

(1983) 06 J&K CK 0001

In the Jammu And Kashmir High Court

Case No : Writ Petition No's. 254, 275, 294, 302, 303, 337, 338, 405, 485, 502, 624, 626, 679 of 1980, 20, 21, 64, 55, 119, 333, 356, 357, 358, 360, 364, 365, 379, 397, 399, 400, 471, 472, 478, 499, 537 to 540, 544, 547, 634, 652, 653, 671, 672, 677 to 681, 721, 72

Bir Sein Anand and Others

APPELLANT

Vs

State of Jammu and Kashmir and Others

RESPONDENT

Date of Decision : 24-06-1983

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 265, 301, 304

Citation : (1983) 54 STC 354

Hon'ble Judges : Mufti Baha-Ud-Din Farooqi, C.J.; I.K. Kotwal, J

Bench : Division Bench

Advocate : S.P. Gupta, V.C. Malhotra, J.M. Gupta, M.M. Gupta, V.K. Chopra, V.K. Gupta, B.S. Bedi, L.K. Sharma, P. Kohli, A.K. Sawhney, R. Dutt, V.R. Gupta, S.C. Gupta, S.K. Gupta, K.K. Sawhney, K. Kundan, K.K. Jindial, V.R. Vazir, K.R. Gupta, Joginder Singh and K.K. Pragar, for the Appellant; S.A. Salaria, S.D. Sharma and S. Dutt, for the Respondent

Final Decision : Dismissed

Judgement

I.K. Kotwal, J.—The petitioners in all these petitions are dealers duly registered under the Jammu and Kashmir General Sales Tax Act,

1962, hereinafter to be referred to as the Act, who have been called upon to pay either interest on the amount of sales tax already deposited by

them, or to pay the amount of sales tax that is still due from them along with interest chargeable on it in terms of Section 8 of the Act. For a better

understanding of the controversy raised in these petitions, the petitioner-assessee may be conveniently placed in four categories, viz., (i) an

assessee who has neither filed the return of his turnover nor deposited the sales tax due on it and the assessing authority has determined the

amount of tax payable by him and issued a composite demand notice asking him to deposit the amount of tax along with interest due on it ; (ii) an

assessee who has filed the return of his turnover but has not deposited the sales tax due on it ; and the assessing authority having accepted his

return has issued a composite demand notice, asking him to pay the amount of tax along with interest due on it ; (iii) an assessee who has not only

filed the return of his turnover, but has also deposited the sales tax due on it, but after filing of the return and not along with it and the assessing

authority having accepted his return has issued a demand notice asking him to pay the interest chargeable on the said amount for the period for

which the deposit of the sales tax has been delayed ; and (iv) an assessee who has filed the return of his turnover and has at the same time

deposited the sales tax due on it, but the assessing authority has not accepted his return and has enhanced the amount of tax payable by him and

issued a composite notice to him demanding the payment of the excess amount of the tax along with interest due on it. The petitioners have

challenged the right of the respondents to recover interest from them on the grounds: firstly, that Section 8 of the Act under which interest is sought

to be recovered, is itself violative of Articles 14, 19, 265, 301 and 304 of the Constitution of India, hereinafter referred to as the Constitution ; and

secondly, that the demand notices are illegal and without jurisdiction as in no case can interest be recovered from an assessee, without first serving

upon him a prior notice of demand in terms of Section 8 of the Act.

2. The respondents have controverted these grounds, according to whom, Section 8 is constitutionally valid and no prior notice of demand is

required to be served on an assessee falling under any of the four categories. Controversy in these writ petitions, therefore, lies in a narrow

compass and their decision turns upon only two questions : one, whether or not Section 8 is constitutionally valid; and two, whether or not interest

could have been recovered from a petitioner falling under any of the aforesaid four categories, without serving upon him a prior demand notice.

3. Section 4 of the Act is the charging section and Section 5 empowers the Government to grant exemption from payment of sales tax. These two

sections inter alia provide that sales tax shall be chargeable on every article sold by a dealer, unless it has been exempted from its payment u/s 5

and further that tax shall be charged on an article according to the rate fixed therefore by the Government u/s 4; such rate in no case to exceed 25

per cent of the taxable turnover. Section 6 forbids a person from carrying on business, unless he has been duly registered as a dealer in accordance

with the provisions of the Act and Section 17 exposes a dealer carrying on business in contravention of Section 6 to criminal liability. Section 7

makes provision for filing of return by dealers and their assessment and reassessment to sales tax by the assessing authority. Section 8 lays down

the procedure for recovery of the tax and Section 16 says that the amount of tax, penalty, interest or any other sum imposed under the Act, shall

be recoverable as arrears of land revenue. Sections 7 and 8, which alone are material, to the extent they are relevant for the present discussion, are

reproduced as below :

7. Return, assessment and reassessment.-(1) Every dealer liable to pay tax under this Act, shall furnish in the prescribed form a return of this

turnover for a year within one hundred and twenty days from the expiry of that year.

