced by the Finance Act of 1984, which read as under :

"44AB. Every person,--

(a) carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds forty lakh rupees in any previous year or years relevant to the assessment year commencing on the 1st day of April, 1985, or any subsequent assessment year; or

(b) carrying on profession shall, if his gross receipts in profession exceed ten

lakh rupees in any previous year or years relevant to the assessment year commencing on the 1st day of April, 1985, or any subsequent assessment year,

get his accounts of such previous year or years audited by an accountant before the specified date and obtain before that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed:

Provided that in a case where such person is required by or under any other law to get his accounts audited by an accountant, it shall be sufficient compliance with the provisions of this Section if such person gets the accounts of such business or profession audited under such law before the specified date and obtains before that date the report of the audit as required under such other law and a further report in the form prescribed under this section.

Explanation.--For the purposes of this section,--

(i) "accountant" shall have the same meaning as in the Explanation below Sub-section (2) of Section 288 ;

(ii) "specified date", in relation to the accounts of the previous year or years relevant to an assessment year, means the date of the expiry of four months from the end of the previous year or, where there is more than one previous year, from the end of the previous year which expired last before the commencement of the assessment year, or the 30th day of June of the assessment year, whichever is later.

271B. If any person fails, without reasonable cause, to get his accounts audited in respect of any previous year or years relevant to an assessment year or obtain a report of such audit as required u/s 44AB, the Income Tax Officer may direct that such person shall pay, by way of penalty, a sum equal to one-half per cent. of the total sales, turnover or gross receipts, as the case may be, in business, or of the gross receipts in profession, in such previous year or years or a sum of one hundred thousand rupees, whichever is less."

3. Learned counsel for the petitioner has challenged the validity of Section 44AB on the anvil of articles 14 and 19(1)(g) of the Constitution and other facets have also been raised in order to show that Section 44AB is in contravention of the other provisions of the Income Tax Act and, therefore, they are not workable.

4. Before we examine the various facets which learned counsel for the petitioner has submitted for my consideration, it will be necessary to have a look into the background in which the present sections have been incorporated in the Income Tax Act, by the Finance Act of 1984. The Statement of Objects and Reasons reads as under [1984] 146 ITR 161:

"Accounts maintained by companies are required to be audited under the Companies Act, 1956. Accounts maintained by co-operative societies are also required to be audited under the Co-operative Societies Act, 1912. There is,

however, no obligation on other categories of taxpayers to get their accounts audited.

A proper audit for tax purposes would ensure that the books of account and other records are properly maintained and that they faithfully reflect the income of the taxpayer and claims for deductions are correctly made by him. Such audit would also help in checking fraudulent practices. It can also facilitate the administration of tax laws by a proper presentation of the accounts before the tax authorities and considerably save the time of assessing officers in carrying out routine verifications, like checking correctness of totals and verifying whether purchases and sales are properly vouched or not. The time of the assessing officers thus saved could be utilised for attending to more important investigational aspects of a case.

Having regard to the foregoing considerations, the Bill seeks to make a new provision in the Income Tax Act making it obligatory for a person carrying on business to get his accounts audited before the "specified date" by an "accountant" if the total sales, turnover or gross receipts in business for the accounting year or years relevant to the assessment year 1985-86 or any subsequent assessment year exceed or exceeds forty lakh rupees (corrected by authors in the light of the law as it stands). A person carrying on profession will also have to get his accounts audited before the "specified date", if his gross receipts in profession for an accounting year or years relevant to any of the aforesaid assessment years exceed ten lakh rupees. The proposed new provision also casts an obligation on such persons to obtain before the "specified date" a report of the audit in the prescribed form duly signed and verified by the "accountant" setting forth such particulars as may be prescribed by rules made in this behalf by the Central Board of Direct Taxes.

In cases where accounts are required to be audited by or under any other law (as in the case of companies and co-operative societies), it will suffice if the accounts are audited under such other law before the "specified date" and the assessee obtains before the said date the report of the audit as required under such other law, and also a report of audit in the form to be prescribed by the Central Board of Direct Taxes.

For the purposes of the proposed provision, the term "accountant" will have the same meaning as in the Explanation below Sub-section (2) of Section 288 of the Income Tax Act. The expression "specified date", in relation to the accounts of any accounting year or years relevant to any assessment year, would mean the date of the expiry of four months from the end of the accounting year or, where the assessee has more than one accounting year, from the end of the accounting year which expired last before the commencement of that assessment year or the 30th June of that assessment year, whichever is later.

If any person fails, without reasonable cause, to get his accounts audited in respect of any accounting year or years relevant to an assessment year or to

obtain a report of such audit as required under the aforesaid provision, the Income Tax Officer may direct that such person shall pay, by way of penalty, a sum equal to one-half per cent. of the total sales, turnover or gross receipts, as the case may be, in the business or of the gross receipts in the profession, in such accounting year or years, subject to a maximum of one lakh rupees.

The proposed provision will take effect from 1st April, 1985, and will, accordingly, apply in relation to the assessment year 1985-86 and subsequent years."

5. The Constitution entry which covers this subject is contained in the Seventh Schedule, List I, at item No. 82 which reads as under :

" 82. Taxes on income other than agricultural income."

