

(2014) 06 GAU CK 0017

Gauhati High Court

Case No: W.P. (C) No. 1930 of 2006

Pabhojan Tea Estate

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision: June 13, 2014

Acts Referred:

- Central Sales Tax Act, 1956 - Section 9, 9(2), 9(2-A)
- Constitution of India, 1950 - Article 226, 227
- Finance Act, 2003 - Section 128(1), 157, 157(1), 157(3)

Citation: (2014) 307 ELT 448 : (2014) 27 GSTR 219

Hon'ble Judges: Abhay Manohar Sapre, C.J; Arup Kumar Goswami, J

Bench: Division Bench

Advocate: K.N. Choudhury, Sr. Advocate and Ms. A. Borpujari, Advocate for the Appellant;
D.C. Chakraborty, Central Govt. Counsel, Advocate for the Respondent

Judgement

Abhay Manohar Sapre, C.J.

By filing this writ petition under Article 226/227 of the Constitution of India, the assessee seeks to challenge the demand dt. 27.4.2005 (Annexure-4) for Rs. 6,96,000, raised on it by Superintendent of Central Excise, Golaghat (respondent no 5) towards payment of "interest" on account of delayed payment made by the writ petitioner of (1) additional duty of excise payable under the Finance Act 2003,(2) cess payable under the Tea Act and (3) Education cess payable under the Finance Act on the "Tea" produced and sold by them during the period (April 2003 to December 2005.)

2. The fact of the case lies in a narrow compass. Indeed, issue involved in the writ petition is purely legal. However, in order to appreciate the issue, it is necessary to set out facts with relevant legal provisions.

3. The petitioner is a proprietorial concern. It is engaged in the business of manufacture and sale of "Tea". It has a factory located at Barapathar in District

Golaghat. The "Tea" is an excisable commodity under the provisions of Central Excise Act.

4. By Finance Act 2003, the Parliament imposed an additional excise duty payable as a surcharge on "Tea and Tea waste" at the rate of "Rs. one per Kg". Section 157(1) of the Finance Act provided that there shall be levied and collected for the purpose of the Union, by surcharge, an "additional duty of excise" at the rate specified in the schedule.

5. Sub Section (2) provided that the additional excise duty payable under sub section (1) would be in addition to any other duties of excise chargeable on such goods under the Central Excise Act at the rates specified in the Schedule appended to the Act.

6. Sub Section (3) provided that the provisions of Central Excise Act and the Rules made there under including those relating to refunds, exemptions from payment of duties and imposition of penalty, shall as far as may be, apply in relation to collection of additional duty of excise leviable under this Section. The fourth schedule of the Act was accordingly amended.

7. Section 157 and the fourth schedule read as under:-

157. Additional duty of excise (tea and tea waste).-

(1) In the case of goods specified in the Fourth Schedule, being goods manufactured in India, there shall be levied and collected for the purposes of the Union, by surcharge, an additional duty of excise, at the rate specified in the said Schedule.

(2) The additional duty of excise referred to in subsection (1), shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act or any other law for the time being in force.

(3) The provisions of the Central Excise Act and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty, shall, as far as may be, apply in relation to the levy and collection of the additional duty of excise leviable under this section in respect of the goods specified in the Fourth Schedule as they apply in relation to the levy and collection of the duties of excise on such goods under that Act or those rules, as the case may be.

THE FOURTH SCHEDULE

[See sections 128(1) and 157(1)]

8. The petitioner was therefore liable to pay additional duty of excise on the Tea produced at the rate of Rs. one per Kg in accordance with the provisions of Section 157 of the Finance Act 2003 in addition to other duties payable in law failing which it was recoverable in accordance with the provisions of Central Excise Act by virtue of Section 157(3) *ibid*.

9. By letter/demand dt 27.4.2006 (annexure-4), the Superintendent of Central Excise (respondent No. 7) demanded a total sum of Rs. 6,96,000.00 from the petitioner towards payment of interest at the rate of 24 % on account of delayed payment of additional duty of excise of Rs. 166,622.00 which the petitioner had paid up to 31.3.2005. According to the department, since the payment of additional duty of excise was made late during the period in question, petitioner was liable to pay interest on such delayed payment. The demand enclosed the details of the amount of additional duty of excise, the period within which it was to be paid and actually paid, and lastly, the period for which the interest was demanded.

