
(2014) 07 KL CK 0292

In the High Court Of Kerala

Case No : W.A. Nos. 1807 and 1828 of 2013 in W.P. (C) No. 4808 of 2010

Assistant Commissioner (KVAT) and Others

APPELLANT

Vs

ACC Limited

RESPONDENT

Date of Decision : 03-07-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31, 36
Contract Act, 1872 — Section 50
Finance (No. 2) Act, 1998 — Section 88
Income Tax Act, 1961 — Section 140A, 140A(1)
Kerala General Sales Tax Act, 1963 — Section 14, 17, 19, 19A, 19B

Citation : (2015) 78 VST 169

Hon'ble Judges : Manjula Chellur, C.J.;A.M. Shaffique, J

Bench : Division Bench

Advocate : Bobby John Pulikkaparambil, Government Pleader, Advocates for the Appellant; Joseph Markose, Senior Advocate and Ramesh Cherian John, Advocates for the Respondent

Judgement

Dr. Manjula Chellur, C.J.—The above two appeals, one is filed by Revenue and another is filed by the assessee. The facts that led to filing of the above appeals are as under :

"The assessee is a company engaged in manufacture and sale of cement. For the assessment year 1998-99, provisional assessment was completed as per exhibit P1 order. According to the assessee, it was erroneously assessed to sales tax on the turnover involving second sale of cement manufactured and sold to it by M/s. Cochin Cements Limited. Additional liability to sales tax and imposition of interest on account thereof was disputed by filing appeals. The statutory first appellate authority passed a conditional order of stay directing the assessee to remit a sum of Rs. 2,00,00,000 (rupees two crores) as per exhibit P3. Admittedly, the assessee deposited the said amount and appeal was dismissed. Hence, the assessee carried the matter in second appeal before the Tribunal. The Tribunal also passed a conditional order of stay directing the assessee to remit Rs.

1,80,99,000 as per exhibit P5. The assessee deposited the amount towards tax for obtaining stay of recovery of the demand. The Tribunal cancelled the provisional assessment and opined that levy under section 5(2) of the Kerala General Sales Tax (KGST) Act was not sustainable. The Revenue filed revision (S. T.R. No. 76 of 2008) before this court. This court allowed the revision opining that levy under section 5(2) of the KGST Act is valid and directed the officer to complete final assessment. By that time, final assessment was already completed. The assessee approached the apex court by filing special leave petition against the decision of this court and the same is pending consideration."

Meanwhile, in 2008, the State Government announced the amnesty scheme for settlement of arrears of tax under the KGST Act and relevant section 23B was inserted in the KGST Act. Apparently, the assessee also applied for settlement under amnesty scheme as per section 23B of the Act. By virtue of the provisions under section 23B, waiver of 95 per cent of interest on tax amount came to be granted and total amount was computed at Rs. 5,28,18,168. This was intimated to the assessee. Initially though the assessee disputed the calculation, finally remitted the amount as per intimation of the Department. Thereafter, the assessee filed W.P. (C) No. 4808 of 2010 contending, inter alia, that the amount remitted twice as per conditional orders of stay should be appropriated towards principal amount and computation under the amnesty scheme should be modified accordingly. According to the assessee, the Department was wrong in demanding payment of full amount without granting credit for deposits of tax made for the year pursuant to interim orders of the first appellate authority and Appellate Tribunal as well.

2. According to the Department, interim deposit of Rs. 3,80,99,000 had already been adjusted towards interest as on the date of such deposits considering section 55C of the KGST Act. But, according to the assessee, under threat of rejecting the settlement application under amnesty scheme, the assessee remitted the full settlement amount under protest without having set off for the deposits already made during the pendency of litigation.

3. The learned single judge partly allowed the claim and directed appropriation of deposit of Rs. 1,80,99,000 towards tax holding that the same was a deposit made "on account" but denied appropriation of rupees two crores on the ground that deposit was an open payment in the absence of a specific direction in the interim order of stay. Aggrieved by the opinion of learned single judge (supra), the Revenue filed W.A. No. 1807 of 2013 and the assessee filed W.A. No. 1828 of 2013.