6. In this background, learned counsel for the petitioner submitted that in fact what is taxed is the income, and thus the basis of this provision, i.e., sale or gross receipts in a particular year of assessment is foreign to the Income Tax Act. According to entry 82, tax will be levied on the total income of the assessee and not with reference to his turnover or sale, etc. Learned counsel submits that Section 44AB has exceeded the jurisdiction and thereby it is arbitrary, discriminatory and violative of article 14 of the Constitution of India. I am afraid this submission of learned counsel is not well-founded. It is true that what is taxable is the total income of the individual under entry 82 of the Central List of the Seventh Schedule attached to the Constitution but all matters incidental to it shall come within the domain of this entry in order to effectuate the purpose and intent contained in the entry. The basic idea is to tax the income and in order to check the evasion of income, the Legislature is competent to make such laws under this entry. Thus, a perusal of the objects and reasons would show that this provision has been enacted in order to check fraudulent transactions or evasion. It will also facilitate the administration of the tax law by proper presentation of accounts before the taxing authority and that will considerably save the time of the Income Tax Officer for carrying out verification at the time of assessing the assessee's return and the same may be utilised for more important investigational aspects of the case. Hence, in this back ground, it has been made obligatory for the assessee whose total sales, turnover or gross receipts, as the case may be, in business exceed Rs. 40 lakhs in the previous year or his professional receipts in any profession, if his gross receipts exceed Rs. 10 lakhs, then he will have to get his accounts audited. Thus, this provision is a very salutary provision for the purpose of making the taxing Act more effective. It will also save the time of the administrative machinery so as to focus its attention on other important matters. When the audited accounts are submitted to the Income Tax Officer, he will have an advantage of properly prepared accounts and after observing those accounts, he will be in a better position to assess the situation rather than do the whole exercise by himself. Needless to say that the job of a chartered accountant has been made more responsible and his expertise on the subject will be more useful so as to effectively bring evasion of tax to light. It may be a little harsh on the assessee but none the less looking to the

economic feature in the country if the Legislature in its wisdom has laid down this rigorous standard in order to avoid evasion of tax, then no exception can be taken. In this connection, I would like to refer to the case of R. Abdul Quader and Co. v. STO [1964] 15 STC 403, wherein their Lordships of the Supreme Court observed as under (at page 407):

"These incidental and ancillary powers have to be exercised in aid of the main topic of legislation, which in the present case, is a tax on sale or purchase of goods. All powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the ambit of the legislative entry as ancillary or incidental."

7. Thus, in view of the clear position of law as enunciated by their Lordships of the Supreme Court, there is no hesitation in saying that the present provision which has been incorporated is incidental and in order to check the evasion of tax. Thus, it cannot be said to exceed the legislative competence under entry 82 of List 1 of Schedule VII to the Constitution. Likewise, it cannot be said to be arbitrary so as to be violative of article 14 of the Constitution.

8. In this connection, reference may be made to the case of Mudiam Oil Co. and Others Vs. Income Tax Officer and Others, , wherein it has been held as under (at page 528):

"It was also contended that the impugned provisions are in excess of the powers conferred upon Parliament under entry 82 in List I of the Seventh Schedule to the Constitution. Entry 82 relates to "taxes on income other than agricultural income". According to the learned counsel, the impugned provisions result in taxing the gross receipts in respect of income in the guise of disallowing the expenditure. We are unable to agree with the learned counsel. The provisions are there, as already stated by us, to safeguard the revenues of the state. If there is evasion of tax on the income and if measures are taken to check evasion, it cannot be said that the measures taken are ultra vires or beyond the powers of the Legislature."

9. In the case of Vallabhdas Manjibhai Dholakia and Others Vs. Commissioner of Income Tax, Gujarat III and Others, , it has been held as under (at pages 421 and 422) :

"The impugned provision is made on the basis of a well-known fact which is a matter of common knowledge and common report and all that it requires a building contractor to do is to furnish prescribed particulars within the stipulated time-limit on the pain of penalty with a view to detecting evasion of tax. Such a provision is clearly incidental or ancillary to the power to levy tax because the power to enact a provision for preventing evasion of tax is always an incidental power. In fact, the challenge levelled at the impugned provision on the ground of legislative incompetence has not even been pressed in the present case. In these circumstances, in our opinion, it could hardly be contended that the impugned provision being not incidental or ancillary to the main power to tax income which

is conferred by the Act, it has no nexus with the statute in question."

10. In the case of T. Venkata Reddy and Others Vs. State of Andhra Pradesh, , it has been held as under (at p. 731):

"It is a settled rule of constitutional law that the question whether a statute is constitutional or not is always a question of power of the Legislature concerned. Dependent upon the subject-matter of the statute, the manner in which it is accomplished and the mode of enacting it. While the courts can declare a statute unconstitutional when it transgresses constitutional limits, they are precluded from inquiring into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised. The motives of the Legislature in passing a statute is beyond the scrutiny of courts. Nor can the courts examine whether the Legislature had applied its mind to the provisions of a statute before passing it. The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the courts. An ordinance passed either under article 123 or under article 213 of the Constitution stands on the same footing. When the Constitution says that the ordinance making power is legislative power and an ordinance shall have the same force as an Act, an ordinance should be clothed with all the attributes of an Act of Legislature carrying with it all its incidents, immunities and limitations under the Constitution, It cannot be treated as an executive action or an administrative decision."

11. The validity of the impugned provisions has already been upheld by the Karnataka and Madhya Pradesh High Courts in the case of T.S. Natraj Vs. Union of India and Others, and Mohan Trading Company and Others and Hari Shankar Shrivastava and Another Vs. Union of India (UOI) and Others, . Thus, the contention raised by learned counsel for the petitioner has no force and it is rejected.

12. It has been further submitted that u/s 288 of the Income Tax Act, seven classes of persons have been permitted to appear before the Income Tax Officer but audit can be done only by a chartered accountant, This is discriminatory because persons similarly situated are treated dissimilarly. In this connection, learned counsel for the petitioner has placed reliance on the cases of The State of Kerala Vs. Haji K. Kutty Naha and Others etc., : S.K. Dutta, Income Tax Officer and Others Vs. Lawrence Singh Ingty., , New Manek Chowk Spinning and Weaving Mills Co. Ltd. and Others Vs. Municipal Corporation of The City of Ahmedabad and Others, and R.B. Basu Vs. P.K. Mukherji, .