10. The petitioner being aggrieved by this demand, filed the writ petition and questioned its legality and correctness. Notice of this writ petition was served on the respondents.

11. Heard Mr. K.N. Choudhury, learned senior counsel assisted by Ms. Amrita Borpujari, learned counsel for the petitioner and Mr. D.C. Chakraborty, learned Central Govt. Counsel for the respondents.

12. Shri K.N. Choudhury, learned senior counsel while assailing the impugned demand of interest, contended that it was without jurisdiction for want of authority in law. Elaborating his submission, learned counsel contended that liability to pay/recover/demand/levy interest arises only when there is a substantive law made by Parliament/State to that effect. According to him, unless Revenue was able to show the specific authority which empowers them to charge the interest, no interest could be demanded from the assessee for the delayed payment of additional duty of excise. Learned senior counsel pointed out that Finance Act of 2003 only empowered the Revenue to charge additional duty of excise on tea by virtue of Section 157(1) and further empowered to recover and if not paid or less paid by taking recourse to the provisions of Central Excise Act. He pointed out that in the absence of any charging Section to levy interest in the Finance Act 2003, no demand for interest could be raised by the Revenue. Learned senior counsel pointed out that Section 157(3) only empowered the Revenue to apply the provisions of Central Excise Act in relation to imposition of penalty, grant of exemptions and claim for refund but Section 157(3) specifically excluded within its net "interest". He urged that substantive provision relating to levy of interest contained in the Central Excise Act also, therefore, cannot be applied to additional duty of excise, by relying on Section 157(3) *ibid*.

13. Learned senior counsel placed heavy reliance on two decisions of the Supreme Court reported in [J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another](#), and in [India Carbon Ltd. etc. Vs. State of Assam](#), and contended that the issue urged by him remains no more *res integra* and squarely covered by these two decisions in petitioner's favour.

14. Learned counsel for the respondent supported the impugned demand and urged for its upholding. He contended that on harmonious interpretation of the provisions of Finance Act 2003 and Central Excise Act, the demand for interest imposed on the writ petitioner deserves to be upheld.

15. Having heard the learned counsel for the parties and on perusal of the record of the case, we find force in the submission of learned counsel for the petitioner.

16. The basic question which arises for consideration in this writ petition is whether there is any substantive provision which empowered the Revenue to charge interest from the assessee for delayed payment of additional duty of excise payable u/s 157(1) of the Finance Act 2003 and if so, which is that provision?

17. The answer to this question has to be found by carefully reading the law laid down by the Supreme Court in two decisions reported in [J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another](#), and later followed in [India Carbon Ltd. etc. Vs. State of Assam](#), . It is in these two decisions, this question was examined by the Supreme Court and on interpretation of the provisions of the Acts, which fell for interpretation in these cases, it was held therein that Revenue had no power to levy interest for want of any substantive law.

18. This issue came up for consideration first before the Constitution Bench in the case of J.K. Synthetics Ltd. supra wherein following general principle of law was laid down.

16. It is well-known that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. (See *Whitney v. IRC*, *CIT v. Mahaliram Ramjidas*, *India United Mills Ltd. v. Commissioner of Excess Profits Tax, Bombay* and *Gursahai Saigal v. CIT, Punjab*). But it must also be realised that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount. (See *Bengal Nagpur Railway Co. Ltd. v. Ruttanji Ramji* and *Union of India v. A.L. Rallia Ram*). Our attention was, however drawn by Mr. Sen to two cases. Even in

those cases, CIT v. M. Chandra Sekhar and Central Provinces Manganese Ore Co. Ltd. v. CIT, all that the Court pointed out was that provision for charging interest was, it seems, introduced in order to compensate for the loss occasioned to the Revenue due to delay. But then interest was charged on the strength of a statutory provision, may be its objective was to compensate the Revenue for delay in payment of tax. But regardless of the reason which impelled the Legislature to provide for charging interest, the Court must give that meaning to it as is conveyed by the language used and the purpose to be achieved. Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law. So construed and applying the normal rule of interpretation of statutes, we find, as pointed out by us earlier and by Bhagwati, J in the Associated Cement Co. case, that if the Revenue's contention is accepted it leads to conflicts and creates certain anomalies which could never have been intended by the Legislature.

