

Order No. (Misc. 17-749)2017/ 419

(Writ Petition seeking to determine the constitutionality of the fiscal incentives granted by the Government)

Petitioner..... Druk Nyamrup Tshogpa (DNT)
Represented by Counsel
Jabmis
Yeshi Wangdi & Sonam Dhendup:

Versus

Respondent.....Ruling Government: People’s Democratic Party
(PDP)
Represented by Attorney General of Bhutan

Preliminary Order:

Presided over by the Hon'ble Acting Chief Justice Sangay Khandu, Justice Lungten Dubgyur, Justice Tshering Namgyel, Justice Duba Dukpa, Justice Kinley Dorji, Justice Pema Wangchuk and Justice Pema Rinzin.

1. Brief Facts:

The Petitioner, **Druk Nyamrup Tshogpa (DNT)** a registered political party has moved the Royal Court of Justice, High Court of Bhutan by way of writ petition and its jurisdictional competence citing the provision of the Constitution and other laws. The Petitioner primarily seeks an order of constitutional Writ to declare the action of Ruling Government *ultra virus*, in granting fiscal incentives in the form of tax holiday to some of the selective businesses in violation of Article 14, Section 1 and thereby posing burden on the consolidated fund under Article 14, Section 3 of the Constitution.

The matter was registered before the Court by way of Miscellaneous Registry No. 749, dated 18.08.2017. The show cause order was issued to the Respondent through the Office of Attorney General as per section 80 of the Civil and Criminal Procedure Code (hereinafter CCPC) to appear before the Court on 25.09.2017. The Respondent was granted leave to submit a written response to the Court on 25.10.2017 as to why a Writ petition filed and sought by Petitioner should not be granted notwithstanding other incidental issues raised by the Petitioner. The Hearing was conducted by the Larger Bench in accordance with sections 81 and 81.1 of CCPC.

2. Submission of the Parties

2.1 For the Petitioner:

“MAY IT PLEASE THIS HON'BLE HIGH COURT,

Most humbly, Druk Namrup Tshogpa begs to submit petition before this Hon'ble High Court as hereunder;

(Part I)

Brief Back ground of the case, Jurisdiction and Locus Standi

Brief preface of the case

We beg to submit that as per Article 14(1) of the Constitution, it unambiguously provides that, “*Taxes, fees and other forms of levies shall not be imposed or altered except by law*”. The term except by law is a guiding principle wherein the government power is restricted and cannot arbitrarily impose or alter the tax

and can only act in accordance with law. It is as a consequence of this constitutional principle that such law as the Public Finance (amendment) Act, 2012 was enacted by Parliament.

However, the present government has discriminately granted Fiscal Incentive to some business entities and others thereby violating the above Article of the Constitution and the Public Finance (amendment) Act, 2012. We submit that it is a clear violation of the above cited Article of the Constitution since the Public Finance (Amendment) Act, 2012 under section 46A clearly provides that, “*if any matter pertaining to the imposition or increase of any tax or abolition, reduction or remission of any existing tax, it should be construed as Money Bill or Financial Bill*”. When that matter falls under the ambits of Money Bill or Financial Bill, it is mandatory as per Rule of Procedures of National Assembly and section 46B of the Public Finance (Amendment) Act, 2012 to realize the parliamentary process which is not the case in the present issue.

Jurisdiction

We beg to submit that in accordance with Article 7(23) and Article 21(18) of the Constitution, every person has the rights to approach the Courts in matter arising out of the Constitution and others laws. In consonance with the above two Articles of the Constitution, we humbly submit that the Hon’ble High Court and Most Hon’ble Supreme Court are only two Courts of competent jurisdiction and are provided with the exclusive jurisdiction to accept and try the Constitutional cases. In doing so, the two courts are empowered to issue such declarations, orders, direction or writs as may be appropriate in the circumstances of each case as per Article 21(10) of the Constitution. Hence, the DNT, with most humbly begs to file petition praying for issuance of writ to remedy the constitutional rights as provided in our supreme law.

Locus Standi

1. We beg to submit that in accordance with Article 21(18) of the Constitution, *every person has the right to approach the Courts in matter arising out of the Constitution and other laws*. While the terms, “every person” in agreement with the universally accepted legal definition, it is understood as Natural person and Juristic person. Hence, we submit that Druk Nyamrup Tshogpa as a registered political Party under section 140 of the election Act of Bhutan, 2008 and with hundreds of members and the support of many thousands more, it is a Juristic Person in the eyes of law.

DNT as a legally qualified entity, we submit that the alteration of tax by the present Government unambiguously tantamount to deliberate breach of Article 14(1) of our Constitution and for this reason, it is undoubtedly within the ambit of matter arising out of the constitution. Hence, there isn’t any question as to *Locus Standi* in the present issue.

We submit that the present Government has not only violated Article 14(1) of the Constitution but also other law time being in force as well. The other law herein has reference to section 46A of the Public Finance (amendment) Act, 2012 in particular which exhaustively defines what is Money or Financial Bill. We submit that granting of Fiscal Incentives by the present government has direct impact on tax and with this very fact; we have every reason to believe that Fiscal incentive granted by

the present government must be considered as Money bill. Hence it provides every reason for the present government to realize the parliamentary process which is *sine qua non* in the present controversy. However, the present government's deaf ear to observe the parliamentary process despite outcry in the media has aggrieved DNT and larger section of the society; we are left with no other alternative than to pray this Hon'ble High Court to issue writs as per Article 21(10) of the Constitution.