13. Section 288 reads as under :

"288. Appearance by authorised representative.--(1) Any assessee who is entitled or required to attend before any Income Tax authority or the Appellate Tribunal in connection with any proceeding under this Act otherwise than when required u/s 131 to attend personally for examination on oath or affirmation may, subject to the other provisions of this section, attend by an authorised

representative.

(2) For the purposes of this section, "authorised representative" means a person authorised by the assessee in writing to appear on his behalf, being-

(i) a person related to the assessee in any manner, or a person regularly employed by the assessee ; or

(ii) any officer of a Scheduled Bank with which the assessee maintains a current account or has other regular dealings ; or

(iii) any legal practitioner who is entitled to practise in any civil court in India ; or

(iv) an accountant; or

(v) any person who has passed any accountancy examination recognised in this behalf by the Board ; or

(vi) any person who has acquired such educational qualifications as the Board may prescribe for this purpose ; or

(vi)(a) any person who, before the coming into force of this Act in the Union territory of Dadra and Nagar Haveli, Goa, Daman and Diu or Pondicherry, attended before an Income Tax authority in the said territory on behalf of any assessee otherwise than in the capacity of an employee or relative of that assessee ; or

(vii) any other person who, immediately before the commencement of this Act, was an Income Tax practitioner within the meaning of Clause (iv) of Sub-section (2) of Section 61 of the Indian Income Tax Act, 1922 (11 of 1922), and was actually practising as such.

Explanation.--In this section, "accountant" means a chartered accountant within the meaning of the Chartered Accountants Act, 1949 (38 of 1949), and includes, in relation to any State, any person who by virtue of the provisions of Sub-section (2) of Section 226 of the Companies Act, 1956 (1 of 1956), is entitled to be appointed to act as an auditor of companies registered in that State."

14. So far as the proposition of law that persons similarly situated should be given similar treatment is concerned, the same is not disputed. But it is always possible that a reasonable classification can be made with a view to achieve a particular object. In this connection, I would like to refer the case of Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, . In this judgment, the whole scope of article 14 has been brought out. Their Lordships of the Supreme Court held as under (at pages 547 and 548):

"It is now well established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from

others left out of the group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of the Supreme Court that article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

" The decisions of this court further establish-

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds ;

(d) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality, 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 ; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws."

15. Thus, in the present case, the object is to check evasion of tax. That can be achieved through checking the accounts of the assessee and for that purpose a specialised person like a chartered accountant is well equipped to check into all its aspects. Thus, this particular job has been entrusted to the accountant who is fully qualified under the Chartered Accountants Act. Out of the seven classes of

persons, as contemplated u/s 288 of the Income Tax Act, special responsibility has been conferred on the accountant who is fully qualified under the Chartered Accountants Act. Thus, the job which an expert person like a chartered accountant will be able to do, the other person, though similarly situated so far as presenting the case of an assessee before the Income Tax Officer is concerned, cannot do with that facility as can be done by the chartered accountant. Thus, this class has been specially recognised for the job and this cannot be said to be discriminatory so as to be violative of article 14 of the Constitution. It is only an invidious classification which is prohibited but if the classification is based on occupations like the present one, viz., that of chartered accountants, then such classification cannot be said to be violative of article 14 of the Constitution. In this connection, reference may be made to the case of AIR India Vs. Nergesh Meerza and Others, , wherein it has been held as under (at page 1842) :

" Thus, from a detailed analysis and close examination of the cases of this court starting from 1952 till today, the following propositions emerge :

(1) In considering the fundamental right of equality of opportunity, a technical, pedantic or doctrinaire approach should not be made and the doctrine should not be invoked even if different scales of pay, service terms, leave, etc., are introduced in different or dissimilar posts.

Thus, where the class or categories of service are essentially different in purport and spirit, article 14 cannot be attracted.

(2) Article 14 forbids hostile discrimination but not reasonable classification. Thus, where persons belonging to a particular class in view of their special attributes, qualities, mode of recruitment and the like, are differently treated in public interest to advance and boost members belonging to backward classes, such a classification would not amount to discrimination having a close nexus with the objects sought to be achieved so that in such cases, article 14 will be completely out of the way.

(3) Article 14 certainly applies where equals are treated differently without any reasonable basis.

(4) Where equals and unequals are treated differently, article 14 would have no application.

(5) Even if there be one class of service having several categories with different attributes and incidents, such a category becomes a separate class by itself and no difference or discrimination between such category and the general members of the other class would amount to any discrimination or to denial of equality of opportunity.

(6) In order to judge whether a separate category has been carved out of a class of service, the following circumstances have generally to be examined :--

- (a) the nature, the mode and the manner of recruitment of a particular category from the very start,
- (b) the classifications of the particular category,
- (c) the terms and conditions of service of the members of the category,
- (d) the nature and character of the posts and promotional avenues,
- (e) the special attributes that the particular category possesses which are not to be found in other classes, and the like."

16. Special reference may be made to para. (5) of the aforesaid case, wherein it has been held that in one class of service having several categories with different attributes and incidents, such a category becomes a separate class by itself and no discrimination between such category and the general members of the other class will amount to discrimination or denial of equal opportunity. A similar aspect was considered in the case of T.S. Natraj Vs. Union of India and Others, and Mohan Trading Company and Others and Hari Shankar Shrivastava and Another Vs. Union of India (UOI) and Others, . Thus, these authorities clinch the issue.