4. According to the assessee, the deposits which were made pursuant to interim direction of two appellate authorities during the pendency of the appeals cannot be considered on par with remittance of tax under voluntary scheme as both provisions have its own characteristics and deposits are entirely different from each other. According to the assessee, the deposits made during the pendency of litigation continues to be a deposit until the litigation is over. Therefore, in the

light of civil appeal pending before, the honourable Supreme Court, the Revenue has no right to appropriate the deposit towards interest. The assessee further contends that the provisos to sections 34(5) and 39(6) of the KGST Act refer to powers of appellate authorities to give directions in respect of pre-deposit pending appeals. Therefore, it can only be pre-deposit of tax. The assessee further contends that none of the provisions of the KGST Act shows that section 55C of the KGST Act overrides the provisions of sections 34 and 39, hence, pre-deposit amount cannot be appropriated towards interest under section 55C. They also contend that section 23B starts with non obstante clause and therefore, it overrides all other provisions of the KGST Act, therefore the very benefit provided under section 23B, if interpreted as advanced by the Revenue, becomes redundant. So far as section 23B of the KGST Act, there is no requirement that litigation shall remain pending as on the date of application under amnesty scheme. On the other hand, sub-section (7) of section 23B permits continuation of litigation even after settlement of demand. Placing reliance on several decisions, which would be referred to later, they have sought for allowing W.A. No, 1828 of 2013 and dismissing W.A. No. 1807 of 2013.

5. As against this, learned Government Pleader, by referring to amnesty scheme introduced under section 23B of the KGST Act, contends that at the time of remittances made by the assessee as per exhibits P3 and P5 conditional orders of stay, no amnesty scheme as such was in existence, therefore, assessing authority was justified in appropriating the remittance towards interest as per clear mandate of section 55C of the KGST Act. According to the Revenue, first and second appellate authorities, being the creation of statute, have no jurisdiction to make direction to the effect that amount remitted to be appropriated towards principal amount in violation of the statutory provisions under section 55C. Therefore, the wordings in conditional orders of stay are not at all relevant to decide the controversy whether amount remitted is to be appropriated towards interest or principal amount or other amount. The unequivocal terms of section 55C mandates that any amount paid under "the Act" is to be appropriated towards interest first.

6. So far as the contention of non obstante clause in section 23B of the KGST Act, according to the Revenue, it was not in statute at the relevant point of time when pre-deposits were made by the assessee. Therefore, none of the provisions under section 23B can affect the mandate under section 55C of the KGST Act. It is further contended that amnesty scheme is applicable only in respect of arrears due at the time of scheme. Therefore, arrears due could be only after appropriation of amounts remitted as per conditional orders of stay at exhibits P3 and P5. In the light of section 55C(1) creating an embargo against adjusting any payments made towards tax when interest is outstanding, the only exception could be sub-section (2) of section 55C which says, amount already appropriated towards tax need not be computed. This clearly indicates that no other exception was made to the rule that first dues towards interest has to be adjusted. The word arrears appearing in section 23B would only mean arrears as on the date of

coming into force of the provision. It is further contended that the expression "is in arrears" at section 23B itself shows that the scheme is applicable only for the amount in arrears as on the date of provision coming into force, i.e., April 1, 2008; therefore, the amount "is in arrears" means the balance outstanding after appropriating payments made as per stay orders towards interest.

7. Certain dates and provisions of the Act are relevant in order to appreciate the genuineness of the claim made by the assessee. Admitted facts are provisional assessment order came to be passed by the Assistant Commissioner, Commercial Taxes on July 7, 1999. O.P. No. 20762 of 1999 came to be filed on August 11, 1999. Said writ petition was dismissed on July 18, 2006 opining that the assessee can invoke the alternate remedy by filing appeal before the Deputy Commissioner (Appeals). On August 16, 2006, appeal and stay petition bearing No. 823 of 2006 came to be filed challenging the provisional assessment order. On September 29, 2006 order of stay was granted subject to deposit of Rs. 2,00,00,000 which came to be deposited on October 28, 2006. On November 30, 2006 appeal was dismissed on merits upholding the provisional assessment order. On March 2, 2007, an appeal along with stay petition bearing No. 40 of 2007 came to be filed before the Kerala Sales Tax Appellate Tribunal. On March 14, 2007 stay was granted in respect of provisional assessment directing the assessee to deposit 50 per cent of the balance disputed tax amount and same came to be deposited on April 12, 2007 (Rs. 1,80,99,000). Meanwhile, final assessment order was passed on March 19, 2007 and same was served on the assessee on March 24, 2007. On April 19, 2007, an appeal along with stay petition came to be filed before the Deputy Commissioner (Appeals) against the final assessment order. On August 31, 2007, the Appellate Tribunal allowed the appeal in respect of provisional assessment order passed granting full relief to the assessee. Aggrieved by the same R.P. No. 76 of 2008 along with application for condonation of delay came to be filed before this court by the Department on February 27, 2008. No stay order was granted. On March 10, 2008, a letter came to be filed before the Assistant Commissioner, Commercial Taxes seeking refund of pre-deposit in pursuance of the order of the Kerala State Appellate Tribunal in favour of the assessee. On October 3, 2008, the appeal filed against final assessment order was dismissed. On December 19, 2008, an appeal along with stay petition was filed before the Appellate Tribunal challenging the order of the first appellate authority (final assessment). On February 21, 2009, the Appellate Tribunal granted order of stay so far as final assessment proceedings. On March 31, 2009, revision petition filed by the Department in respect of provisional assessment order was disposed of.