2. That the DNT, with the very intent to attend the sacred responsibility placed to all the registered political parties under Article 15(1) of the Constitution (The Supreme law of Nation) and for the welfare of the good governance, we begs to submit petition against the Government for constitutional breach and other laws. We submit that the above Article clearly imposes duty and sacred responsibility to all Political Parties in ensuring that national interest prevails over all other interest and also ensure good governance. The DNT in order to discharge this sacred responsibilities so imposed as a registered political party by the Constitution and to ensure public trust and confidence hereby file petition before this Hon'ble High Court.
3. We beg to submit that DNT has unquestionably fulfilled all the requisite criteria set in the Civil and Criminal Procedure Code of Bhutan under section 31.2. To this, there is concrete case or controversy since the Government has violated the section 46A of the Public Finance (amendment) Act 2012 and Article 14(1) of our Constitution. The alteration of tax by the present Government unambiguously tantamount to blatant breach of Article 14(1) of our Constitution and it is undoubtedly within the ambit of matter arising out of the constitution contributing to concrete case of controversy under section 31.2 of the civil and criminal procedure code of Bhutan, 2001.

By unconstitutionally granting remission and making reduction of taxes, we contend that the Government cannot ensure that the cost of recurrent expenditure is met from internal resources of the country as enshrined in the Article 14(6) of our Constitution, as the tax being one of the most guaranteed internal resources of our nation. It is not only DNT and its members but the larger section of our society has been aggrieved and injured by this unconstitutionally granting remission and making reduction of tax. By unconstitutionally granting remission (under the guise of fiscal incentives) by the present government, it has cost the national exchequer, millions of Ngultrums which otherwise would have been accumulated in our Consolidated Fund. This money would have gone towards improving health, education, provision of water and other such public services. While a few have been enriched, the large majority of us have been denied with critical funds that could have gone towards our nation's development. To conclude, the very breach of the Supreme Law of the nation is injury in itself and there will be no greater injury than this. Hence, Druk Nyamrup Tshogpa begs to file the petition under section 116 of the Civil and Criminal Procedure Code of Bhutan seeking writ under Article 21(10) of our Constitution.

Part II

Brief Back ground of the case

We beg to submit that the present Government on 08/05/2017 has submitted Fiscal Incentive Policy before the Parliament merely as report, not as Money Bill or Financial Bill for granting incentive to few selective business entities and others. Although, the people have supposedly presumed that the act of the Government is within the purview of the laws, however, the DNT on several occasions has raised the objection and vehemently contended that it is against the provision of our constitution and other laws for the time being in force. But, the government negligently defended its act stating that it is within the purview of the law.

We submit that as per the Article 1(9) of our Constitution, the Constitution is the Supreme law of our nation and; article 14(1) state that the taxes, fees and other forms of levies shall not be imposed or altered except by law. Further the Public Finance Act (amendment) Act, 2012 under section 46A provides that if any matter deals with imposition or increase of any tax or abolition, reduction or remission of any existing tax, it should be construed as Money Bill or Financial Bill. However, the present government has not adhered to the due process as enunciated in the Public Finance Act and has miserably failed to submit before the parliament as money bill; thereby violating the sacred provisions of our Constitution and other laws. By unconstitutionally granting remission of taxes (under the guise of fiscal incentives), it has cost consolidated fund and the national exchequer, millions of Ngultrums which otherwise would have been accumulated in our Consolidated Fund. This money would have gone towards improving health, education, provision of water and other such public services. While a few have been enriched by this discriminatory taxation policy, the large majority of us have been denied with critical funds that could have gone towards our nation's development. The present government cannot ensure that the cost of recurrent expenditure is met from internal resources of the country as per Article 14(6) of our Constitution being tax one of the most guaranteed internal resources of our nation. If the Government of the day, through its presumed prerogative, evades the parliamentary process by granting such unlawful incentive, there is an imminent risk that such tax related money is never reached into the consolidated fund in near future and the parliamentary process of appropriation of such fund is undermined *ipso facto*.

Part III

Question of Law and Fact

Question of Law

We beg to submit that the present Government, after having been elected with much public faith and confidence, the Government is bound to abide by the Constitution and other laws of country passed by the Parliament. However, the Government has blatantly violated the provision of the Constitution and other laws time being in force by granting Tax Holiday to a few business entities in the nomenclature of Fiscal Incentives. Hence the following question of law has arisen to this effect;

- 1) Article 14 section (1) of the Constitution of Bhutan demonstrably provides that the “*Taxes, fees and other forms of levies shall not be imposed or altered except by law*” – *For the purpose of the impugned issue, the Public Finance (Amendment) Act, 2012 can be understood as the other law proclaimed in the above section.* In blatant contravention to this divine Article, the Government has bypassed the Parliamentary process to alter the taxes by granting tax holiday ranging from 5

years to 15 years in the guise of fiscal incentive to a few business entities like small scale business, education and skills institute, and private clinics.

- 2) That the Government has categorically violated section 46A of the Public Finance (Amendment) Act, 2012 wherein the Money Bills and Financial Bills are defined. The Section states that “*A money or Financial Bill is a Bill which contains only provisions dealing with all or any of the following matters*”

- (a) *Imposition or increase of any tax or abolition, reduction or remission of any existing tax.*

- (b) *Government spending that is, appropriation or payment of moneys out of the Consolidated Fund;*

If any question arises whether a bill is a Money Bill or not, the decision of the Speaker thereon shall be final”. Hence, the Government has granted tax remission through the nomenclature of Fiscal Incentive wherein there is actual remission of tax. According to the above section, such Bills should be passed as Money or Financial Bill instead of mere submission of report on Fiscal Incentive thereby violating the prevailing law.