17. The cases cited by learned counsel are distinguishable on facts. In the case of The State of Kerala Vs. Haji K. Kuttu Naha and Others etc., the validity of the Kerala Buildings Tax Act was challenged on the ground that they have taken merely the floor area for purposes of taxation. Their Lordships of the Supreme Court held as under (at page 380):

"Where objects, persons or transactions essentially dissimilar are treated by the imposition of a uniform tax, discrimination may result, for, in our view, refusal to make a rational classification may itself in some cases operate as denial of equality."

18. Thus, this case is wholly distinguishable ; there the floor area of a building was only taken as a basis for taxation irrespective of other consideration, whereas objects, persons or transactions essentially dissimilar were treated by imposing a uniform tax. But this case hardly provides any analogy so far as the present case is concerned. Here, seven classes of persons are eligible to appear and represent the assessee before the Income Tax Officer, but audit report is admissible only by a competent person and for that, the accountant alone has been recognised. This is because of professional reasons and the particular expertise which is required in the matter of auditing accounts. The classification has been made on the basis of occupation of a particular person. Thus, such a classification cannot be said to be an invidious classification so as to be violative of article 14 of the Constitution.

19. Similar is the position in the case of New Manek Chowk Spinning and Weaving Mills Co. Ltd. and Others Vs. Municipal Corporation of The City of Ahmedabad and Others, wherein their Lordships of the Supreme Court held that

the flat rate method according to floor area adopted for determining rent for fixing the rateable value is not rational. Such method was found to be violative of article 14 of the Constitution. This case also does not help the petitioner.

20. In the case of S.K. Dutta, Income Tax Officer and Others Vs. Lawrence Singh Ingty., , an exemption from Income Tax was given to a particular community in Government service, such classification was held to be violative of article 14 of the Constitution. Such is not the case here. It is not a case of class legislation but it is a classification based on the expertise of a particular person so as to provide assistance for assessing the income of the assessee and to avoid evasion of tax.

21. Thus, the contention of learned counsel that persons similarly situated have been dissimilarly treated by accepting only the audit report made by an accountant is ultra vires article 14 is not correct. The contention of learned counsel is without any merit and it is rejected.

22. Next, learned counsel submitted that the basis of classification of Rs. 40 lakhs and Rs. 10 lakhs is not rational and it is not known on what basis they have classified the persons whose turnover is Rs.40 lakhs or whose professional receipts exceed Rs. 10 lakhs alone for submitting audited accounts. In this connection, learned counsel for the petitioner invited my attention to the definition of "assessee" as given in Section 2(7) of the Income Tax Act, which reads as under :

" "assessee" means a person by whom any tax or any other sum of money is payable under this Act, and includes-

(a) every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or of the income of any other person in respect of which he is assessable, or of the loss sustained by him or by such other person, or of the amount of refund due to him or to such other person ;

(b) every person who is deemed to be an assessee under any provision of this Act;

(c) every person who is deemed to be an assessee in default under any provision of this Act."

23. In this connection, learned counsel for the respondent submitted that the bigger assesseees have been brought in this net because in the case of persons who have higher turnover or whose professional income is higher, their accounts will be more complicated and will require more scrutiny and this job will be made easier by audit report. A limit has been fixed by Parliament looking to the conditions obtaining before them. The Legislature is the best judge to lay down the limit because the evil which is being sought to be remedied by this enactment is the evasion of tax and the Legislature in its wisdom has thought it proper that the persons whose turnover is higher like group of Rs. 40 lakhs and 10 lakhs, such persons should be put to this auditing, then such classification

cannot be said to be discriminatory so as to be violative of article 14 of the Constitution of India.

24. In this connection, learned counsel for the respondent has invited my attention to the case of *Murthy Match Works and Others Vs. The Asstt. Collector of Central Excise, and Another*, . In this case, Krishna Iyer J., observed as under (headnote at page 497):

"Bare equality of treatment regardless of the inequality of realities is neither justice nor homage to the constitutional principle. Another proposition which is equally settled is that merely because there is room for classification, it does not follow that legislation without classification is always unconstitutional. The court cannot strike down a law because it has not made the classification, which commends to the court as proper. Nor can the legislative power be said to have been unconstitutionally exercised because within the class a sub-classification was reasonable but has not been made. The modern State, in exercising its sovereign power of taxation, has to deal with complex factors relating to the objects to be taxed, the quantum to be levied, the conditions subject to which the levy has to be made, the social and economic policies which the tax is designed to subserve, and what not. From the judicial inspection tower the court may only search for arbitrary and irrational classification and its obverse, namely, capricious uniformity of treatment where a crying dissimilarity exists in reality. Unconstitutionality and not unwisdom of a legislation is the narrow area of judicial review."

25. Thus, it cannot be said that the classification is in any respect discriminatory if the Legislature, which is the best judge of the factual aspect and on the basis of the data available before them have found that the classification of Rs. 40 lakhs and Rs. 10 lakhs will be a right basis for the object of checking evasion of tax, and such classification cannot be struck down as being violative of article 14 of the Constitution of India.

26. In this connection, learned counsel for the respondent has invited my attention to the case of *Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others*, , *T.S. Natraj Vs. Union of India and Others*, , *Mohan Trading Company and Others and Hari Shankar Shrivastava and Another Vs. Union of India (UOI) and Others*, and *Satish Majumdar v. State of Tamil Nadu*, AIR 1979 Mad 246. In these cases, identical arguments have been negated. Thus, I do not find this classification as bad and I overrule the contention of the petitioner.

