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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE S.V.BHATTI

&

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 13TH DAY OF JULY 2021 / 22ND ASHADHA, 1943

WA NO. 701 OF 2015

AGAINST THE JUDGMENT IN WPC 10/2015 OF HIGH COURT OF KERALA, ERNAKULAM

APPELLANT/PETITIONER:

SR.MARY LUCITA
CARMELITE PROVINCIAL HOUSE,
KOVILVATTOM ROAD, ERNAKULAM, PIN-682 035.

BY ADVS.
SRI.V.M.KURIAN
SRI.ISAC T.PAUL
SRI.MATHEW B. KURIAN
SRI.K.T.THOMAS

RESPONDENTS/RESPONDENTS:

1. JOINT COMMISSIONER OF INCOME TAX (TDS)
3RD FLOOR, AYAKAR BHAVAN, KAWDIAR,
THIRUVANANTHAPURAM, PIN-695 003.

2. STATE BANK OF TRAVANCORE
CENTRALISED PENSION PROCESSING CENTRE,
VAZHUTHACAUD,
THIRUVANANTHAPURAM, PIN-695 014.

BY SRI.CHRISTOPHER ABRAHAM, SC

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 13.07.2021, ALONG WITH W.A.No.410/2015 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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"C.R."

JUDGMENT

[WA Nos.410, 411, 414, 426, 427, 428, 429, 430, 434, 435, 436, 440, 441, 444, 445, 446, 447, 448, 451, 465, 466, 468, 469, 473, 474, 475, 476, 477, 492, 493, 494, 495, 496, 497, 498, 499, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518 & 701 of 2015]

Dated this the 13th day of July 2021

Bechu Kurian Thomas, J.

"Render unto Caesar the things that are Caesar's
Render unto God the things that are God's."

We are reminded of the above teachings of Jesus Christ as written in the synoptic gospels of the Bible, while we consider an engrossing question on the liability of tax deduction at source from the salary paid to teachers who are nuns or priests of the religious congregations. The learned Single Judge dismissed the writ petitions by concluding that tax is liable to be deducted at source from the salary paid to the teachers, who are nuns or priests. Hence this batch of writ appeals, at the instance of writ petitioners.

2. Few of the nuns and priests indulge in pedagogy apart from their religious calling. Those pedagogues are paid salaries. Under

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their religious covenant, nuns and priests bind themselves to a vow not to own property. At the time of initiation into their religious calling, they claim to have taken that vow - known as the vow of poverty. Therefore, the income received by them is handed over to their religious congregation.

3. From 1944 until the filing of the writ petitions in 2014, the salary paid to the nuns or priests by the Government was admittedly not subjected to tax deduction at source (for brevity 'TDS'). (It is admitted that during the pendency of the writ petition as well as these appeals, such salary has not been subjected to TDS). Appellants relied upon circulars issued by the Central Board of Direct Taxes ('the CBDT' for short) in the year 1944 as well as in 1977, to claim exemption from TDS. According to the appellants, based upon the circulars so issued, salary received by the nuns and priests, and made over to the religious congregations were not chargeable to income tax, and tax was never deducted at source from the salary paid to the nuns and priests.

4. Surprisingly, in the year 2014, Income Tax Officers informed District Treasury Officers that proper deduction of TDS must be effected in the case of employees of Government or aided

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institutions, who are members of religious congregations receiving salary from the Government exchequer. The aforesaid communication resulted in the writ petitions challenging the direction issued by the Income Tax Officers. Writs of mandamus were sought to direct the disbursement officers not to deduct TDS from the salary of teachers who are members of the petitioners' congregations. Three individual priests and one nun had also filed separate writ petitions.

5. Controverting the claim of the petitioners, statements were filed by the second respondent in all the writ petitions, pleading that the CBDT circular does not have the effect of exempting deduction of TDS from the salary paid by the Government to the teachers through their respective institutions. It also stated that the nuns and priests receiving salary from Government are to be considered as Government employees and that they are given salary, pension, and even gratuity, on par with other Government employees. It was further pleaded that if any person is entitled to exemption from payment of income tax, the same is not a ground for not deducting TDS. Respondents claimed in their statement that the entitlement of salaried employees for exemption or deduction from tax could at the

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most be a ground for seeking a refund but not for avoiding TDS.