19. It is this principle which was later applied in the case of India Carbon Ltd. (supra) by the Supreme Court. It is therefore necessary to appreciate the facts of the case of "India Carbon Ltd." to find out as to how the Supreme Court applied the aforesaid principle to the facts of India Carbon Ltd. for holding therein that Revenue did not have power to demand interest from the assessee.

20. The assessee (India Carbons Ltd.) was engaged in the business of manufacture and sale of petroleum coke. The assessee was registered dealer under the Central Sales Tax Act (for short called CST Act) and was therefore liable to pay Central Sales tax on petroleum coke, a declared good under the CST Act. During the assessment years 1974 to 1998, the assessee delayed in making payment of the Central Sales Tax dues on certain inter-state sales transactions. The assessing authority therefore, raised a demand for payment of interest at the rate of 24 % per annum u/s 35-A of the Assam Sales Tax Act 1947(for short called-AST ACT). The assessee felt aggrieved, filed the writ petition in the Gauhati High Court questioning its legality and correctness. There was, however, a difference of opinion between the two learned judges of the Division Bench on the issue arising in the petition and therefore, the matter was referred to the third judge by formulating 4 questions. One of the questions which was referred to the third judge for his decision was-Whether Section 9(2) of the CST Act visualize any payment of interest? The third judge answered the question in affirmative and held that demand raised by the department for interest was justified. It was, accordingly, upheld which resulted in dismissal of assessee's writ petition. The assessee being aggrieved, appealed to the Supreme Court.

21. The Supreme Court applied the principal of law laid down by the Constitution Bench in the case of J.K. Synthetics (supra). Justice Bhargava (as his Lordship then was and later CJI), speaking for the bench in Para 7 explained the legal position emanating from the Constitution Bench decision as under.

7. This proposition may be derived from the above: interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf.

22. Their lordship then examined the wordings of Section 9(2) and (2-A) of CST Act with a view to find out as to whether such provision can be relied upon by the Revenue to sustain the demand of interest on the assessee to show the source of power to levy/charge interest. On interpreting the wording of Section 9(2) and (2A) it was held that Section 9 does not empower the Revenue to levy/charge interest from the assessee. It was held that since there is no substantive provision in the CST Act to charge interest on delayed payment of CST, the demand for charging interest from the assessee was bad in law.

23. It is apposite to quote the law laid down on this issue in para 11 to 14 as under.

11. Section 9(2-A) makes applicable to the assessment, reassessment, collection and enforcement of Central Sales tax the provisions relating to offences and penalties contained in the State Acts as if the Central sales tax was a State sales tax. But Section 9(2-A) makes no reference to interest.

12. There is no substantive provision in the Central Act requiring the payment of interest on Central sales tax. There is, therefore, no substantive provision in the Central Act which obliges the assessee to pay interest on delayed payments of Central sales tax.

13. Now, the words "charging or payment of interest" in Section 9(2) occur in what may be called the latter part thereof. Section 9(2) authorizes the sales tax authorities of a State to assess, reassess, collect and enforce payment of the Central sales tax payable by a dealer as if it was payable under the State Act; this is the first part of Section 9(2). By the second part thereof, these authorities are empowered to exercise the powers they have under the State Act and the provisions of the State Act, including provisions relating to charging and payment of interest, apply accordingly. Having regard to what has been said in the case of Khemka & Co. it must be held that the substantive law that the States' sales tax authorities must apply in the Central Act. In such application, for procedural purposes alone, the provisions of the State Act are available. The provision relating to interest in the latter part of Section 9(2) can be employed by the States' sales tax authorities only if the Central Act makes a substantive provision for the levy and charge of interest on Central sales tax and only to that extent. There being no substantive provision in the Central Act requiring the payment of interest on Central sales tax the States' sales tax authorities cannot, for the purpose of collecting and enforcing payment of Central sales tax, charge interest thereon.