- 3) It is very much explicable that the contradictory provisions of the Bhutan Sales tax, customs and excise (Amendment) Act, 2012 were amended to this effect and maintained to follow the legislative process to impose or alter the taxes in compliance with the Bhutan Public Finance (Amendment) Act, 2012. According to which the any matter pertaining to the Imposition or increase of any tax or abolition, reduction or remission of any existing tax shall be considered as Money or Financial Bill against which the Government has incontrovertibly acted upon to grant tax holiday to few business houses.
- 4) Previously, in the case of Government v. Opposition, vide Judgment No. SC(HUNG-11-1) dated 24th February, 2011, in 3rd Paragraph, stated that,

“Under no circumstances the authority to impose or alter taxes may be delegated to the Executive. The alleged authority to impose or alter indirect taxes has no legal basis under the Constitution. Therefore, the imposition or alteration of taxes must comply with the legislative process for making laws at all times as provided under Sections 234 - 238 of the National Assembly Act 2008. Moreover, the Bill relating to imposition or alteration of tax shall come into force on the day the Bill is introduced in Parliament”.

With which it can be vividly construed that the remission of taxes shall be deemed as alteration of the taxes. Furthermore, the alteration of taxes has been implemented discriminately among the fellow Bhutanese as they granted the tax holiday to only few business entities thereby defeating the very essence of progressive taxation.

Although, the general policy of Fiscal Incentive is a plausible development policy yet we deplore the same for the noncompliance of the Legislative Process. To grant tax remission to any entity, as such, shall be passed as Money or Financial Bill by the Parliament. The Government, in granting remission of tax in the guise of Fiscal Incentive, has viciously negated the sanctity of our sacred Constitution.

- 5) Section 4.2, Chapter 3, Part I, 6.1 Chapter 4, Part II and 4.1 Chapter 3, Part III of the Sales Tax, Customs and Excise Act 2000 and a part of Section 21 of the Public Finance Act 2007

perpetuating the rights, privileges, and powers prior to the enactment of law is inconsistent with Section 1 Article 14 of the Constitution. Therefore, the provisions of the Sales Tax, Customs and Excise Act 2000 quoted by the Government in media are *ultra-vires* the constitutional provisions related to the subject matter. The doctrine of eclipse and severability enshrined under Section 10 Article 1 of the Constitution, states that:

“All laws in force in the territory of Bhutan at the time of adopting this Constitution shall continue until altered, repealed or amended by Parliament. However, the provisions of any law, whether made before or after the coming into force of this Constitution, which are inconsistent with this Constitution, shall be null and void”.

Hence, the provisions of the Sales Tax, Customs and Excise Act 2000 are to be deemed null and void as it is inconsistent with the provisions of the Constitution and Section 46A of the Bhutan Public Finance (Amendment) Act, 2012.

Furthermore, in accordance to the Judgement para 6.5 of the *In Re* Government v. Opposition case, it is stated that, “Constitutionalism is an anti-thesis to autocracy. Therefore, the Constitution has different centers of power under vertical, horizontal and intra check and balance ensured through separation of power. The Constitution has carefully crafted the checks and balance inherent to constitutionalism. It prevents power from being concentrated in too few hands, which could result in an autocratic and dictatorial government”. For which, we have repost much of our trust and faith in the interpretation ordained from the Apex Court of Bhutan pertaining to the check and balance motive ensuring though proper separation of Power.

Question of Facts

1. We beg to submit that granting remission of tax by the present Government in the guise of fiscal incentive, people at large are confounded by this move. All the taxes, fees and other forms of levies though clearly fall under the direct definition of Money or Financial Bill as per the relevant provisions of the laws though, the present government has presumed otherwise. We contend that when any matter falls under the definition of Money or Financial Bill, it is mandatory to route through parliamentary process for its adoption. However, the present government has arbitrarily bypassed the parliamentary procedure by granting fiscal incentive. Further, if the power to decide as to the question whether it is money bill or financial bill, the decision to this effect is retained with the speaker of the National Assembly without any check from other members of parliament, it provides gateway to breach Constitutional provision as well many other provision of the laws time being in force.
2. We beg to submit that the Fiscal Incentive Policy can be primarily segregated into two heads i.e, tax related and non tax related fiscal incentive. We humbly acknowledge that the Fiscal incentive a policy is initiated for the economic development of the nation at large and apparently seems to be prerogative of the government of the day. However, if we make close scrutiny of the policy in question, it has direct impact on tax. Hence, parliamentary process is *sine qua non*. If the power to grant fiscal incentive is retained with the government without having to discuss it in the parliament as Money or Financial Bill, such autocratic decision pertaining to incentive will no doubt cost the

consolidated fund. There is also imminent risk that the government of the day, for the purpose of political mileage may accord their whims and fancy and may grant such incentive obliterating the very principle of the democracy.

3. We also would like submit that the previous government in the year 2010 and 2013 has granted fiscal incentive to some business entities amounting to Nu. 7,000,000,000/- (seven billion) and 42,360,000/-(forty two million thirty six hundred thousand) respectively. This move unquestionably affects to ensure the cost of recurrent expenditure being met from internal resources of the country as enshrined in our Constitution. Such move by government will undoubtedly contribute in breaching Article 14(3) of the Constitution which provides that the public money shall not be drawn from the consolidated fund except through appropriation in accordance with the law. The other law in this issue being the Public Finance (amendment) Act, 2012, the government hasn't considered adhering to those legitimate provisions.
4. We also beg to submit that the fiscal incentive that has direct impact on tax must in accordance with the provision of the Constitution and other laws have to realize the parliamentary process for its adoption. Any taxes so imposed or collected should be deposited into the consolidated fund and must be drawn through the only process of appropriation after seeking approval from the parliament. However, the present government without the prior approval from the parliament waived off or granted to remission to some business entities. This move by the present government unquestionably amounts to breach of procedure laid down in the Constitution as to how the consolidated fund must be appropriated and be withdrawn therefrom.