27. Next question that learned counsel for the petitioner urged is that this is an unreasonable restriction on the petitioner's business/profession and, therefore, it is violative of article 19(1)(g) of the Constitution. I am afraid this submission of learned counsel is without any basis. These are reasonable restrictions and such reasonable restrictions like submitting audit report of the accounts of the persons whose turnover is more than Rs. 40 lakhs and professional income is more than Rs. 10 lakh, cannot be said to be violative of article 19(1)(g) of the Constitution.

These are reasonable restrictions imposed with an intention to check evasion of tax and as such cannot render the provision violative of article 19(1)(g) of the Constitution. Learned counsel for the respondent, in this connection, has invited my attention to the case of Mohan Trading Company and Others and Hari Shankar Shrivastava and Another Vs. Union of India (UOI) and Others, and T.S. Natraj Vs. Union of India and Others, On the basis of these authorities, it has been argued that Sections 44AB and 271B are not violative of article 19(1)(g) of the Constitution. I uphold the submission of learned counsel for the respondent and find there is no merit in the contention of learned counsel for the petitioner.

28. The next limb of the argument of learned counsel for the petitioner is that the present section is unworkable because it is inconsistent with the various other provisions of the Act. Learned counsel submits that by, virtue of Section 44AB, no discretion has been left with the Income Tax Officer and that if for reasons beyond control, the audit report could not be submitted within the specified date, then the assessee will be subject to the penalty as contained in Section 271B of the Income Tax Act, whereas u/s 139(2), discretion has been given to the Income Tax Officer that if a return could not be filed in time, then he can extend the time, but as against this there is no discretion left with the Income Tax Officer. Thus, this section will work harshly and will militate against Section 139 of the Income Tax Act. The proviso to Sub-section (2) of Section 139, which is relevant for this purpose reads as under :

"Provided that, on an application made in the prescribed manner, the Income Tax Officer may, in his discretion, extend the date for furnishing the return, and, notwithstanding that the date is so extended, interest shall be chargeable in accordance with the provisions of Sub-section (8)."

29. It is true that u/s 139(2) discretion has been given to the Income Tax Officer that he can extend the time for furnishing the return but interest will be chargeable in accordance with the provisions of Sub-section (8) and likewise in Sub-section (9) of Section 139, if the return furnished by the assessee is defective, then he may intimate the defects and he can he given an opportunity to rectify the defects within 15 days from the date of such intimation and within such further period on an application made in this behalf.

30. Learned counsel for the respondent has submitted that both the provisions can be read harmoniously and he submits that u/s 271B also, discretion has been given to the Income Tax Officer because Section 271B provides that "if any person fails without reasonable cause" to get his accounts audited in respect of any previous year or years relevant to an assessment year or obtain a report of such audit as required u/s 44AB, the Income Tax Officer may direct that such person shall pay by way of penalty, a sum equal to one-half per cent, of the total sales. If reasonable cause has been shown, then it is always a discretion of the Income Tax Officer to levy the penalty or not to levy the penalty. Thus, both the provisions can be read harmoniously and it cannot be said that the present provision is not workable. Learned counsel for the respondent has also invited

my attention to Section 139(9)(e) which reads as under :

"(e) where the accounts of the assessee have been audited, the return is accompanied by copies of the audited profit and loss account and balance-sheet and the auditor's report and, where an audit of cost accounts of the assessee has been conducted, u/s 233B of the Companies Act, 1956 (1 of 1956), also the report under that section."

31. It has been submitted that where the accounts of the assessee have been audited, the return has to be accompanied by copies of the audited profit and loss account and balance-sheet. Thus, learned counsel submitted that where audited accounts are there, copies of the audit report have to accompany the return u/s 139(9)(e) of the Income Tax Act and in case he does not file them, then too he can be subjected to penalty except when time has been allowed by the assessing Authority. Thus, in this case also u/s 139(9)(e), audit report has to be filed or otherwise the return will be improper. He emphasised that the filing of the audit report u/s 139(9)(e) is also a must. Thus, he submits that both the provisions can be read consistently. I think the submission of learned counsel is correct and both the provisions as contained u/s 139(9)(e) and Section 44AB and Section 271B can be harmoniously read and the expression "without reasonable cause" provides a sufficient insulation to the workability of Section 44AB. In this connection, he has invited my attention to the Principles of Statutory Interpretation by G. P. Singh, to the following passage :

" "The principle behind this rule is that an enactment designed to prevent fraud upon the Revenue" is more properly a statute against fraud rather than a taxing statute, and for this reason properly subject to a liberal construction in the Government's favour (page 549)."

32. He has further invited my attention to page 550, which reads as under:

"How far the provisions of such an Act are successful in including in their reach, different transactions resorted to by taxpayers for avoidance of tax would depend upon the construction of the provisions which are frequently couched in general terms, and may include devices not prevalent at the time of the passing of the Act. There is, however, "no presumption that the plug must exactly fit the hole"."

33. The conspectus of the whole situation is that both the provisions, i.e., Section 44AB along with Section 271B and Section 139(9)(e) can be read together and a harmonious construction is that the assessee has to file an audit report within the specified date, failing which he will have to pay the penalty if he fails to show reasonable cause for not doing so. Thus, I think both the provisions are harmoniously workable and as such the contention of learned counsel is without any basis and it is rejected.