14. The requirement of the 1st respondent's sales tax authorities that the appellant should pay interest at the rate of 24% p.a. on delayed payment of Central sales tax under the provisions of Section 35-A of the State Act must, therefore, be held to be

bad in law.

24. Coming now to the facts of this case, when we examine the provisions of Finance Act 2003 keeping in view the aforesaid principle of law, then we find that there is no substantive provision contained in the Finance Act 2003 to charge/levy interest on delayed payment of additional excise duty payable u/s 157(1) *ibid*.

25. In our view, the liability to pay additional duty of excise on tea is created for the first time by Section 157(1) of the Finance Act 2003. However, the Finance Act of 2003 does not contain any substantive provision to charge/levy interest from the assessee in case if payment of additional duty of excise is not made or made late. So far as Section 157(3) is concerned, it does not mention the word "interest" but only mentions the words "imposition of penalty, refund and exemption". In other words, by virtue of Section 157(3), only provisions relating to "imposition of penalty, refund and exemption" from Central Excise Act are made applicable to Finance Act, 2003. This, therefore, clearly suggests that so far as levy of additional duty of excise on tea is concerned, no provision is made applicable to the levy relating to payment of interest for its delayed/short/non-payment. To put it differently, firstly, there is no provision made to levy/charge interest in the Finance Act, 2003; secondly, substantive provision relating to levy/charging of interest from Central Excise Act is not made applicable to Finance Act, 2003 and thirdly, by virtue of Section 157(3), only provisions relating to penalty, refund and exemption contained in Central Excise Act are made applicable to Finance Act, 2003.

26. As rightly pointed out by Mr. Choudhury, learned senior counsel for the petitioner, that even if the expression "interest" had been mentioned in Section 157(3) of the Finance Act 2003, yet it would not have improved the case of Revenue for sustaining the demand for interest. In our view, it was for the reason that Supreme Court while interpreting the expression "charging or payment of interest" occurring in Section 9 of Central Sales Tax Act has held that Section 9 is only a "procedural provision" notwithstanding use of this expression in Section 9 but not a "substantive provision" and hence, no recovery of interest could be made on the basis of such procedural provision.

27. In our considered view, the Revenue may have power to charge interest from the assessee for non-payment/short payment/delayed payment of "excise duty" on the excisable goods but there is a distinction between "additional duty of excise" and "excise duty". The former is paid under the Finance Act 2003 whereas the later is paid under the Central Excise Act. Since the Finance Act, 2003, does not contain any substantive provision to charge interest, a fortiori no demand for interest could be raised for non-payment/short payment/delayed payment of additional excise duty under the Finance Act, 2003. Such is not the case of non-payment/short payment/delayed payment of "excise duty" because it is paid under the Central Excise Act which contains a specific substantive provision to charge the interest. If the intention of legislature was to levy interest also on non-payment/short payment

of "additional duty of excise" then, it would have made separate specific substantive provision in the Finance Act, 2003 itself. However, it was not done.

28. Learned counsel for the respondent was not able to point out any significant distinguishing feature from the law laid down by Supreme Court in the case of India Carbon Ltd., which would persuade this Court to sustain the impugned demand.

29. In the light of foregoing discussion, we hold that impugned demand raised by respondent is without jurisdiction as it was issued by the department without there being any substantive provision to levy/charge interest in the Finance Act, 2003. It is therefore not legally sustainable and has to be quashed.

30. In view of foregoing discussion, the writ petition succeeds and is allowed. The impugned demand dated 27.4.2005 issued by the respondent No. 7 (Annexure-4) is quashed by issuance of writ of certiorari. As a result, if the petitioner is found to have paid any amount pursuant to the impugned demand, then the same may be refunded to them.

31. No cost.