Part IV Conclusion

Our country has transcended to Democratic Constitution Monarchy and she has become exemplary country enriched with Gross National Happiness in the eyes of the political world. If the Government fails to comply with the law and the opposition fails to oppose the same, it is the responsibility of the political party to infuse certain check and balance to prevent such noncompliance. The check and balance in the democratic process prevents power from being concentrated in too few hands, which could result in an autocratic and dictatorial government. Therefore, in accordance to section 10 of Article 21 of the Constitution of the kingdom of Bhutan, we beseech before the most Illustrious High Court of Bhutan to kindly issue writ of Mandamus Ordering the impugned Government to follow the legislative process to increase, decrease, remit and change the Tax.

Part V Prayers

Most humbly, the Druk Nyamrup Tshokpa, would like to submit the following prayers before Hon'ble Justices for the magnanimous writ order;

- 1) The Government, countenancing tax remission to a few selective business houses, has palpably breached Article 13 and Article 14 Section 1 of the Constitution, the Supreme Law of Bhutan; and Section 46A of the Bhutan Public Finance (Amendment) Act, 2012. Accordingly, the tax remission granted by the government shall be deemed ultra vires the Constitution and the prevailing laws of the Country whatsoever the nomenclature may be proclaimed thereof. Hence, we are reduced to submit our prayers to order the impugned Government to lawfully realize the moneys, remitted unlawfully, in the Consolidated Fund.

- 2) We are further reduced to pray before the Constitutional Bench of the Hon'ble HJigh Court to render Benevolent Writ Order, in accordance to Article 21 Section 10 of the Constitution of Bhutan, for the Government to consider the matters pertaining to the remission and/or alteration of the tax(es) to be deemed as Money or Financial Bill and; forthwith, uphold the provisions of Article 13 of the Constitution of Bhutan and strictly follow the rules of procedures to enact the Money or Financial Bill in accordance with the National Assembly Act, 2008.
- 3) Such order or orders as the Hon'ble Court may deem fit and necessary to uphold the Constitutionalism in the face of Governmental dealings.

On this 18th August, 2017 corresponding to the twenty sixth day of sixth month of the female fire Bird year of the Lunar Calendar.

Most respectfully submitted by:”

2.2 For the Respondent:

“MAY IT PLEASE THIS HONOURABLE COURT,

The Office of the Attorney General, acting for and on behalf of the Government of Bhutan (“Government”), would like to submit its grounds for the immediate dismissal of the petition filed before this Honourable Court by a registered political party, the Druk Nyamrup Tshogpa (“Petitioner”), on 18th of August 2017 as follows:

1. The subject matter of the impugned petition is a *sub judice* matter.

The subject matter of the impugned petition filed is *sub judice* under Article 21(8) of the Constitution for the following reasons:

- (a) Your Honourable Justices, pursuant to the National Assembly’s resolution at its 9th Session of the Parliament (Annexed hereto as “**Exhibit I**”), the Government has petitioned His Majesty the Druk Gyalpo, vide petition dated 16th of August 2017 (Annexed hereto as “**Exhibit II**”), for consideration to invoke Article 21(8) of the Constitution to obtain opinion of the Supreme Court on the issues of fiscal incentives granted till May 2017 by both the present and previous governments. Thus effectively rendering the subject matter *sub judice* so far as due process of law is concerned.

The Article 21(8) of the Constitution provides constitutional means to resolve legal matters of public importance through non-litigious means. It provides:

“Where a question of law or fact is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court, the Druk Gyalpo may refer the question to the Supreme Court for its consideration, which shall hear the reference and submit its opinion to Him.”

In keeping with the above cited Article, Section 18 of the Civil and Criminal Procedure Code, 2001 (“CCPC”) provides on the exclusive advisory jurisdiction of the Supreme Court on the matters referred to it for its opinion. Hence the original jurisdiction of the High Court stands in abeyance when the same subject matter is in pendency or under motion before the Supreme Court.

Whether acted with or without the knowledge of the Government's motioned petition, the Petitioner has raised before this Honourable Court the same subject matter which is already a *sub judice* matter. Further, in a democratic polity, it is important to adhere to the constitutional means to resolve democratic issues which the impugned petition has disregarded by bypassing that democratic recourse provided by the cited Article of the Constitution.

- (b) The supremacy of law under Sections 9, 10 and 11 of Article 1 and the appellate chain of courts under Sections 2, 3 and 7 of Article 21 of the Constitution are integral elements for the purpose of determining the pending petition for its dismissal.

It is therefore not only inappropriate for the Honourable High Court to admit and maintain the impugned petition but it also must contemplate on itself contravening the very due course enshrined under Article 21(8) of the Constitution that has been already motioned by the government before the impugned petition was filed.

The subject matter of the impugned petition being incontrovertibly a *sub judice* matter, the same petition must therefore be dismissed in its entirety, at once.

2. Petitioner has no *locus standi* to file the present suit.

Your Honourable Justices, the Respondent submits that the Petitioner has no *locus standi* to file the impugned petition before this Honourable Court for the following reasons:

- (a) Article 21(18) of the Constitution vests in every person the right to approach courts in the matter arising out of the Constitution or other laws. However, that right is subject to Article 7(23) of the Constitution which provides that “*a person can approach a court of law subject to the procedure established by law.*” Hence, accordingly, Section 31.2 of the CCPC prescribes procedural pre-condition for a person to have “*legal standing*” to file a petition which must “*involve a concrete case or controversy*”. If the petition is a class action suit under Section 149 of CCPC, there must be a large number of individuals whose interests are closely related, and the petitioner not only has to represent interest of those members but must also be aggrieved or be an injured member of that class of people. It is thus critically relevant for the Honourable Court to consider whether the petitioner or the class of people the petitioner purports to represent have, in fact, suffered from any nature of injury caused by the fiscal incentives granted thus far by different governments.