34. Next, learned counsel for the petitioner submitted that u/s 143(1), the Income Tax Officer without requiring the presence of the person shall assess if his income is less than Rs. 1,00,000; as against this, the person whose turnover

is beyond Rs. 40 lakhs and professional receipts exceed Rs. 10 lakhs, then he will have to undergo an audit of accounts and he will have to submit the same within the specified date. Such provision will also be harsh and discriminatory because "assessee" as defined u/s 2(7) means any person by whom tax is payable or any sum of money is payable under the Act, therefore, these two persons with different incomes will be subjected to discriminatory treatment. He further submits that if the audit report is not submitted, then the assessee will be subject to penalty u/s 271B whereas another assessee whose income is less than Rs. 1 lakh will not be subjected to this penalty. I am afraid, this submission of learned counsel is without any basis and it is not tenable. As already mentioned above, in order to guard against the evasion of tax, a particular class of assessee has been made subject to audit and failure is to be penalised u/s 271B. It is for the Legislature to lay down a rational classification as to which class of persons shall be subject to this audit. Looking to the facts and circumstances obtaining before Parliament, Parliament in its wisdom thought it proper to lay down the criteria of Rs. 40 lakhs and Rs. 10 lakhs, then such criteria cannot be said to be discriminatory nor can it be said to be harsh. It is already mentioned above that the persons who get their accounts audited under Section, 139(9)(e) will have to file their returns with the copies of the balance-sheet and audit report otherwise, it will be an incomplete return and in case it is an incomplete return, then other consequences shall automatically follow. Therefore, if the audit has been made compulsory for the particular class of persons u/s 44AB, then it cannot be said to be harsh or unworkable. Thus, I do not find any merit in this submission of learned counsel for the petitioner and it is rejected.

35. Learned counsel further submitted that Section 142(2A) gives power to the Income Tax Officer, if looking to the complexity of the accounts and interests of the Revenue, he is of the opinion that it is necessary to get the accounts audited, then with the previous approval of the Commissioner, he can direct the assessee to get his accounts audited. Sub-section (2A) of Section 142 reads as under :

"(2A) If, at any stage of the proceedings before him, the income tax Officer, having regard to the nature and complexity of the accounts of the assessee and the interests of the Revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Commissioner, direct the assessee to get the accounts audited by an accountant, as defined in the Explanation below Sub-section (2) of Section 288, nominated by the Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as the Income Tax Officer may require."

36. Learned counsel for the petitioner submits that the assessee will be put to twice auditing, one u/s 142(2A) and the other u/s 44AB. I think the submission of learned counsel is not well-founded. A perusal of both the sections would show that rather they are both consistent and can go harmoniously together. Section

142(2A) comes into play only when the accounts appear to be complex to the Income Tax Officer, and in that situation he can direct the assessee to get his accounts audited in the interests of the Revenue with the approval of the Commissioner. In fact, the germ of auditing was already in existence in Section 142(2A) that in the case of complex accounts audit can be directed by the Income Tax Officer in a given situation after compliance with the condition laid down in Section 142(2A). In Section 44AB, it was made more explicit and now it has been made compulsory for persons whose total turnover exceeds Rs. 40 lakhs or in case of a professional whose income (receipts) exceeds Rs. 10 lakhs, he has to get his accounts audited before submission of his return. In fact, Section 142(2A) was a dormant provision which was to be invoked in a given situation and that has been made explicit by incorporating the same in Section 44AB. Section 44AB has facilitated the task of the Income Tax Officer in that a person whose income (turnover or receipts) exceeds Rs. 40 lakhs or Rs. 10 lakhs is now bound to have complex accounts and, therefore, audit has been made necessary. Thus, both the provisions are consistent and the submission of learned counsel is without any basis and it is rejected.

37. Learned counsel for the petitioner further submitted that the proviso to Section 44AB trenches upon the provisions of the Companies Act and the other provisions of the Co-operative Societies Act, etc., where different periods for completing auditing have been provided. I am afraid this submission of learned counsel is without any basis. So far as tax purpose is concerned, the provisions of the Income Tax Act will be applicable and the petitioner-assessee will have to get its accounts audited in terms of the provisions of the Income Tax Act. The provisions of the Companies Act cannot override the provisions of the Income Tax Act.

38. Then learned counsel submitted that the submission of audit report will amount to abdication of the discretion exercised by the income tax Officer to the chartered accountant. This submission of learned counsel is without any basis. The discretion of the Income Tax Officer will not be abdicated simply because the assessee is required to submit audit report, rather on the contrary it will be more useful and it will assist the Income Tax Officer in order to arrive at his decision expeditiously and that will be for the benefit of the administration.

39. Learned counsel further submitted that u/s 80 of the Income Tax Act, the assessee has to file return of loss so as to enable him to have the benefit of carry forward of such loss. Learned counsel submits that return of the loss has to be filed within time or within the extended time, otherwise, he shall not be allowed the benefit of carrying forward under Sub-section (1) of Section 72 or Sub-section (2) of Section 73 or Sub-section (1) of Section 74. He further submits that u/s 139(9)(e), a discretion has been given, whereas no such discretion has been given u/s 44AB. This submission of the learned counsel is without any basis. As I have already pointed out above, the audit report made must be for the purpose of checking of evasion of the tax and both the provisions can be

read harmoniously. Therefore, nothing turns on this argument.

40. Next, learned counsel submits that u/s 44AB, no auditor can sign the audit report after the expiry of a period of four months and if it is done so, then it will be invalid. I am afraid this submission of learned counsel is not well-founded. Reading Section 44AB and Section 271B, the expression "without reasonable cause" is very significant and in given facts if the Income Tax Officer is satisfied that because of reason beyond the control of the auditor, an audit report cannot be filed, then he can exercise his discretion in the given situation. Thus, nothing turns on the validity of Sections 44AB and 271B. It will depend upon how the present section is put to work and it is not a case that the Income Tax Officer has been left without any discretion.

41. Thus, having cleared the objection regarding validity and unwork-ability of Section 44AB with the other provisions of the Act, the next question that comes up for consideration is how Section 44AB is to be interpreted. Whether this section is applicable to commission agents or not. My answer to the question is that the present section is applicable to commission agents also.

