Tax v Fee

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THE distinction between a tax and fee has substantially been effaced in the development of our constitutional jurisprudence. At one time, it was possible for courts to assume that there is a distinction between a tax and a fee: a tax being in the nature of a compulsory exaction while a fee is for a service rendered. This differentiation, based on the element of a ***quid pro quo*** in the case of a fee and its absence in the case of a tax, has gradually, yet steadily, been obliterated to the point where it lacks any practical or constitutional significance. For one thing, the payment of a charge or a fee may not be truly voluntary and the charge may be imposed simply on a class to whom the service is made available. For another, the service may not be provided directly to a person as distinguished from a general service which is provided to the members of a group or class of which that person is a part. Moreover, as the law has progressed, it has come to be recognized that there need not be any exact correlation between the expenditure which is incurred in providing a service and the amount which is realized by the State. The distinction that while a tax is a compulsory exaction, a fee constitutes a voluntary payment for services rendered does not hold good. As in the case of a tax, so also in the case of a fee, the exaction may not be truly of a voluntary nature. Similarly, the element of a service may not be totally absent in a given case in the context of a provision which imposes a tax. (From a recent judgement of the Supreme Court - ***Jalkal Vibhag Nagar Nigam - Civil Appeal No 6107 of 2021 - 2021-TIOL-259-SC-MISC-LB***)

The gradual obliteration of the distinction between a tax and a fee on a conceptual level has been the subject matter of several decisions of the Supreme Court.

In Southern Pharmaceuticals and Chemicals, Trichur v. State of Kerala, Justice AP Sen speaking for the Court held:

> ***25. "Fees" are the amounts paid for a privilege, and are not an obligation, but the payment is voluntary. Fees are distinguished from taxes in that the chief purpose of a tax is to raise funds for the support of the Government or for a public purpose, while a fee may be charged for the privilege or benefit conferred, or service rendered or to meet the expenses connected therewith. Thus, fees are nothing but payment for some special privilege granted on service rendered. Taxes and taxation are, therefore, distinguishable from various other contributions, charges, or burdens paid or imposed for particular purposes and under particular powers or functions of the Government. It is now increasingly realised that merely because the collections for the services rendered or grant of a privilege or licence, are taken to the consolidated fund of the State and are not separately appropriated towards the expenditure for rendering the service is not by itself decisive. That is because the Constitution did not contemplate it to be an essential element of a fee that it should be credited to a separate fund and not to the consolidated fund. It is also increasingly realised that the element of quid pro quo stricto senso is not always a sine qua non of a fee. It is needless to stress that the element of quid pro quo is not necessarily absent in every tax.***

Seervai in his Constitutional Law, states: [HM Seervai Constitutional Law of India, 2nd Edn, Vol. 2]

"the fact that the collections are not merged in the consolidated fund, is not conclusive, though that fact may enable a court to say that very important feature of a fee was present. But the attention of the Supreme Court does not appear to have been called to Article 266 which requires that all revenues of the Union of India and the States must go into their respective consolidated funds and all other public moneys must go into the respective public accounts of the Union and the States. It is submitted that if the services rendered are not by a separate body like the Charity Commissioner, but by a government department, the character of the imposition would not change because under Article 266 the moneys collected for the services must be credited to the consolidated fund. It may be mentioned that the element of quid pro quo is not necessarily absent in every tax."

In ***Kewal Krishan Puri v. State of Punjab [(1979) 3 SCR 1217, 1230]***, the Supreme Court observed,

"The element of quid pro quo must be established between the payer of the fee and the authority charging it. It may not be the exact equivalent of the fee by a mathematical precision, yet, by and large, or predominantly, the authority collecting the fee must show that the service which they are rendering in lieu of fee is for some special benefit of the payer of the fee."

In Municipal Corporation of Delhi v. Mohd. Yasin, Justice O.Chinnappa Reddy observed:

"What do we learn from these precedents? We learn that there is no generic difference between a tax and a fee, though broadly a tax is a compulsory exaction as part of a common burden, without promise of any special advantages to classes of taxpayers whereas a fee is a payment for services rendered, benefit provided or privilege conferred. Compulsion is not the hallmark of the distinction between a tax and a fee. That the money collected does not go into a separate fund but goes into the consolidated fund does not also necessarily make a levy a tax. Though a fee must have relation to the services rendered, or the advantages conferred, such relation need not be direct, a mere causal relation may be enough. Further, neither the incidence of the fee nor the service rendered need be uniform. That others besides those paying the fees are also benefitted does not detract from the character of the fee. In fact, the special benefit or advantage to the payers of the fees may even be secondary as compared with the primary motive of regulation in the public interest. Nor is the court to assume the role of a cost accountant. It is neither necessary nor expedient to weigh too meticulously the cost of the services rendered etc. against the amount of fees collected so as to evenly balance the two. A broad co-relationship is all that is necessary. Quid pro quo in the strict sense is not the one and only true index of a fee; nor is it necessarily absent in a tax."

In Sreenivasa General Traders and Others v. State of Andhra Pradesh, the Supreme Court held:

There is no generic difference between a tax and a fee. Both are compulsory exactions of money by public authorities. Compulsion lies in the fact that payment is enforceable by law against a person in spite of his unwillingness or want of consent. A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the service. It is now increasingly realised that merely because the collections for the services rendered or grant of a privilege or licence are taken to the consolidated fund of the State and not separately appropriated towards the expenditure for rendering the service is not by itself decisive.

It emerges that the practical and even constitutional, distinction between a tax and fee has been weathered down. As in the case of a tax, a fee may also involve a compulsory exaction. A fee may involve an element of compulsion and its proceeds may form a part of the Consolidated Fund. Similarly, the element of a quid pro quo is not necessarily absent in the case of every tax.

In ***IDEAL ROAD BUILDERS PVT LTD*** - **2011-TIOL-1658-CESTAT-MUM**, the CESTAT observed,

While the tax imposition is made for public purpose without reference to any service rendered by the State or any specific benefit conferred upon the tax payer, a fee is a payment levied by the State in respect of the services performed by it for the benefit of the individual.
Money raised by a fee is set apart and appropriated specific for the purpose of the service for which it has been imposed and is not merged in the general revenues of the state.

In State Street Syntel Services V Commissioner of Central GST, the CESTAT observed on 9th May, 2019

A tax recovered by the government goes into the Consolidated Fund of India which is utilised for all public purposes and no money out of the Consolidated Fund of India shall be appropriated except in accordance with law and for the purposes and in the manner provided in the Constitution.
Whereas a cess or fee does not become part of the Consolidated fund and are earmarked for the purpose of services for which it is levied.
A Cess can never become part of the Consolidated Fund. It should be earmarked and set apart for the purpose for which it is levied.Â

These views don't seem to be in tune with the views of the Supreme Court.

List I-Union List under the Seventh Schedule to the Constitution specifically mentions taxes and fees.

82. Taxes on income other than agricultural income.

85. Corporation tax.

96. Fees in respect of any of the matters in this List, but not including fees taken in any court.

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

Thus, even the Constitution assumed that fees and taxes are not same, but as the Supreme Court says,
the distinction between a tax and fee has substantially been effaced in the development of our constitutional jurisprudence.

What difference does it make whether we have to pay a fee or a tax?

What's in a name? That which we call a tax, by any other name â€¦â€¦

Until Next Week.