8. When things stood as stated above, on June 25, 2009, an application for settlement of arrears under Amnesty Scheme came to be made and intimation of payment of arrears was sent to the assessee by assessing authority on July 3, 2009. Meanwhile, an SLP came to be filed against the order of this court on July 4, 2009. Another letter dated July 16, 2009 was submitted by the assessee before the Assistant Commissioner (KVAT) contending that the amount pre-

deposited by them was not considered for computation of liability under the Amnesty Scheme. Meanwhile, the Appellate Tribunal passed final order in respect of final assessment proceedings on July 17, 2009. On July 18, 2009, the Assistant Commissioner (KVAT) intimated that pre-deposit has been appropriated towards interest due as on date of deposit under section 55C of the KGST Act. On August 5, 2009, a notice was issued by the Assistant Commissioner (KVAT) proposing to reject the amnesty application since the assessee failed to remit 25 per cent of the arrear amount within fifteen days. On August 19, 2009, personal hearing regarding pre-deposit was held. On August 21, 2009, another letter came to be filed before the Assistant Commissioner (KVAT) intimating that in terms of the directions issued, the assessee was making initial payment of Rs. 1,32,04,542 and sought for revision of schedule. On August 24, 2009, the Assistant Commissioner permitted the assessee to remit the balance amount under the amnesty scheme in three equal monthly installments. Accordingly by November 17, 2009, all installments came to be remitted. On December 28, 2009 S.T. Rev. No. 13 of 2010 came to be filed before this court against final assessment proceedings. On February 15, 2010, W.P. (C) No. 4808 of 2010 came to be filed before this court against the amnesty order. Meanwhile, the revision came to be disposed of. On July 4, 2009 an SLP came to be filed against the order of this court dated March 31, 2009 and the same was admitted on March 8, 2010. Again another SLP filed against the final order of this court was allowed.

9. In the light of several events as stated above, when two SLPs are allowed and appeals are pending consideration so far as challenge made to the provisional assessment and also final assessment, whether pre-deposit in pursuance of conditional stay orders could be appropriated towards interest as contemplated under section 23B of the Act. Statutory provisions to be considered in the above appeals are sections 23B, 34, 39 and 55C of the KGST Act, which read as under :

"23B. Reduction of arrears in certain cases.-(1) Notwithstanding anything contained in this Act, or in any judgment, decree or order of any Tribunal, an assessee who is in arrears of tax or any other amount due under the Act relating to the period ending on March 31, 2005, may opt for settling the arrears by availing of reduction at the following rates :

(a) In the case of demands relating to the periods up to and including March 31, 1991 a reduction of twenty five per cent for the tax amount, and complete reduction of the interest on the tax amount and for the amount of penalty and interest thereon;

(b) In the case of demands relating to the period from April 1, 1991 to March 31, 1996, a complete reduction of the interest on the tax amount, and for the amount of penalty and interest thereon;

(c) In the case of demands relating to the period from April 1, 1996 to March 31, 2000, a reduction of ninety five per cent of the interest on the tax amount, and for the amount of penalty and interest thereon;

(d) In the case of demands relating to the period from April 1, 2000 to March 31, 2005, a reduction of ninety per cent of the interest on the tax amount, and for the amount of penalty and interest thereon; and

(e) In cases where principal amount has already been remitted prior to coming into force of section 55C of the Act, a reduction of ninety per cent of the interest amount.