In granting a fiscal incentive, there is a positive action targeted to lift certain tax burden from the general populace which is diametrically opposed to the burden of tax imposition. Further, injury must result from violation of legal rights for which law provides remedies and the petitioner being a juristic person in the eyes of law is incapable of being *directly* affected by the act of respondent nor does the petitioner represents large number of aggrieved individuals.

Hence, besides preposterous assumption of possible future misuse of fiscal incentive granting powers of the government, the impugned petition has nothing more to substantiate on that critical requirement as the petitioner neither establishes the fact of itself having directly suffered from any

injury nor being member of a class of people having suffered injury there-from. In effect, the petitioner appears to represent a fictitious class of its own making without any member thereof to legitimize its legal standing as required under Sections 31.2 and 149 of CCPC. Therefore, the petitioner is neither a victim of direct injury nor represents a class of injured members having merits to claim the legal remedies as required by law.

- (b) The petitioner cannot invoke Article 15(1) of the Constitution for its *locus standi* as the intent of that Article is to require political parties to “*keep in mind the national interests, take into account the values and aspiration of the people in formulating their policies for responsible and good governance.*” After formation of Parliament, it is both the duty and prerogative of the Opposition in the House, under Article 18 of the Constitution, to “*critique and scrutinize the laws and policies of the ruling government in developing, defining and presenting alternative measures.*” The Supreme Court in *re Government vs. Opposition* ruled on the legal standing of the Opposition Party as legitimate and in keeping with its institutional role as provided under Article 18(1). Hence, the petitioner cannot scheme to replicate or usurp functions of the Opposition Party as only the ruling and opposition parties enjoy the legitimacy of being charged with answerable duty to the people by the Constitution. Further, the petitioner attempts to undermine the vital roles played by the democratic institutions that consists our Parliament under Articles 10(2) and 11(2) of the Constitution.

The Petitioner being absolutely vacant of the critical requirement of the *locus standi* to file the impugned petition, it therefore must summarily be dismissed in its entirety.

3. The Government has addressed fiscal incentives granting powers in perpetuity.

Although inappropriate, at this stage, to rebut on the fiscal incentive issues raised in the impugned petition, it is important to apprise Your Honourable Justices that the government determinately believes that the granting of fiscal incentives is neither unconstitutional nor illegal as they are granted strictly as per standing provisions of the applicable laws which has been tested and reinforced by the Supreme Court Judgment No.SC(Hung 11-1) dated 24 February, 2011. Objectively, be it by the previous or present government, fiscal incentives are granted to boost economic growth by incentivizing investments, broaden future tax base, generate employment opportunities and secure sovereign economic interest of the nation.

However, being concerned of the possible future misuse of the fiscal incentive granting power and to further strengthen democratic governance, the present Government has not only decided to table fiscal incentives as Money Bill to achieve democratic deliverance thereon but had already adopted it as Fiscal Incentives Act 2017 at its 9th Session of the Second Parliament. Further, the provisions of different laws that vest fiscal incentive granting power in the government are being motioned for necessary amendments and repeals in the forthcoming 10th Session of the Parliament. The general concern on the granting of fiscal incentives by government has thus been addressed in perpetuity.

Prayers

Your Honourable Justices, based on the incontrovertible grounds of the subject matter being already a *sub judice* and the petitioner being absolutely vacant of the critical requirement of the *locus standi* as

submitted hereinabove, the Respondent submits that the admittance of the presently impugned petition by the Honourable Court could only aid in setting a constitutionally untoward precedence that incubates grave potency to not only paralyze the functioning of a legitimate and all-time law abiding government as that of the present Government, but it also attempts to open a floodgate for such cantankerous suits which, if not contained effectively in time, could lead to social disharmony, waste of precious state resources in responding to such dubious petitions and cause unjustifiable depletion to the precious public time of the Honourable court.

The responding Government therefore prays before this Honourable Court to:

1. Summarily dismiss the impugned petition at once, in its entirety, with cost in favor of the Respondent; and
2. Issue such order or orders as the Honourable Court may determine necessary and appropriate thereof the impugned petition.”

Most respectfully submitted by:"

3. COURT FINDINGS:

3.1. Issues related to the constitutionality of fiscal incentives whether *sub judice* and the jurisdictional competence of the High Court:

- 3.1.1 The Respondent challenging the jurisdictional competence of the High Court submits that pursuant to the National Assembly resolution of the 9th Session of the Second Parliament, the Government has petitioned His Majesty the Druk Gyalpo, vide petition dated 16th August 2017, for consideration to invoke Article 21, Section 8 of the Constitution to obtain opinion of the Supreme Court on the issues of fiscal incentives granted till May 2017 by the present and previous governments.

The Respondent argues that Article 21, Sections 8 of the Constitution provides constitutional means to resolve legal matters of public importance through non-litigious means and provides an exclusive advisory jurisdiction of the Supreme Court on the matters referred to it for its opinion. Hence, the original jurisdiction of the High Court stands in abeyance when the same subject matter is in pendency or under motion before the Supreme Court. Respondent further argues that in a democratic polity, it is important to adhere to the constitutional means to resolve democratic issues which the impugned petition has

disregarded by passing that democratic recourse provided by the cited Article of the Constitution. The supremacy of law under Sections 9, 10 and 11 of Article 1 and the appellate chain of courts under Sections 2, 3 and 7 of Article 21 of the Constitution are integral elements for the purpose of determining the pending petition for its dismissal.