6. The learned Single Judge by the impugned judgment dismissed the writ petitions against which these appeals were preferred.

7. We heard the arguments of Senior Advocate Sri. Joseph Kodianthara duly instructed by Adv. Abraham Joseph Markose, Senior Advocate Sri. Kurian George Kannanthanam instructed by Adv. Tony George Kannanthanam and Adv. A.Kumar, on behalf of the appellants. We also heard the Senior Standing Counsel Sri. Christopher Abraham, on behalf of the Income Tax Department.

8. We must mention at this juncture that, at the time when the writ appeals came up for admission, this Court had, on 09.03.2015, while interdicting deduction of tax at source during the pendency of the appeals, directed consideration of the issue of the 1944 and the 1977 circulars, by the CBDT and to place its views/decision before this Court for further consideration. The abstract of the aforesaid order is as follows: "............*We think that primarily, this is an issue which the CBDT ought to consider, having regard to the fact that Exhibit P1 instructions of CBDT following the circular of 1944 still appears to hold the field. Under such circumstances, the Secretary, CBDT is directed to place*

WWW.LIVELAW.IN

this issue along with a copy of this order and the materials referred to above for the consideration of CBDT, so that a decision can be generated at that end and the decision of the CBDT can be placed before this Court for further consideration of this appeal."

9. Pursuant to the aforesaid order, an affidavit has been filed on behalf of the CBDT stating that "*the salary and pension earned by the members of the congregation in lieu of services rendered by them in their individual capacity are taxable in the hands of the members themselves even if the same are made over to the congregation. In view of the above, no exemption from TDS is envisaged under the Circulars and Instructions of the Board under reference in respect of payments received by members of religious congregations in their individual capacity as remuneration for services rendered by them on the basis of their individual qualifications and experience which do not have the character of fees collected in a fiduciary capacity.*"

10. Thus, contrary to the understanding of the Appellants, the CBDT has submitted before this Court that the circulars of 1944 and even that of 1977 do not exempt the members of the religious congregations from the requirement of TDS on the payments received by them as remuneration in their individual capacity.

11. With the above prelude, we refer to the contentions raised by

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the learned counsel for the appellants. Adv. Joseph Kodianthara, the learned Senior Counsel contended that the 1944 notification continued to hold the field even after the coming into force of the Income Tax Act, 1961 (for short 'the Act'), and thereafter, the contents of the circular were reiterated through the 1977 notification. According to the learned Senior Counsel, based on these notifications, no tax has ever been deducted from the salary paid to the nuns and priests. Adverting to the scope of the circulars issued by the CBDT, he emphasized that the circulars are binding upon the officers under the Act and hence Ext.P4 direction to deduct TDS was, according to him, liable to be set aside. Referring to the circulars issued by the CBDT as an interpretation of the CBDT on the statutory provisions, the learned Senior Counsel further urged that Ext.P1 was binding upon all authorities under the statute as it was based on the principle of diversion of income by an overriding title in favour of congregation. He further submitted that the overriding title of the congregations over the salaries paid to the nuns and priests was the reason behind the concept enunciated in the circulars and since the same is not contrary to any statutory provision, the same was binding. By referring to the decisions in **Mother Superior,**

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Adoration Convent, Kanjiramattom v. D.E.O. Kottayam and Others (1977 KLT 303) and **Oriental Insurance Co. v. Mother Superior S.H.Convent** (1994 (1) KLT 868), it was further urged that on account of the civil death invited by the nuns and priests upon taking the oath of vow of poverty, payment to them can only amount to payment to the congregation and the individual remains invisible for collection of tax or TDS.