(2) Notwithstanding anything contained in the Kerala Revenue Recovery Act, 1968, reduction of arrears under sub-section (1) shall be applicable to those cases in which revenue recovery proceedings have been initiated and the assessing authorities shall have the power to collect such amounts on settlement under sub-section (1) and where the amount is settled under sub-section (1) the assessing authorities shall withdraw the revenue recovery proceedings against such dealers which will then be binding on the Revenue Authorities and such dealers shall not be liable for payment of any collection charges.

(3) A dealer who wishes to opt for payment of arrears under sub-section (1) shall make an application to the assessing authority in the prescribed form before June 30, 2008.

(4) On receipt of an application under sub-section (3) the assessing authority shall work out the actual amount of tax and other amounts due from the dealer under sub-section (1) and shall intimate the amount to the dealer, and thereupon the dealer shall remit twenty five per cent of the amount within fifteen days of receipt of the intimation, and the balance amount in three equal monthly installments starting from the subsequent month.

(5) If the dealer commits any default in payment of the installments the reduction granted under sub-section (1) is liable to be revoked.

(6) No action under sub-section (5) shall be taken without giving notice to the dealer.

(7) If the amount settled under this provision has been a subject-matter of appeal or revision, such appeal and revision may be continued and if the final orders of such appeal or revision results in the reduction of tax payable under this Act, the amount so reduced shall be refunded. But if, as the result of such appeal or revision, the tax payable under this Act is enhanced, the dealer shall pay such enhanced amount, with interest thereon, in accordance with the provisions of this Act.

34. Appeals to Appellate Assistant Commissioner.-(1) Any person objecting to an order affecting him passed by an appropriate authority under sub-section (6) or sub-section (7) of section 14, sub-section (2) or (sub-section (3) or sub-section (4) or sub-section (4A) of section 17), (xxxx) sub- section (1) or sub-section (2) of section 19, (section 19A) (section 19B, section 19C) section 26, section 29, (section 29A) (section 30 or section 30A or an order passed by a lower authority under section 43) may, within a period of thirty days from the date on which the

order was served on him, appeal against such order to the Appellate Assistant Commissioner:

(2) to (4)...

(5) Notwithstanding that an appeal has been preferred under sub-section (4), the tax or other amounts shall be paid in accordance with the order against which the appeal has been preferred :

Provided that the Appellate Assistant Commissioner may, in his discretion, give such directions as he thinks fit in regard to the payment of the tax before the disposal of the appeal, if the appellant furnishes sufficient security to his satisfaction in such form and in such manner as may be prescribed.

39. Appeal to Appellate Tribunal.-(1) Any person objecting to an Order referred to in the first proviso to sub-section (1) of section 34 or any officer empowered by the Government in this behalf or any other person objecting to an Order passed by the Appellate Assistant Commissioner under sub- section (3) of section 34 and any person objecting to an order passed by the Deputy Commissioner under sub-section (1) of section 35 (xxx) may, within a period of sixty days from the date on which the order was served on him in the manner prescribed, appeal against such order to the Appellate Tribunal :

(2) to (5)...

(6) Notwithstanding that an appeal has been preferred under sub-section (1), the tax shall be paid in accordance with the order of assessment against which the appeal has been preferred :

Provided that the Appellate Tribunal may, in its discretion, give such directions as it thinks fit in regard to the payment of the tax before the disposal of the appeal, if the appellant furnishes sufficient security to its satisfaction in such form and in such manner as may be prescribed.

55C. Appropriation of payment.-(1) Where any tax or any other amount due or demanded under the Act is paid by any dealer or other person, the payments so made shall be appropriated first towards interest accrued on such tax or other amount under sub-section (3) of section 23 on such date of payment and the balance available shall be appropriated towards principal outstanding, notwithstanding any request to the contrary by the dealer or any person making such payments.

(2) Notwithstanding anything contained in sub-section (1) where any dealer or other person has paid any amount towards tax or any other amount and such payment has been set off towards the principal amount prior to the coming into effect of this section, no re-computation of such payment shall be made under sub-section (1)."