(2) Without prejudice to the provisions of Sub-section (1), every dealer shall also furnish in the prescribed form quarterly returns for each quarter

of the year within thirty days from the expiry of that quarter. Every such return shall be accompanied by a treasury receipt or any other proof of

having paid the tax due on that return.

(3) Every dealer other than a registered dealer, who may be required so to do by the assessing authority by notice served in the prescribed

manner, shall furnish such returns by such dates as may be fixed by the said authority.

(4) ...

(5) ...

(6) If the assessing authority is satisfied that the return submitted under Sub-section (1) or Sub-section (3) is correct and complete, he shall assess

the amount of tax due from the dealer on the basis of such return.

(7) If the assessing authority is not satisfied that a return furnished is correct and complete, he shall serve on the dealer a notice in the prescribed

form requiring him on a date and at a place specified therein to attend in person or to produce or cause to be produced any evidence on which

such dealer may rely in support of such return.

(8) On the day specified in the notice or as soon afterwards as may be, the assessing authority shall, after recording such evidence as the dealer

may produce and such other evidence as the assessing authority may require on specified point, assess the amount of tax due from the dealer.

(9) If a dealer fails to comply with the terms of a notice issued under Sub-section (7) the assessing authority shall, within four years of the expiry of

such date, mentioned therein, proceed to assess to the best of his judgment, the amount of tax, if any, due from the dealer.

(10) If no return is submitted by the dealer under Sub-section (1) or Sub-section (3) before the date prescribed or specified in that behalf, the

assessing authority shall proceed to assess to the best of his judgment the amount of tax due from the dealer.

8. Payment and recovery of tax.-(1) The tax assessed, or any other amount demanded, under this Act shall be paid in such manner and within such

time not being less than fifteen days from the date of the notice of demand, as may be specified in the notice. In default of such payment the whole

of the amount then remaining due shall become recoverable in accordance with Sections 16 and 16-A:

Provided that the Commissioner or any other officer not below the rank of the assessing authority, authorised in writing by the Commissioner, may

on an application in the prescribed form, extend, the date of payment specified in the notice of demand or allow him to pay the demand in

instalment subject to such conditions including the payment of interest under Sub-section (2) and furnishing of a security, as the officer may

consider necessary.

(2) If the tax or any other amount due under this Act is not paid by the dealer or any other person, by whom it is payable within the period

specified in demand notice, the dealer or such other person shall be liable to pay interest on the tax or other amount from the date it was payable to

the date of actual payment at the following rates :

(a) If the default is for a period of three months at 1 per cent per month ;

(b) If the default is for a period exceeding three months but less than six months at 2 per cent per month ;

(c) If the default is for a period exceeding six months at 3 per cent per month:

Provided that where, as a result of an order under Sections 11, 12, 24 or an order of the court, the amount of tax or other sum on which interest

was payable under this Sub-section has been reduced, the interest shall be reduced accordingly and excess interest paid, if any, shall be refunded.

Explanation.-Interest shall be charged for full calendar month and not for a part of the month.

(3) Tax due on the basis of a quarterly return under Sub-section (2) of Section 7 shall be paid before the expiry of the last date for filing such

return and in case of default the provisions of Sub-section (2) of this section, Section 16 and Section 16-A shall apply to the recovery of these

demands.

4. So far as the vires of Section 8 are concerned, nothing was urged before us except that this section is not compensatory but confiscatory in

nature, in that it requires the defaulting assessee to pay the amount of tax due from him along with interest at an exorbitant rate of 3 per cent per

month. Though half-heartedly, it was also argued that selling goods on credit being an unavoidable incident of business, a dealer who sells goods

on credit shall have to pay interest from his own pocket which in turn is bound to affect his business adversely. The question as to whether charging

interest on the amount of the tax payable according to the rate specified in a provision of a statute renders that provision confiscatory in nature, is

no more res Integra. In Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others, , it was held :

We are concerned in this case with the liability of the assessee to pay interest on the amount of tax which had remained unpaid. Tax, interest and

penalty are three different concepts. Tax becomes payable by an assessee by virtue of the charging provision in a taxing statute. Penalty ordinarily

becomes payable when it is found that an assessee has wilfully violated any of the provisions of the taxing statute. Interest is ordinarily claimed from

an assessee who has withheld payment of any tax payable by him and it is always calculated at the prescribed rate on the basis of the actual

amount of tax withheld and the extent of delay in paying it. It may not be wrong to say that such interest is compensatory in character and not

penal.