The Respondent submits that it is not only inappropriate for the Honourable High Court to admit and maintain the impugned petition but it also must contemplate on itself contravening the very due course enshrined under Article 21, Section 8 of the Constitution that has been already motioned by the government before the impugned petition was filed. Since the issue is incontrovertibly a *sub judice* matter, the Respondent prays that the petition must be dismissed in its entirety.

3.1.2 The Petitioner by way of oral submission argues that the question of fiscal incentives issue being *Sub judice* does not arise as the Parliament or the Executive has no jurisdiction to Petition His Majesty the King invoking Article 21, Section 8 of the Constitution. This cited Article does not grant such powers to the Prime Minister except His Majesty the King to refer to the Supreme Court.

3.1.3 Based on the above submissions, the Court establishes that the Respondent relies its stand to consider the subject matter as *sub judice* since the issues related to fiscal incentives granted till May 2017 have been already petitioned to His Majesty the Druk Gyalpo to seek Supreme Court's advisory opinion pursuant to the National Assembly's resolution at its 9th Session of the Second Parliament. The Court has been provided with exhibits supporting the argument. It is observed that the Constitutional design provides enough guarantees to solve both political and legal issues through various provisions cited in this Order. The Court as the last bastion to give the final interpretation on the provisions of laws and that the High Court being vested with original jurisdiction on constitutional matters exalts to interpret Article 2, Section 8 of the Constitution. Based on this premise, the Court determines as to whether the Parliament or the Government can invoke Article 21, Section 8 of the Constitution by petitioning to His Majesty to seek advisory jurisdiction of the Supreme Court.

Article 21, Section 8 states that:

“Where a question of law or fact is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court, the Druk Gyalpo may refer the question to the Supreme Court for its consideration, which shall hear the reference and submit its opinion to Him”.

This provision provides explicit jurisdiction of the Supreme Court when referred to by His Majesty the Druk Gyalpo which, is also legally termed as an “abstract judicial review” or seeking an “advisory opinion” of the Supreme Court.

Similarly, in *Re: Government Vs. Opposition*, the Supreme Court ruled that:

“Under the Constitution only His Majesty the King has been provided with the authority to command “abstract judicial review” as provided under Section 8 Article 21 of the Constitution...”

“The Abstract Judicial Review provides a form of action to review the constitutionality of laws enacted by Parliament without it being a subject matter of a concrete proceeding. It allows for the broadest of reviews of a statute possible. The review takes place detached from any particular case and refers to the compatibility of the statute with the provisions of the Constitution. Therefore, no other individual or entity may request the Courts for an “abstract judicial review” except His Majesty the King.”

3.1.4 Having observed as above, the Court hereby rules that:

(a) Bhutan has adopted a Parliamentary form of democracy as reflected under the provisions of Article 17 of the Constitution. Article 1, Section 2 of the Constitution states that, *“The form of Government shall be that of a Democratic Constitutional Monarchy”* which, emphatically expounds the defined constitutional structure of a democratic design with His Majesty as *“the Head of the State and the symbol of unity of the Kingdom and people of Bhutan”* reflected under Article 2, Section 1 of the Constitution. Hence, the roles of the Executive and Legislative functions can not be confused and under Article 21, Section 8 of the Constitution only His Majesty the King has the prerogative to seek advisory opinion from the Supreme Court.

- (b) The delineation of powers on law making and procedure established under Article 13 of the Constitution allows addressing legislative issues through legislative procedure while the power vested upon the Prime Minister and the Executive Government is clearly defined under Article 20 of the Constitution. The delineated function of a court is to answer questions of law or fact when properly raised before it in a dispute between the parties. However, Article 21, Section 8 confers an exceptional or particular jurisdiction also referred as “*consultative or advisory jurisdiction, on the Supreme Court to give its opinion on questions unconnected with a pending case.*” For this purpose only His Majesty has the prerogative to refer to the Supreme Court a question of law or fact which in His opinion is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court.
- (c) The power to obtain the opinion of the Supreme Court is bestowed upon the Head of the State. Therefore, “*the Prime Minister, as the head of Executive branch of the government and belonging to a political party, cannot obtain the opinion of the Supreme Court, as it would violate the cardinal principle of separation of powers.*”
- (d) Only His Majesty the King can command for such an “abstract judicial review” and that too if His Majesty may pleased be desired as per the decision of the Supreme Court *in re Opposition Vs Government*. Therefore, Article 21, Section 8 of the Constitution provides clear legislative intent that “abstract judicial review” from the Supreme Court can be referred only by His Majesty the King and for this His Majesty is not bound to act on the reference of the Prime Minister and for that any Government, be it present or future, shall not have jurisdiction to seek intervention of His Majesty the King under the said provisions of the Constitution. If the matter is in any way pending before the Supreme Court as alleged by the Respondent, the High Court’s jurisdiction could have been ousted by way of invoking Article 21, Section 9 of the Constitution. Thus, the Respondent’s claim that the fiscal incentives issue being *Sub judice* is hereby dismissed.