12. Adv. Kurian George Kannanthanam, the learned Senior Counsel, by inviting the attention of this Court to the concept of the three vows undertaken by a nun or a priest during their initiation into the religious order under the canon law, submitted that, on account of the civil death undergone by the nuns and priests, they are not entitled to hold any property of any nature whatsoever. According to the learned Senior Counsel, the nuns and priests are not entitled to have any income or hold any property and all their properties, assets including salary and pension, belong or accrue to the religious congregation. Reliance was placed again on the decisions in **Mother Superior, Adoration Convent, Kanjiramattom v. D.E.O. Kottayam and Others** (1977 KLT 303) and **Oriental Insurance Co. v. Mother Superior S.H.Convent** (1994 (1) KLT 868). As an alternative

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contention, it was submitted that since a co-ordinate Bench had adopted a different view in **MSGR. Xavier Chullickal and Others v. C.G.Raphael and Others** [2017 (3) KHC 193 (DB)], the question must be referred for consideration by a Full Bench.

13. Adv. A.Kumar, the learned counsel appearing for the three priests who have individually filed appeals, after adopting the arguments of the learned Senior Counsel, further added that the right claimed by the three individual appellants is sourced from the canon law and according to him, the circulars of 1944 and 1977 only recognized the right of diversion of income by overriding title. He submitted that it was a practice that has been in vogue for the last 76 years and is in alignment with the taxing statute. According to Adv. A.Kumar, the circular did not create any new right, instead, it merely recognized the underlying principle of an existing right of appellants. He further bolstered his submissions by pointing out that, since there was no dispute that the salary received by the nuns and priests are handed over to the respective religious congregations, the said income cannot have any significant impact upon the taxability of the said income.

14. Adv. Christopher Abraham, the learned standing counsel

WWW.LIVELAW.IN

representing the Department, on the other hand, contended that the CBDT circular of 1944, as well as that of 1977, deal with and refers to the income earned by 'missionaries' as 'fees', in contradistinction to the salary earned by nuns or priests. He further submitted that the letter now placed before this Court by the CBDT, pursuant to the direction of this Court, clarified the position and the said clarification now holds the field. It was also argued that canon law cannot have predominance over the Act under any circumstances. He further submitted that even though by a mistaken notion, tax had not been deducted by the officers responsible for paying the salary all these years, the said mistake is liable to be corrected. He also invited Our attention to the decision in **Joshi Technologies International Inc. v. Union of India and Others** [(2015) 7 SCC 728] and canvassed that there cannot be any estoppel against law. It was also argued that the circular cannot override the statutory provisions under any circumstances whatsoever and in the absence of any independent exemption from tax, the appellants cannot rely upon the 1944 or even 1977 circular to claim exclusion from TDS. The learned standing counsel also invited our attention to the decision reported in **Union of India v. Society of Mary Immaculate (Tamil Nadu),**

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Madras [(2019) 412 ITR 545] wherein the Madras High Court had, after approving the judgment of the learned Single Judge impugned in this appeal, declared that the TDS is liable to be deducted from the salaries paid to the nuns or priests.

15. The rival contentions adverted to at the Bar has given rise to the following questions for our consideration:

(i) Whether the writ petitions were maintainable?

(ii) Whether salaries paid to nuns and priests, who are employees of educational institutions, are liable for tax deduction at source?

(iii) Whether the principle of diversion of income by overriding title apply to the salary received by nuns and priests?

(iv) Whether the circulars of 1944 and 1977 are valid? If yes, do they exclude TDS from the salaries of nuns or priests?

(v) Whether deduction of tax at source violates Article 25 of the Constitution of India?

(vi) Whether the non-deduction of tax at source from the salaries of nuns or priests for more than 76 years confers a right against such deduction?

16. The above questions are considered in seriatim as below.

Q.(i) Whether the writ petitions were maintainable?

17. At the outset itself, we observe that, of the 49 appeals in this batch, except for four, the rest are all preferred by different

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religious congregations who are not the assessees for the purpose of receiving the salary. Of the four appeals mentioned above, W.A. No.701 of 2015 is filed by a nun while W.A. No.434 of 2015, W.A. No.435 of 2015 and W.A. No.436 of 2015 are filed by individual priests along with the religious congregations.