5. It may also be worthwhile to mention here that under the Act not only is the

assessee liable to pay interest on the amount of tax the payment

whereof has been withheld by him, but equally liable is the Government to pay interest to him on the delayed refund of the amount of tax it has

recovered from him in excess of what was actually due from him ; and according to the same rate. This is provided by Section 10-B of the Act. So

far as the second argument is concerned, it is simply devoid of any force. By reason of the mere fact that a dealer may some times have to sell his

goods on credit, Section 8 does not become violative of his right to carry on his trade or business, nor does it thereby become confiscatory in

nature. A dealer is under no compulsion that can be said to have been created by the Act to sell his goods on credit. If he does so, he does it in his

own business interest. There is thus no force in the contention that Section 8 is constitutionally invalid.

6. This brings us to the main contention that in no case can interest be charged from a dealer without serving upon him a demand notice of at least

fifteen days duration in terms of Section 8(1) and (2) of the Act reproduced heretofore. A similar argument was raised on behalf of the assessee in

Haji Lal Mohd. Biri Works, Allahabad through Abdul Hamid Vs. The state of U.P. and Others, In that case the assessee had been assessed for

two years by virtue of two assessment orders of different dates. It had sought compounding of the tax and the U.P. Finance Minister had stayed

the recovery of the tax in the meanwhile. The assessee could not succeed before him as well, who eventually vacated the stay order. Thereafter,

the Sales Tax Officer sent two recovery certificates for the two assessment years to Collector, Allahabad, to effect recovery of the tax due from it

along with statutory interest. The assessee deposited the amount of sales tax but questioned the right of the Government to recover interest from it,

inter alia, on the ground that the recovery was not preceded by a demand notice. For this reliance on its behalf was placed on Section 8 of the

U.P. Sales Tax Act, which, to the extent it is relevant for the present discussion, is reproduced as below :

8. Payment and recovery of tax.-(1) The tax assessed under this Act shall be paid in such manner and in such instalments, if any and within such

time, not being less than fifteen days from the date of service of the notice of assessment and demand as may be specified in the notice. In default

of such payment, the whole of the amount then remaining due shall become recoverable in accordance with Sub-section (8).

(1-A) If the tax payable under Sub-section (1) remains unpaid for six months after the expiry of the time specified in the notice of assessment and

demand or the commencement of the Uttar Pradesh Bikri-Kar (Dwitiya Sanshodhan) Adhiniyam, 1963, whichever is later, then without prejudice

to any other liability or penalty which the defaulter may, in consequence of such non-payment, incur under this Act, simple interest at the rate of

eighteen per cent per annum shall run on the amount then remaining due from the date of expiry of the time specified in the said notice, or from the

commencement of the said Adhiniyam, as the case may be and shall be added to the amount of tax and be deemed for all purposes to be part of

the tax.

7. This contention was repelled by their Lordships with these observations :

According to Section 8(1-A), simple interest at the rate of 18 per cent per annum shall run on the amount of arrears of sales tax from the date

specified in that Sub-section. It would thus appear that the liability to pay interest is automatic and arises by operation of law....We find nothing in

any of the provisions of the Act as may warrant making of another assessment order by the Sales Tax Officer regarding the amount of interest or

making it obligatory for him to issue a demand notice in respect of the interest before sending the recovery certificate to the Collector.

8. On the question of charging interest for the period during which recovery of the tax was stayed by the Finance Minister, their Lordships said :

Argument has also been advanced by Mr. Sen that the interest on arrears of sales tax could not be realised for the period during which the

recovery of sales tax was stayed. We find it difficult to accede to this contention because there is nothing in the language of Section 8(1-A) of the

Act which prevents the running of interest because of the operation of any stay order. Indeed, the liability to pay interest is created by the statute

and the Sales Tax Officer has no discretion to grant any exemption from the payment of interest.