42. While dealing with the validity of Section 44AB, I have already extracted reasons for introducing this section. As a matter of fact, the necessary germ of Section 44AB was already in existence, i.e., in Section 142(2A) which has already been reproduced by me above. Previously, u/s 142(2A), it was left to the discretion of the income tax Officer that if he thought it proper looking to the complexity of the accounts and in the interests of the Revenue, he can direct the assessee to get his accounts audited with the previous permission of the Commissioner. But that dormant provision has been made explicit by introducing Section 44AB with the condition that persons whose turnover, sale or gross receipts exceeds Rs. 40 lakhs, or whose professional gross receipts exceed Rs. 10 lakhs, will have to get his accounts audited and he will have to file an audit report with the return for such of the previous year or years relating to the assessment year within a period of four months from the end of the previous year or where there is more than one previous year from the end of the previous year which expired last before the commencement of the year, whichever is later. Thus, the assessee will have to get his accounts audited. Now, the question in relation to the petitioner who happens to be a commission agent is whether he is required to get his accounts audited or not. Though it is essentially a question of fact, however, since the interpretation of the provisions of the Act is involved, I am undertaking the present exercise. Learned counsel for the petitioner submits that commission agents do not come within the four corners of Section 44AB and, therefore, they are not liable to get their accounts audited. In this connection, learned counsel has laid emphasis on the expression "sale, turnover, gross receipts." Learned counsel submits that he only gets commission or remuneration for bringing a prospective purchaser of goods of his principal. If the petitioner is doing only the bringing of the prospective purchaser to the prospective seller, i.e., his principal, and gets simple remuneration for his labour,

then in that case if his gross receipts of this profession exceed Rs. 10 lakhs, then he will be subjected to audit u/s 44AB, and if not, then he will not be subject to the exercise of audit. The question is whether, whatever sales which he makes on behalf of the principal, it can be counted towards his sales or his turnover or gross receipts. The expression "sale, turnover or gross receipts" has not been defined in the present Act. Learned counsel has referred to the definition of "turnover" as given in Random House Dictionary, 1972 edn., at page 1418, which reads as under :

" the total amount of business done in a given time."

43. In Webster's Third New International Dictionary, it has been defined as under:

" the amount of business done; degree of business activity" (page 2469).

Section 44AB clearly contemplates that if the assessee's total sales, turnover or gross receipts exceed the limit, Rs. 40 lakhs or Rs. 10 lakhs, then he will have to be subjected to audit. Now, the expression here is "his total sales, turnover, or his gross receipts". If his gross receipts in profession means that if the assessee has made a sale as of his own or has shown as his own turnover, then he will be subject to this audit report. But, working as a commission agent, if he is not showing goods of his principal as his own sales or turnover, then he will not be subject to this audit. In plain and simple words, if any commission agent is wholly dealing with the selling and purchase of goods, not on his own behalf, but only gets remuneration for bringing the prospective purchaser and seller together then he shall not be governed by the provisions of Section 44AB. But if goods are being sold by him and he is showing it as his own turnover, then he will have to be subjected to the requirements of audit. In this connection, learned counsel for the respondent has invited my attention to the case of *Kandula Radhakrishna Rao v. Province of Madras*, AIR 1952 Mad 718, a Full Bench decision, wherein while dealing with the Madras General Sales Tax Act, the working of the commission agent has been dealt at length. In this case, learned counsel has invited my attention to para. 7, which reads as under (at pages 721 and 722):

"The next question and by far the more important one is assuming that the plaintiffs have violated the conditions of the licences and, therefore, were not entitled to exemption u/s 8 of the Act, whether they would be liable to the tax as dealers. This question appears to us to be a mixed question of fact and of law and not a mere question of law. It is, therefore, necessary to ascertain the nature of the business transacted by the plaintiffs as commission agents. It was indeed common ground and amply supported by the evidence that the plaintiffs were acting as agents for several seller-principals who entrusted them with goods for sale at specified prices. Though these principals were known to the plaintiffs, they rarely, if ever, disclosed their names to the several buyers. So far as the buyers were concerned, the transactions were between them and the plaintiffs. The seller and the buyer as a rule were not brought into contact with

each other. The plaintiffs, as commission agents, are given full authority to pass the property and the title in the goods to the buyers. P.W. 1 in O. S. No. 93 of 1946, a partner of the firm of the plaintiffs in that case, deposed that the firm had 100 to 200 principals, 90 per cent. of whom resided outside the place of business. The principals send the goods to the firm for sale. On these facts must be determined the question whether the plaintiffs can fall within the definition of "dealer" in the Act. I have referred to these facts because during the course of the argument, it became evident to me that the actual decision in *Government of Madras v. Veerabadrappa*, ILR [1951] Mad 257, on the facts found in that case was unassailable. I shall briefly show what divergence there is between the facts in the present cases and the facts in the case before the learned judges in *Government of Madras v. Veerabadrappa* ILR [1951] Mad 257. Satyanarayana Rao J. extracted in his judgment the summary of the evidence made by the learned District Munsiff as regards the nature of the business carried on by the plaintiffs in that case. That summary clearly demonstrates the fact that the plaintiffs were acting merely as brokers and were bringing the sellers and the buyers together. The sellers brought their goods to the plaintiffs' shop and the plaintiffs sent for prospective purchasers who came in person or sent their representatives. The purchasers themselves inspected the goods and the prices were fixed after discussion between the sellers and the buyers and the commission agents. Thereafter, there was delivery made to the buyers. The plaintiffs were paid commission and the other amounts which were called *gumastha*, *dharma*, *rusum*, etc. The payment of these sums was consented to by the sellers. Viswanatha Sastri J. alludes to the nature of the business in the following passage in his judgment:

"Here the plaintiffs are mere commercial agents who brought buyers and sellers of groundnuts together, arranged the sale or purchase and earned a small commission or brokerage from both of them. The learned District Judge described the situation thus :

"An agent who merely brings a buyer and seller together cannot be said to buy or sell his goods on his own behalf, any more than a marriage broker who brings the parties together can be said to be a party to the marriage.""