18. The religious congregations are not in receipt of any amount as salary. In the eyes of law and that of the income tax department, tax deduction at source is to be effected from the salary paid to the employee of the Government. The religious congregations have no role in that whatsoever. The religious congregations are not employees. In such circumstances, we are of the firm view that, the writ petitions filed by the religious congregations were not maintainable except for those filed by the nun and priests individually. However, taking into perspective the importance of the questions raised and the fact that the maintainability of the writ petitions was not questioned seriously, we consider the questions raised in these appeals on merits. We are also persuaded to consider the questions not only due to their importance but also because, a nun and three individual priests are even otherwise before this Court raising the same challenge. We

WWW.LIVELAW.IN

hold the writ petitions to be maintainable in the peculiar circumstances of the cases.

Q.(ii) <u>Whether salaries paid to nuns and priests, who are employees of educational institutions, are liable for tax deduction at source?</u>

19. Income tax is a tax on income. As tax is a compulsory extraction of money, however much one despises it, once income accrues, the compulsory extraction is inevitable, unless excluded by law. While appreciating the weighty contentions put forth by all the learned counsel, we also remind ourselves, apart from the above-referred propositions, that, there are no equities in tax.

20. Section 4 of the Act creates the incidence of income tax on the total income of every person. Sections 4(1) and (2) of the Act reads as follows:-

> *"**4. Charge of Income-Tax.**-(1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person:*
>
> *Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.*
>
> *(2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is*

WWW.LIVELAW.IN

so deductible or payable under any provision of this Act"

21. While section 4(1) of the Act levies tax on the total income of an assessee, section 4(2) empowers deduction of tax at source wherever it is so deductible under the provisions of the Act. The effect of the aforesaid charging provision is that, if the statute imposes tax and provides for deducting tax at source through its provisions, the same has to be done, peremptorily.

22. Section 14 of the Act deals with Heads of Income and clause A is the head "Salaries". Section 15(a) of the Act provides that any salary due from an employer to an assessee in the previous year whether paid or not, is chargeable to income tax under the head "Salaries". Further, section 16 deals with permissible deductions while section 17 of the Act deals with what all are included as salary.

23. Since we are dealing with the question of deduction of tax at source from salaries, it is advantageous to extract section 192(1) of the Act, which is as follows:-

> ***"192. Salary*** *(1) Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year."*

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24. The above-extracted provision makes it obvious that it is the statutory duty of the person paying any income as salary to another, to deduct, at the time of making the payment, income tax at the rates in existence. None of the provisions referred to above provide any exemption for any category of persons, based on their nature of vocation or occupation.

25. As mentioned by us earlier, when the incidence of tax under the Act falls on every person based upon his income, the deduction of tax at source under section 192 of the Act must be effected from every person who receives any income as salary, if they fall within the purview of chargeability.

26. Section 192 of the Act does not contemplate any exemption from the liability to deduct tax at source on the basis of the nature of calling, profession, or vocation of the person who receives the salary. The statute makes it an obligation upon the person who pays the salary to deduct tax, at the time when payment of salary is made. As per the statutory scheme, the sole focus under section 192 of the Act, upon the person paying the salary, is whether the income is chargeable under the head 'Salaries'. If the income payable will fall under the head 'Salaries', the statute attaches an obligation to the

WWW.LIVELAW.IN

person paying the salary to deduct TDS. While deducting the TDS under section 192 of the Act, the person deducting it, is not obliged to or required to ascertain the nature of calling or vocation of the assessee or utilization or application of the income by the assessee.

27. Chargeability to tax is not dependent on the manner of utilization of the income. The utilization of a person's income may be a window for claiming a deduction or a refund, but, it is irrefutably not a ground to claim an exclusion from deduction of tax at source. At the time of deducting tax at source, the exigibility to tax or the quantum to be taxed are not matters of relevance. Under the scheme of the Act, those are matters to be considered subsequently, after the annual returns are filed. Thus we hold that section 192 of the Act obliges every person who makes a payment under the head 'Salaries' to deduct tax at source at the rates prescribed without fail.

Q.(iii) Whether the principle of diversion of income by overriding title applies to the salary received by nuns and priests?