4.2 Issues related to the *Locus standi* of DNT:

4.2.1 The Petitioner's primacy on *locus standi* relies and invokes Article 15, Section 1 of the Constitution wherein it states that "*Political parties shall ensure that national interests prevail over all other interests and, for this purpose, shall provide choices based on the values and aspirations of the people for responsible and good governance.*" The Petitioner submits that the party secured around 17% (percent) of the national votes and therefore, harmed those who relied upon the party and voted for. The Petitioner contests that the fiscal incentives in the form of tax holiday to some of the selective businesses posed burden on the consolidated fund as public money shall not be drawn from Consolidated Fund under Article 14, Section 3 of the Constitution and thereby caused injury to the nation as a whole. The Petitioner alleges that the Respondent has violated the constitutional procedure of passing a law under Article 14, Section 1 of the Constitution and Section 46(A) of the Public Finance (Amendment) Act, 2012.

The Petitioner argues that there is a concrete case of controversy accompanied by injury as provided by Section 32.1 and Section 149 of CCPC. The Petitioner further submits that Article 7, Section 23 and Article 21, Section 18 of the Constitution vest with jurisdiction even for an individual person and that the phrase, "every person" in agreement with the universally accepted legal definition is understood as both Natural person and Juristic person, and DNT as a registered political Party under section 140 of the Election Act with hundreds of members and the support of many thousands more, is a Juristic Person in the eyes of law. The Petitioner argues that DNT as a registered political party is a legal entity and hence, have irrevocable jurisdiction to petition and argues that the alteration of tax by the present Government unambiguously tantamount to deliberate breach of Article 13 and Article 14, Section 1 of the Constitution. For this reasons the Petitioner submits that it is undoubtedly within the ambit of the matter arising out of the Constitution and prays to issue such order or directions under Article 21, Section 10 of the Constitution and hold the Respondent's

action *ultra virus* and bias by granting fiscal incentives to selective business through reduction or waiver of taxes.

- 4.2.2 The Respondent argues that the Petitioner has no *locus standi* to file the impugned petition before the Court. Article 21, Section 18 of the Constitution vests in every person the right to approach courts in the matter arising out of the Constitution or other laws. However, that right is subject to Article 7, Section 23 of the Constitution which provides that, “*a person can approach a court of law subject to the procedure established by law.*” Hence, accordingly, Section 31.2 of the CCPC prescribes procedural precondition for a person to have “*legal standing*” to file a petition which must “*involve a concrete case or controversy*”. If the petition is a class action suit under Section 149 of CCPC, there must be a large number of individuals whose interests are closely related, and the petitioner not only has to represent interest of those members but must also be aggrieved or be an injured member of that class of people. It is thus critically relevant for the Honourable Court to consider whether the petitioner or the class of people the petitioner purports to represent have, in fact, suffered from any nature of injury caused by the fiscal incentives granted thus far by different governments.

The Respondent further argues that after the formation of Parliament, it is both the duty and prerogative of the Opposition in the House, under Article 18 of the Constitution, to “*critique and scrutinize the laws and policies of the ruling government in developing, defining and presenting alternative measures.*” The Supreme Court in *Re Government vs. Opposition* ruled on the legal standing of the Opposition Party as legitimate and in keeping with its institutional role as provided under Article 18, Section 1 of the Constitution. Hence, the petitioner in this case cannot scheme to replicate or usurp functions of the Opposition Party as only the ruling and opposition party enjoy the legitimacy of being charged with answerable duty to the people by the Constitution and that the Petitioner attempts to undermine the vital roles played by the democratic institutions that consist of Parliament under Article 10, Sections 2 and 11 of the Constitution.

4.2.3 Based on the above submissions of the parties, the Court observes that:

- (i) The primary round of election under Article 15, Sections 5, 6 & 7 of the Constitution is founded on the principles of multiparty democracy and provides unrestricted numbers of political parties so long as they are formed and registered within the ambit of the Constitution and the Electoral laws. Based on these principles of multiparty democracy, the primary round of election is held to determine the two highest ranked political parties, which will then be entitled to contest the General Election to form the government as per Article 15, Section 8 of the Constitution. This means that during the primary round of election, all the political parties will campaign and contest nationwide with equal opportunity, and with the objective to win maximum votes or to place them among the top two political parties. It further provides for an opportunity to every candidate and political party to have a common, equal and level playing field.
- (ii) The Constitution further provides a political system which ensures a platform for participatory democracy, political wellbeing and stability of the country, which will ensure peace, progress and justice; and that the basis of government is expressed through periodic election by the general will of the people for a tenure of five years under Article 23, Section 1 of the Constitution. Such election is to be periodically conducted after every five-year term as reflected under Article 10 Section 24 of the Constitution. Hence, the primary round of election is a constitutional design for automatic elimination of all other political parties which could not secure the top two places to contest in the General Election. However, these political parties eliminated in the primary round of election may continue to subsist as a registered political party with renewed focus, plans and program to contest in the next round of primary and general elections. Article 15, Section 1 of the Constitution provides “*choices*” of political parties during the election to the people and to mandate political parties to ensure that national interests prevail over all other interests while providing ‘choices based’ on the values and aspirations of the voters for responsible and good governance if elected to the Ruling or the Opposition. Hence, the role of other political parties (other than ruling and opposition) is confined during the period of election and once the two political parties, based on

people's choice, become the Ruling or Opposition, they solely become answerable to the people.

Therefore, the submission of the Petitioner that they are answerable to the voters who had voted in the primary round of election become indirect and remotely connected as the mandate of the government is based "on popular sovereignty". For these reasons the government of the day is answerable for action or inaction of any policies or political decisions that they make but subject to the powers limited by Constitution and the critical roles of the Opposition Party which are constitutionally assigned during the tenure of the Government under Article 18 of the Constitution. This specific role of the Opposition Party was clearly spelt in the First Constitutional case *in Re Government vs. Opposition* and the jurisdiction to file a Constitutional case that:

"..The Opposition Party has an institutional role to ensure constitutionality and perform important political and public function. The involvement of the Opposition Party in filing cases as a last resort contributes positively to the development of democracy as it helps to clarify issues and encourages political debate and deliberation – providing a source of information to the general public. The Opposition Party has the obligation and the constitutional duty to ensure that the ruling party functions in accordance with the provisions of the Constitution. Moreover, the members of the Opposition Party have the right to vote on any issue that is discussed and required to be passed in the National Assembly."