10. The learned counsel appearing for the appellant/assessee places reliance on Mangilal S. Jain Vs. Commissioner of Income Tax and Another, . This judgment is

from High Court of Karnataka. Their Lordships had an occasion to consider section 140A(1) of the Income-tax Act with reference to Kar Vivad Samadhan Scheme of 1998. Their Lordships opined that Explanation to section 140A(1) providing adjustment of payment towards interest was not applicable for the following two reasons (page 36 in 257 ITR) :

"(i) The provisions of section 88 of the Finance (No. 2) Act, 1998, prevail over the provisions of section 140A of the Income-tax Act, section 88 specifically states that "notwithstanding anything contained in any direct tax enactment", the amount payable under the KVS Scheme will be as stated in the scheme.

(ii) In view of the pendency of the revision, any payment made by the assessee towards tax arrears will be on account and without prejudice subject to the final decision in the revision."

11. They further opined that if litigation is pending, it would mean that the amount determined as income-tax and the amount determined as interest by the assessing authority has not attained finality and is subject to the decision in the pending litigation.

12. The appellant/assessee also places reliance on Full Bench decision of this court in *Ideal Trading Company v. Sales Tax Officer* [2010] 18 KTR 106 (Ker) [FB] to contend that the deposit made pursuant to an interim order remains as deposit. He also places reliance on *Corporation Bank Vs. Saraswati Abharansala and Another*, to contend that sum paid in excess has to be refunded since the rate has been reduced with retrospective effect. In the case of *Commissioner of Income Tax, West Bengal-II, Calcutta Vs. Hindustan Housing and Land Development Trust Ltd.*, , the apex court held that withdrawal of enhanced land acquisition award amount deposited in court pursuant to interim orders cannot be appropriated and assessed as income as the appropriation will happen only when litigation is finally determined. It is pointed out that there is a clear distinction between cases where right to receive payment is in dispute and where right to receive payment is admitted and only quantification levied is to be determined. In the case of *Voltas Limited Vs. The Union of India and Others*, , it was held that a pre-deposit pending appeal remains a deposit and is available for appropriation only on the final order being confirmed. In *P.S.L. Ramanathan Chettiar and Others Vs. O. Rm. P. Rm. Ramanathan Chettiar*, the apex court held that depositing a sum in court to purchase peace by way of stay of execution does not pass title to the money to the decree holder and subject to payment is not in satisfaction of the decree. In *Sanjay Founders Pvt. Ltd. v. Commissioner of Central Excise, Pune-II* [2006] 195 ELT 120 (Trib.-Mum) it was held that a pre-deposit pending appeal remains a deposit and is available for appropriation only on the final order being confirmed.

13. As against this, State has placed reliance on several judgments. Reliance is placed on [2000] 3 KLT 377 in the case of *Joseph v. State of Kerala*. The question that arose before their Lordships was interpretation of rule 6(25) of Abkari Shops

(Disposal in Auction) Rules, 1974 (Kerala). Under this every creditor is entitled to appropriate payments made first towards liability of interest and then only towards principal due. Default contractor is not entitled to contend that amount paid by him under the direction of the court should first be adjusted towards kist amount due. This provision is similar to section 55C of the KGST Act.

14. They also place reliance on *ABY Engineering and Consultants (P) Ltd. Vs. Assistant Commissioner, Special Circle II, Department of Commercial Taxes, Ernakulam*, ; [2009] 2 KLJ 228. Their Lordships, with reference to section 55C(1) of the KGST Act, held as under (page 544 in 38 VST) :

"... the mere fact that the payment is made earlier to the enforcement of section 55C by itself would not result in any shield against recomputation. It further requires the actual appropriation by an officer towards the principal amount. By necessary implication it means that even prior to section 55C if payment is made it was certainly open to the officer to adjust it against interest. In fact, the petitioner may not have the right to contend that even prior to section 55C there was a legal right to have the amount appropriated on a mere request to demand for tax..."

15. They also referred to *Bharat Heavy Electricals Ltd. Vs. R.S. Avtar Singh and Company*, . The question was whether, in the case of part payment of decretal amount deposited in courts pursuant to its orders, principle of appropriation is applicable. In this case, court had directed payment of rupees one crore as a condition for grant of stay order. Execution of decree was kept in abeyance by further deposit of Rs. 1.95 crores. Judgment debtor raised a contention that by virtue of payment made during the pendency of the matter entire decree amount was satisfied. Both award of arbitrator and rule of court make a clear distinction between award amount and interest payable on award amount. When award amount and interest merged together and became the amount payable under the decree, amount has to be first adjusted towards interest which had become due as on that date and adjustment of balance amount only against principal. Sections 31 and 36 of the Arbitration and Conciliation Act and section 50 of Contract Act were considered.