28. Appellants claimed that their income received as salary is wholly made over to the religious congregation, due to their vow of poverty and hence their income is not exigible to tax deducted at source. Appellants based their claim on the principle of diversion of

WWW.LIVELAW.IN

income by overriding title. It is settled that income tax is attracted at the point when income is earned or accrued. Taxability of income is not dependent upon its destination or the manner in which the income is utilized or applied by the asessee. (See **Tuticorin Alkali Chemicals & Fertilizers Ltd., Madras v. Commissioner of Income Tax, Madras** [(1997) 227 ITR 172 (SC)].

29. Though various High Courts had applied the concept differently, the Supreme Court in the decision in **Commissioner of Income-Tax, Bombay City II, Bombay v. Sitaldas Tirathdas, Bombay** (AIR 1961 SC 728) laid down the test to determine the applicability of the aforestated principle. It was stated that if the obligation for diversion of income arises even before the payment is received by the assessee, it can be treated as a case of diversion of income by overriding title. It was further held that if the obligation to pay arises only after the income is received, it is a case of application of income. The following observations of the Supreme Court, classically illustrate the principle "*In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obligated to apply out of his income*

WWW.LIVELAW.IN

and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable. In our opinion, the present case is one in which the wife and children of the assessee who continued to be members of the family received a portion of the income of the assessee, after the assessee had received the income as his own. The case is one of application of a portion of the income to discharge an obligation and not a case in which by an overriding charge the assessee became only a collector of another 's income".

30. The above principle was followed by the Supreme Court in **Moti Lal Chhadami Lal Jain v. Commissioner of Income Tax, Delhi and Ors.** [(1991) 190 ITR 1 (SC)] and **Commissioner of Income Tax v. Sunil J.Kinariwala** [(2003) 1 SCC 660]. The

WWW.LIVELAW.IN

observations of the Supreme Court in the latter of the above cases are also relevant. *"Under the scheme of the IT Act, 1961, it is the total income of an assessee, computed under the provisions of the Act, that is assessable to income tax. So much of the income which an assessee is not entitled to receive by virtue of an overriding title created in favour of a third party would get diverted at source and the same cannot be added in computing the total income of the assessee. The criteria to determine as to when the income attributable to an assessee gets diverted by an overriding title is the nature and effect of the assessee's obligation in regard to the amount in question. When a third person becomes entitled to receive the amount under an obligation of an assessee even before he could lay a claim to receive it as his income, there would be diversion of income by an overriding title; but when after receipt of the income by the assessee, the same is passed on to a third person in discharge of the obligation of the assessee, it will be a case of application of income by the assessee and not of diversion of income by an overriding title."*

31. Similarly in the decision in **Tuticorin Alkali Chemicals & Fertilizers Ltd, Madras v. Commissioner of Income Tax, Madras**, (1997) 6 SCC 117, it was held that tax is attracted at the point when the income is earned. Taxability of income is not dependent upon its destination or manner of its utilization.

WWW.LIVELAW.IN

32. In view of the above propositions laid down by the Supreme Court, we need to consider whether the salary paid to nuns or priests gets diverted even before they can lay a claim to receive it as their income.

33. The basis for applying the principle of diversion of income by overriding title in the instant case is claimed to be the canon law. Appellants contended that as per the canon law, once a perpetual vow of poverty is taken, the nun or priest, as the case may be, undergoes a civil death, and thereafter, they are not 'persons' under the Act. The said contention, according to us, is too far-fetched and is legally untenable.

34. Canon law or the personal law of Christians belonging to the Catholic faith have been held to have only theological or ecclesiastical implications to the followers of that faith. When legislation has been enacted covering a field, the said legislation has to be interpreted based on the provisions of that enactment. The legislation enacted by the legislature gains primacy and supremacy over the personal laws. In this context it would be fruitful to refer to the decision of the Full Bench of the Kerala High Court in **George Sebastian v. Molly Joseph** [1994 (2) KLT 387 (FB)] dealing with the