"Furthermore, in a representative democracy, existence of an Opposition Party and public participation is the cornerstone of the system. It is a bedrock principle that connects government to the governed. It legitimizes the system and helps to make government accountable. Participation by the public and the Opposition Party in government is a creed by which a democratic nation lives. Nevertheless, participation must be authorized and encouraged by

procedures and forms at every level of every branch of our government. Filing of petition against the Government by the Opposition Party and individuals who have locus standi and a concrete case or controversy must be allowed. Preventing the Opposition Party or an individual from engaging in petitioning activities must be deemed to be antithetical to the principles of constitutional democracy...

4.2.4 Thus, the Court hereby rules that:

- (i) The Petitioner has no jurisdiction to file a Constitutional Writ as the Petitioner is not a party who is directly harmed or has the right to invoke ‘class action suit’ as per Section 149 of the CCPC, and declares the lack of ‘*locus standi*’ or *legal standing*” as per Section 31.2 of the CCPC. Under these provisions, only a person or class of individuals, whose rights are directly affected or who suffered an actual injury has the legal standing to sue;
- (ii) The Petitioner’s invocation of ‘legal standing’ based on Article 21, Section 18 and Article 7, Section 23 of the Constitution is not tenable. The Supreme Court *in Re Government vs. Opposition* ruled that “...*Filing of petition against the Government by the Opposition Party and individuals who have locus standi and a concrete case or controversy must be allowed.*” To uphold the binding precedent, the petition must be directly filed by those individuals who are directly affected and not by the political parties who are outside the purview of the Parliament;
- (iii) The Parliamentary remedial measures have already been taken to consider any fiscal incentives to be introduced as Money Bill and other related measures to rectify the concern and the controversy related to fiscal incentives granted thus far by way of the amendment of Sales Tax, Customs and Excise Act, 2000, Income Tax Act, 2001 and other relevant Acts. In this regards, the Court cautions that any Money Bill particularly granting fiscal incentives that stretches over longer period extending beyond the term of the Government, may be cautiously vetted based on the

intended mandate of a particular government elected through periodic election for a fixed term of Five Years. The Court observes that any fiscal incentives be based on the “Principles of State Policy” enshrined under Article 9, Sections 7, 8, 9 and 10 of the Constitution and governments must endeavourer to promote such principles enshrined as such:

Section 7:

“The State shall endeavour to develop and execute policies to minimize inequalities of income, concentration of wealth, and promote equitable distribution of public facilities among individuals and people living in different parts of the Kingdom.”

Section 8:

“The State shall endeavour to ensure that all the Dzongkhags are treated with equity on the basis of different needs so that the allocation of national resources results in comparable socioeconomic development.”

Section 9:

“The State shall endeavour to achieve economic self-reliance and promote open and progressive economy.”

Section 10:

“The State shall encourage and foster private sector development through fair market competition and prevent commercial monopolies.”

- (iv) The political and constitutional mandate of a particular government is term based and therefore, the Court observes that any past fiscal incentives or schemes should be subject to review, if necessary, by the succeeding Government and subsequently ratified by the Parliament through amendment or by way of introducing a new Money Bill on those past fiscal incentives; and
- (v) It is the vision of our Monarchs that the Constitutional basis of the system is the one wherein the democracy functions under the Constitution for many years to come. Therefore, in the words of His Majesty, the democratic system should be subject to constant evaluation, nurturing and

finding solutions to issues through consensus, engaging the collective wisdom of Parliament and other relevant institutions for which the court's intervention should be the last resort.

5. COURT ORDER:

- 5.1 The Court granted full opportunity to the parties to make their submissions by way of written depositions (as provided in this order), documents on record, and the oral arguments. All their submissions were given most careful consideration.
- 5.2 The Court after considering the merits of the petition in particular, reference to the Petitioner seeking the constitutional writ, the prayer for issuance of such ruling or appropriate order against the Respondent was heard exhaustively. The DNT was represented by their two learned counsels and the Government was represented by learned Attorney General and Deputy Attorney General.
- 5.3 Having established without prejudice, the Court hereby dismisses the petition as per section 32.1 (c) of the Civil and Criminal Procedure Code on the grounds and reasons cited in this Order and holds non-justiciable to uphold the prayers for the lack of the Petitioner's *locus standi* and the Respondent's argument that subject matter is *sub judice* is unequivocally dismissed.

Appeal

The matter was exhaustively heard in accordance with Sections 96 of the Civil and Criminal Procedure Code. The Court hereby orders that an appeal may be preferred to the Supreme Court within ten days of this Order as per Sections 96.5 and 109.1 (c) of the Civil and Criminal Procedure Code.

ISSUED UNDER THE HAND AND SEAL OF THIS COURT ON THE NINTH DAY OF NOVEMBER TWO THOUSAND AND SEVENTEEN CORRESPONDING TO THE TWENTY FIRST DAY OF THE NINETH MONTH OF THE FIRE FEMALE ROOSTER YEAR.

(Sangay Khandu)

(Lungten Dubgyur)

(Tshering Namgyel)

(Duba Dukpa)

(Kinley Dorji)

(Pema Wangchuk)

(Pema Rinzin)