The facts in the *The Public Prosecutor Vs. R.T. Narasimha Reddy*, were also similar to the facts in *Government of Madras v. Veera-badrappa*, ILR [1951] Mad 257. Chandrasekhara Aiyar J. referred to the accused in the case as having acted as a broker or commission agent who brought the seller and the buyer together. He pointed out that the word "turnover" as defined was not appropriate to what is done by an agent: "In the way of bringing together a buyer and a seller for brokerage or a commission.""

44. Thus, it is clear that if a person working as commission agent only brings two parties to marriage and charges for his labour of bringing them together, then that cannot amount to his sale, turnover or receipts. But, if, by some other evidence, it could be shown that the goods have remained with him and it is he

who has sold the goods to a prospective purchaser, then such will amount to his sale or turnover. In fact, this provision has been designed precisely in order to check clandestine operations undertaken by such persons so as to avoid tax. No exhaustive principle can be laid down as to in what given situation, particular transaction shall amount to his total sale or a turnover, but only one thing can be said safely without doing any violence to the provisions of the Act that if the commission agent does not sell the goods of his principal as his own and only charges commission for bringing two persons to holy marriage of sale and purchase, then he will not come within the ambit of Section 44AB. Learned counsel for the respondent has tried to formulate certain principles from which it could be inferred that the particular transaction amounts to sale by the commission agent, like :

- (1) commission agent or broker has the possession and control of goods with him ;
- (2) that he had authority to pass the goods as owner;
- (3) sale in his own name ;
- (4) without disclosing the principal's sales ;
- (5) no privity with principal and buyer;
- (6) right to sue purchaser ;
- (7) liability to principal to pay the value of the goods.

45. These are some of the principles which learned counsel for the respondent has placed for my consideration for showing that if these ingredients are present then such commission agent, if he makes sales, then such sales shall amount to his sale. Be that as it may, as already observed above, no exhaustive principles could be laid down except that if he is a plain and simple commission agent and his only interest is his brokerage for bringing the two parties together for marriage, then he will not be subject to audit except when his professional receipts exceed Rs. 10 lakhs. It is also faintly contended that an invoice could be one way of looking at the transactions. I need not go into that aspect because it touches on a question of fact and, in a given case, invoice could be made the basis to show that particular sale was a sale of the commission agent or in a given case it may not be so. In this connection, Mr. Kothari has invited my attention to Sale of Goods by Ramaiya and also referred to the case of Hafiz Din Mohammad Haji Abdulla v. State of Maharashtra [1962] 13 STC 292 (SC). In this case, the question was whether according to the agreement, it constitutes a relationship of principal and agent or vendee and vendor. As already mentioned above, it will depend on the facts whether commission agent has sold the goods for his brokerage or as a seller. Thus, this case cannot provide any help to learned counsel for the petitioner.

46. In the case of Bhopal Sugar Industries Ltd., Madhya Pradesh Vs. D.P. Dube,

Sales Tax Officer, Bhopal Region, Bhopal, , the questions turn on the fact whether the transaction amounted to a sale or not.

47. In the case of C. A. Akhtar & Company v. State of Tamil Nadu [1981] 47 STC 62 (Mad), the question was raised whether there was privity of contract between principal and buyer or not. In this case, one thing is significant, viz., that the case of Kandula Radhakrishna Rao, AIR 1952 Mad 718, a Full Bench decision, was not placed for consideration before the Division Bench.

48. In the case of Commissioner of Income Tax, West Bengal Vs. Tollygunge Club Ltd., , where the question was regarding surcharge, it was held that the surcharge was not charged as a part of the price of admission, but was a payment made for the specific purpose of giving charity.

49. The case of New Nagpur Copra Industries Vs. The State of Maharashtra and another, is also distinguishable because in this case the question was whether copra powder was different from copra and whether copra as found in entry 6 (viii) in Schedule B, Part II of the Bombay Sales Tax Act covers copra powder or not. Thus, this case is also not of any assistance to learned counsel for the petitioner.

50. All the cases cited by learned counsel are distinguishable on facts. Thus, no firm rule could be laid down that in any given situation, a particular sale or turnover shall be treated as a sale or turnover of the commission agent, and it will depend upon the facts of each case.

51. Thus, the submission of learned counsel that the commission agents are not covered by Section 44AB is not correct and this contention has no force and it is rejected.

52. Learned counsel for the petitioner submitted that a direction should be given to the respondents as was given by the Madhya Pradesh High Court that if the accounts could not be audited because of the stay order in some cases and other cases which were pending here, but there was no stay order, then the assessing authority should be instructed that if the return along with the audit report is filed by the petitioner within a period of four months, then they should not be subjected to penalty u/s 271B or interest u/s 139A for this delay.

53. Mr. R. Krishna Murthy, appearing for the respondent, submits, that such direction will be issued to the assessing authority that if the returns are filed with audit report within four months from the date of dismissal of the writ petitions, then the petitioners should not be subjected to any penalty or interest. It is directed that no interest or penalty will be charged from the petitioners for delay in filing the return if the same is filed within four months from the date of this order.

54. Consequently, all the writ petitions are dismissed without any order as to costs.