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order of the ecclesiastical tribunal granting divorce, this Court held that "*When there is a statute governing the area, the statute has primacy over any personal law in that regard. Personal law has relevance only to the above extent, vis-a-vis, the statutory law. In other words, personal law stands clipped to the extent statutory law has stepped*". While affirming the above decision, the Supreme Court in **Molly Joseph Alias Nish v. George Sebastian Alias Joy** [(1996) 6 SCC 337] held that "*It is well settled that when legislature enacts a law even in respect of the personal law of a group of persons following a particular religion, then such statutory provisions shall prevail and override any personal law, usage or custom prevailing before coming into force of such Act.*"

35. The concept of civil death propounded by the canon law is not real. The extent of civil death under canon law is limited in its extent and in its operation. The said fiction under the canon law, cannot be extended to cover all situations in the life of a nun or a priest. It cannot be extended to cover situations governed by the statutes enacted by the legislature unless the same is recognized by the provisions of the statute. None of the provisions of the income tax Act recognize the concept of civil death. Thus the concept of civil death has no application under the Income Tax Act. In fact, the decision relied upon by the appellants in **Mother Superior,**

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Adoration Convent, case (supra) itself refers to the limitations on the fiction of civil death. The said decision observed that the criminal wrongs committed by a nun or a priest will necessarily be dealt with under the criminal laws of the country and when such proceedings are initiated, the nuns or priests cannot take refuge under the canon law or the concept of civil death. According to us, though the ratio decidendi of the aforesaid decision has no application to the present case, the above observations have relevance to the extent of explaining the operational limitations of the canon law vis-a-vis statutory obligations under any statute.

36. The inapplicability of civil death for claiming exemption from tax/TDS liability can be viewed from another perspective. There is no doubt that this Court appreciates the vow of obedience, the vow of celibacy, and the vow of poverty undertaken by the nuns and priests while entering the congregation. However, if in spite of the vow of poverty undertaken by the nuns or priests, they work for gain and receive salary, irrespective of whether the ultimate beneficiary is somebody else or not, the salary partakes the character of income received by the nuns and priests from Government. It stands to reason that, a person receiving income by way of salary, cannot be in

WWW.LIVELAW.IN

a state of penury or continue to be under a vow of poverty. If salary is received for the services rendered, even while the vow of poverty subsists, it ought to be viewed as to how far the vow being eclipsed for the purpose of earning income. The vow of poverty when eclipsed by the receipt of income, renders the civil death contemplated under the religious calling also, in a state of eclipse for the limited application of statutory obligations.

37. Apart from the above, the nuns and priests are part of the society. They can walk freely, speak freely and even indulge in most of the regular activities unrestricted, like any other individual. They enjoy all privileges that law confers upon other persons, including fundamental rights under Part III of the Constitution of India. They have the constitutional right of franchise. They are entitled to practice the profession of law, [see the decision in **Bar Council of India v. Mary Tresa (**2006 (2) KLT 210) medicine, teaching or any other profession of their choice. They act as managers of educational institutions, hospitals and other establishments. They enter into contracts for manifold purposes. In all these spheres, they act like any other living human. In such a scenario, we are of the firm view that the concept of civil death under the canon law, not only stands

WWW.LIVELAW.IN

eclipsed but has no relevance vis-a-vis the taxing statutes. We are a nation governed by the rule of law. The concept of civil death is alien to the Income Tax Act and the same cannot be incorporated into the statute book through any mode of interpretation. The civil death contemplated under our rule of law is only the civil death provided for in section 108 of the Indian Evidence Act, 1872. Thus, the reliance upon the concept of civil death of nuns and priests under canon law, to avoid deduction of tax at source, cannot be of avail to the appellants.

38. After the coming into force of the Constitution, the exigibility to tax is governed and controlled by the respective taxing statutes and not by the canon law. Canon law, cannot relieve the legal obligations/duties created under the various legislations enacted by the legislature. We are therefore in complete agreement with the learned Single Judge that the principle of diversion of income by overriding title has no application to the salary paid to nuns or priests by the Government or any other employer.