16. They also placed reliance on *M/s. Industrial Credit and Development Syndicate Now Called I.C.D.S. Ltd. Vs. Smt. Smithaben H. Patel and Others*, ; AIR 1999 SC 1036 in the case of (*Industrial Credit and Development Syndicate now called I. C. D.S. Ltd. v. Smt. Smitnaben H. Patel*). Their Lordships held that in the absence of agreement between parties regarding mode of payment and in case debtor indicates a manner in which payments have to be adjusted, in such case creditor is not bound to accept such mode for want of an agreement between parties and they should follow the general rule of adjustment firstly towards interest and costs and then to principal amount.

17. They also relied upon the unreported decision of this court in W.A. No. 914 of 2013. In this case property of the assessee was sold for realisation of sales tax

due. Property was sold for a sum of rupees forty three lakhs which was not enough to satisfy the interest portion itself. Apparently, as on the date of sale or confirmation of sale, balance amount due to the Sales Tax Department was more than rupees fifty lakhs. According to the assessee, sale amount has to be adjusted towards sales tax and the date of adjustment shall be the date on which the sale proceeds are deposited with Revenue Department irrespective of date when factually said amount is passed on to the Sales Tax Department from Revenue Department. In that context, it was held that confirmation goes back to the actual date of Confirmation and appropriation has to be made by the procedure established by law in terms of the Revenue Recovery Act on the date of such confirmation. Therefore, the court rejected the contention of the assessee that when he availed of the amnesty scheme the sale proceeds were lying with the Revenue Department and was not transferred towards sales tax due, therefore he is entitled to get refund of the amount.

18. Based on the principles laid down in the above decisions, one has to proceed to analyse the factual situation and how provisions of the Act in question would apply to the issue which is under controversy/With the introduction of section 23B, Amnesty Scheme is brought into force giving benefit of reduction of arrears (mainly interest) in certain cases, however, subject to terms and conditions. Such conditions are enumerated at clauses (a) to (e). They include giving benefit of waiving of interest depending upon the period to which demand relates to, how actual amount should be computed so far as tax and other amounts and how intimation should be sent to the assessee concerned. It also includes benefit of installments apart from indicating consequences if there is default. Sub-clause (7) is relevant which says, if the amount settled under the Amnesty Scheme has been a subject-matter of appeal or revision, such appeal and revision may be continued and in the event of final orders of such litigation results in reduction of tax payable, the amount so reduced shall be refunded. Similarly, in case tax payable is enhanced, dealer shall pay such enhanced amount with interest thereon, in accordance with provisions of the Act.

19. Then coming to factual situation, Amnesty Scheme came to be announced with effect from April 1, 2008 by introducing section 23B in the KGST Act. By April 12, 2007 on two occasions the appellant-assessee had made two payments, one in pursuance of the appellate order dated September 29, 2006 and another on March 14, 2007 in terms of order of Sales Tax Appellate Tribunal. On August 31, 2007 the final order of Sales Tax Appellate Tribunal in respect of provisional assessment was passed favouring the assessee-appellant granting full relief and setting aside entire demand. The Revenue had filed an application for condonation of delay along with revision. On March 31, 2009 such revision was allowed. By virtue of this order, benefit given by the Tribunal was set aside and the appellant-assessee was under an obligation to pay tax and other amounts demanded by the Department. Much later, on June 25, 2009 the assessee filed an application seeking benefit under the Amnesty Scheme. According to senior counsel arguing for the appellant-assessee, since the order of the Tribunal was in

their favour, there was no obligation on them to seek benefit under the Amnesty Scheme. During pendency of Revision Petition No. 76 of 2008 before the High Court, the Amnesty Scheme was introduced. Sub-clause (7) of section 23B does not indicate that the assessee cannot take benefit if the litigation pending is at the instance of the Revenue. Therefore, as on the date of introduction of the Amnesty Scheme, litigation was pending before this court in revision and the same came to be allowed on March 31, 2009. Much later, as the Amnesty Scheme was still in force on June 25, 2009, when no litigation was pending exhibit P12 application came to be filed seeking benefit of the Amnesty Scheme. On July 3, 2009, the amount to be paid as per the Amnesty Scheme was intimated to the appellant-assessee. Thereafter, on July 4, 2009, the appellant-assessee filed SLP before the honourable Supreme Court against order in revision pending before this court pertaining to provisional assessment. SLP came to be admitted only on March 8, 2010. Prior to that, on July 16, 2009 a letter came to be filed before the Assistant Commissioner (KVAT) submitting that the amount pre-deposited by the appellant was not considered for computation of liability under the Amnesty Scheme. On July 18, 2009 the Department intimated the assessee that the pre-deposit has been appropriated towards interest due under section 55C of the KGST Act.