Q.(iv) <u>Whether the circulars of 1944 and 1977 are valid? If yes, do they exclude salaries of nuns or priests from TDS?</u>

39. The contention of the appellants that the circulars of 1944

WWW.LIVELAW.IN

and 1977 exempt the salaries received by the nuns and priests from deduction of tax at source, albeit appealing on first blush, is, on deeper analysis, legally untenable. Since the circular of 1944 was issued before the coming into force of the Act, the said circular is not extracted. However, the circular of 1977 is extracted below for easier comprehension:

V - Circular of the Central Board of Direct Taxes, dated 5th December 1977

11B, Income Tax Exemption to Missionaries
F.No. 200/88/75-II(A)
Central Board of Direct Taxes
GOVT. OF INDIA
New Delhi
Dated 5.12.1977

To

All Commissioners of Income Tax

Sir,

Sub:Exemption from payment of Income-Tax on Salaries of members of Religious Congregations.

Attention is Invited to Circular No. 1 of 1944 C.No.26(43)IT43 dated 24.1.1944 in which the liability to tax on the fees received by Missionaries and subsequently made over to the society have been considered. Representations have been received from the members of religious congregations situated all over the country regarding the taxability of the fees received by them. The question for consideration is whether the fees or the other earnings of the missionaries be accessed as their income, although the same is to be made over to the congregation to which they belong under the rule thereof.

The Board have examined this issue and have decided that since the fees received by the missionaries are to be made over to the congregation concerned there is an overriding title to the fees which would entitle the missionaries to exemption from payment of income tax. Hence, such fees or earnings are not taxable in their hands.

These instructions may be brought to the notice of all the officers working in your charge.

Yours faithfully

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Sd/-
J. F. Sharma
Secretary
Central Board of Direct Taxes.

Note: This exemption is restricted only to the individual missionary and not to the income of the missionary per se. Taxability of such an income gets transferred to the institution from the individual provided the entire income for the missionary is assessed with the income of the institution and satisfies all the rules governing Income Tax exemption given to the institution u/s12A.

40. It is explicit from a reading of the circular extracted above, that, though the caption mentions the subject as 'Fees of members of religious congregation', the recital portion of the circular refers only to the fees received by the missionaries in contradistinction to salary received by the nuns or priests. According to us, the circular of 1977 cannot apply to the salaries received by nuns or priests from the Government or aided institutions. Further, the clarification issued by the CBDT in 2016, pursuant to the direction by this Court in these appeals, mentioned by us as a prelude in this judgment, states in unmistakable terms that the circular does not apply to salaries and pensions received by the nuns or priests.

41. Apart from the above, the chargeability of an income is determined by the statutory provisions. When Article 265 of the Constitution of India clearly specifies that no tax shall be levied or collected except by authority of law, the corollary must also apply with equal rigour. When a tax is imposed by the authority of law, the

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exclusion from the taxing provisions must also be through a valid law. This takes us to the question as to whether the CBDT can issue a circular contrary to the statutory provisions or excluding/exempting a person from payment of tax who is otherwise chargeable to income tax.

42. The power of the CBDT to issue circulars can be traced to section 119 of the Act. A reading of section 119 of the Act will make it explicit that the power to issue circulars, or instructions by the CBDT is only for the 'proper administration' of the Act. In the process of proper administration of the Act, the CBDT does not have the power to issue any circular excluding or exempting a person or a category of persons from the taxing provisions. The power to exclude any person or category of persons from the purview of tax can be done only through the mandate of the statute. If the CBDT is empowered to issue circulars, instructions or directions contrary to the provisions of the statute, the same can be destructive of the legislative intention. A delegated authority cannot, under any circumstances whatsoever, be presumed to possess a power beyond those conferred by the statute. The statute has not recognized any exclusion of tax on the income of nuns or priests. In such a perspective, the CBDT could

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not have issued any circular in exercise of the powers under section 119 of the Act to confer an exemption to the salaries received by the nuns or priests from the rigour of income tax.

43. We are fortified in the above conclusion from the decision in **Kerala Financial Corporation v. Commissioner of Income Tax** [(1994) 4 SCC 375]. It was held in the above referred decision as follows:

> "*14. The fact that the circular to which Shri Salve has referred is one which had been issued in exercise of powers conferred by section 119 of the Act has no significance insofar as the point under consideration, namely, whether the circular can override or detract from the provisions of the Act, is concerned, inasmuch as what Section 119 has empowered is to issue orders, instructions or directions for the "proper administration" of the Act or for such other purposes specified in sub-section (2) of the section. Such an order, instruction or direction cannot override the provisions of the Act; that would be destructive of all the known principles of law as the same view would really amount to giving power to a delegated authority to even amend the provisions of law enacted by Parliament. Such a contention cannot seriously be even raised*."

44. The contention that the practice had the effect of recognizing an underlying principle, according to us, has no basis. As mentioned earlier, under the scheme of the Act, there cannot be an exemption or exclusion of income from chargeability, otherwise than by the taxing statute. Since the statute has not provided for any

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such exemptions or exclusions for a certain category of persons like nuns or priests, the circulars cannot exclude or exempt the obligation created under section 192 of the Act. We are therefore of the firm view that the 1944 circular or even the 1977 circular cannot be construed as excluding tax deducted at source from the salaries received by the nuns or priests from their respective establishments.

Q.(v) Whether deduction of tax at source from the salaries payable to nuns or priests violates Article 25 of the Constitution of India?

45. The learned Senior Counsel also argued that the right to profess, practice and propagate religion under Article 25 of the Constitution of India will be infringed if tax is deducted at source from the salaries payable to the nuns or priests. While considering this contention, we bear in mind the perspective that the right under Article 25 is not an absolute or an unfettered right. Article 25 does not provide any immunity from taxation on the basis of religion. The right is subject to public order, which term has a wide connotation. One of the facets of public order is the law of the land. A valid piece of legislation and its compliance is part of public order under Article 25 of the Constitution. Payment of taxes imposed under a validly

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enacted legislation is an essential attribute of public order. Thus, if a valid law permits deduction of tax at source, we find ourselves at a loss to assimilate the scope of the contention that deduction of tax at source violates the fundamental right to freedom of religion. We reject the said contention.

Q.(vi) Whether the non-deduction of tax at source from the salaries of nuns or priests for more than 76 years confers a right against such deduction?

46. The respondents have admitted that by a mistaken notion, tax had not been deducted from the salaries payable to nuns or priests by the officers responsible for paying the salary all these years. According to the department, the said mistake is liable to be corrected and that too, without further loss of time. The appellants contended that the non collection of TDS all these years have vested a legitimate expectation and a right upon them. We are afraid that we cannot agree with the contentions put forward by the appellants. Since we have already found that the mandate of section 192 of the Act is clear that TDS has to be deducted from the salaries payable to nuns or priests, a contrary practise, which was contrary to the law of the land, cannot be permitted to be continued. As held in the decision

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in **Joshi Technologies International Inc. v. Union of India and Others** [(2015) 7 SCC 728] and several other decisions, there cannot be any estoppel against law. Hence we reject the said contention too.

47. We have been referred to the decision of the Madras High Court in **Union of India v. Society of Mary Immaculate (Tamil Nadu), Madras** [(2019) 412 ITR 545] where the Madras High Court, after taking note of the judgment of the learned Single Judge impugned in these appeals, agreed with the learned Single Judge of this Court. We too, agree with the conclusions reached by the learned Single Judge in the impugned judgment as well as in the aforecited decision of the Madras High Court.

48. In deference to the observations of the Madras High Court towards the concluding paragraphs, we hold that this judgment shall apply only with prospective effect and not for any earlier periods. This direction is issued not on the basis of any proclaimed right of the nuns or priests, but solely on account of the admission of the department that they had not, by a mistake/omission failed to properly instruct the collection of TDS at source prior to 2014. From 2014 till date, this Court had interdicted collection of tax at source

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also.

49. Thus, let all render unto the exchequer what is due to it and let all render the remaining at one's own discretion.

In view of the above, we dismiss these appeals with the above observations and in the nature of the case, there shall be no order as to costs.

Sd/-

S.V.BHATTI
JUDGE

Sd/-
BECHU KURIAN THOMAS
JUDGE

vps

/True Copy/ PS to Judge