20. In the above factual-situation, one has to appreciate the stand of the parties. It is crystal clear, as on June 25, 2009, when the appellant-assessee chose to seek benefit of Amnesty Scheme so far as provisional assessment proceedings, no litigation was pending. But final assessment litigation was pending before the Sales Tax Appellate Tribunal. Two deposits in question pertain to the provisional assessment proceedings. It is pertinent to mention that the litigation is not in respect of evasion of tax or quantum of tax payable. According to the appellant-assessee, the very liability to pay tax is erroneous as turnover in question involves second sale of cement manufactured and sold to M/s. Cochin Cements Ltd. As on today, final assessment proceedings are also completed and order dated February 16, 2010 went against the appellant-assessee. SLP pertaining to final assessment order also filed and the same was admitted on July 19, 2010. In other words, the appellant-assessee is prosecuting litigation after admission of SLP pertaining to the very payment of tax on the ground that they are not liable to pay the same. If they are successful before the apex court, the amount paid under the Amnesty Scheme as well as two deposits made during pendency of provisional assessment proceedings would be refunded to them.

21. Then coming to the law declared by the High Court of the Karnataka in *Mangilal S. Jain Vs. Commissioner of Income Tax and Another*, it was similar to the one involved in this case. Under both the schemes, there is non obstante clause which overrides all other provisions under respective Acts. In other words, the benefit provided under section 23B contemplates consideration of the matter independently. Therefore, object and purpose with which benefit was extended under section 23B has to be understood with reference to that particular section without taking recourse to any other provision, is the contention of the appellant-

assessee. Under section 55C, non obstante clause is not provided. On more than one occasion, the apex court and various High Courts, including this court had opined that if a particular provision indicates how part payment is to be taken into account, such provision is applicable irrespective of the agreement between the parties or notification by Government if issued contra to the provisions of statute. Therefore, there cannot be a second opinion regarding appropriation or adjustment of amounts paid towards interest and if any balance amount remains, it is payable towards tax and other dues.

22. However, in the present case we have to see whether the factual situation warrants refund of two deposits made during pendency of provisional assessment. Section 55C has to be considered along with section 23B. According to learned single judge (*supra*), so far as second deposit, it is a deposit made "on account", therefore, it has to be refunded. We are afraid, this opinion is not correct, since there cannot be any direction contra to section 55C.

23. The only question that has to be seen is, whether the amounts deposited during the pendency of provisional assessment deserve to be refunded, since the appellant-assessee has deposited amounts under the Amnesty Scheme. If the appellant-assessee is successful before apex court, he would be entitled for refund of entire amount, i.e., two deposits already made and also the amount paid under the Amnesty Scheme. If the apex court holds against the appellant-assessee, so far as liability to pay tax he had already taken the benefit of the Amnesty Scheme. In the present case, by virtue of section 55C, pre-deposit amounts could be appropriated in terms of sub-section (3). With the dismissal of STR before this court as early as March 31, 2009, provisions of section 55C would be applicable. Therefore, if any interest was payable, that would be first adjusted and then balance amount to be paid has to be calculated. The date of submission of application for settlement of arrears was on June 25, 2009 and the amount to be paid as per Amnesty Scheme was intimated on July 3, 2009. Only on July 4, 2009 SLP was filed challenging the order dated March 31, 2009. Mere filing of SLP would not vest the appellant-assessee with any right and it cannot be considered as continuation of revisional proceedings, which is a settled position. In the light of the above observations, we are of the opinion, the normal rule that payment has to be first adjusted towards interest and then towards principal as provided under section 55C is applicable. Hence, W.A. No. 1828 of 2013 filed by the appellant-assessee is dismissed and W.A. No. 1807 of 2013 filed by the Revenue is allowed.