9. In Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others, the assessee had filed two returns for the assessment

year 1974-75, one each under the Rajasthan Sales Tax Act and the Central Sales

Tax Act. In those returns it had not, however, included* freight charges in the taxable turnover, as there were some decisions to the effect that freight charges did not form part of the taxable turnover and also because this question was sub judice before the Supreme Court. The Supreme Court, in Hindusthan Sugar Mills Vs. State of Rajasthan and Others, having ultimately held that freight charges did form part of taxable turnover, the assessee filed revised return and also deposited the excess amount of tax due on them. In spite of this, the assessing authority imposed penalty as well as interest on the delayed deposit of this amount. The assessee challenged the recovery of penalty on the ground that it had not filed a false return to escape the liability to pay higher amount of tax, but had filed the original return under a bona fide belief that freight charges did not form part of taxable turnover. So far as interest was concerned, its recovery was challenged on the ground that in terms of Sub-sections (1) and (2) of Section 7 of the Rajasthan's Sales Tax Act, the amount of sales tax that the assessee would be required to deposit before the filing of the return, could not exceed the amount that would become payable on the basis of the return filed by it. Their Lordships, on the authority of Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, , quashed the order of the assessing authority in so far as penalty was concerned, but on the interpretation of Sections 7 and 11B of the Rajasthan Sales Tax Act, upheld the aforesaid order in so far as it related to the recovery of interest. These two sections, in so far as they are relevant for the present discussion, are extracted as below :

7. Submission of returns.-(1) Every registered dealer and such other dealer, as may be required to do so by the assessing authority by notice served in the prescribed manner, shall furnish prescribed returns, for the prescribed periods, in the prescribed forms, in the prescribed manner and within the prescribed time to the assessing authority :

Provided that the assessing authority may extend the date for the submission of such returns by any dealer or class of dealers by a period not exceeding fifteen days in the aggregate.

(2) Every such return shall be accompanied by a treasury receipt or receipt of any bank authorised to receive money on behalf of the State Government, showing the deposit of the full amount of tax due on the basis of

return in the State Government treasury or bank concerned,

11B. Interest on failure to pay tax, fee or penalty.-(a) If the amount of any tax payable under Sub-sections (2) and (2A) of Section 7 is not paid

within the period allowed, or

(b) if the amount specified in any notice of demand, whether for tax, fee, or penalty, is not paid within the period specified in such notice, or in the

absence of such specification, within 30 days from the date of service of such notice, the dealer shall be liable to pay simple interest on such

amount at one per cent per month from the day commencing after the end of the said period for a period of three months and at one and a half per

cent per month thereafter during the time he continues to make default in the payments.

10. Interpreting the expression ""tax due on the basis of return"" occurring in Sub-section (2) of Section 7 of the Rajasthan Sales Tax Act, which is in

part materia with the expression ""tax due on the return"" occurring in Sub-section (2) of Section 7 of the Act, their Lordships observed as under:

...A fair reading of Section 11B of the Act suggests that the Act expects that all assesseees who are liable to pay sales tax should file a true return

within the period prescribed under Sub-section (1) of Section 7 and should produce a treasury receipt or a receipt of any bank authorised to

receive money on behalf of the State Government showing that full amount of tax due from them has been paid.

11. Holding that Sections 7 and 11B were only machinery sections and not charging sections, which had to be interpreted in a way that full effect

was given to the charging section, their Lordships further held :

In the present case if we construe the words 'on the basis of return' occurring in Sub-section (2) of Section 7 of the Act as on the basis of a true

and proper return which ought to have been filed under Sub-section (1) of Section 7 then all the three classes of persons, viz., (i) those who have

not filed any return at all and who are later on found to be liable to be assessed, (ii) those who have filed a true return but have not deposited the

full amount of tax which they are liable to pay and (iii) those who have filed a return making a wrong claim that either the whole or any part of the

turnover is not taxable and who are subsequently found to have made a wrong claim, would be placed in the same position and they would all be

liable to pay interest on the amount of tax which they are liable to pay but have not paid as required by Sub-section (2) of Section 7 of the Act.

We are of opinion that this view is in conformity with the legislative intention in enacting Section 11B of the Act.

12. The assessee not having filed a true return of its taxable turnover, even though under a bona fide belief that freight charges did not form part of

taxable turnover, their Lordships held that it was still bound to pay interest on the excess amount of sales tax, which it ought to have deposited

along with its original return as its liability to pay the same arose when the original return was filed. This is borne out from their following

observations :

We are of opinion that either by delaying the filing of the return or not filing it at all or by filing a return wrongly claiming that a certain part of the

turnover is not taxable or by not disclosing a part of the taxable turnover in the return an assessee cannot escape the liability to pay interest u/s 11

B(a) on the amount of tax withheld, as a consequence of his own action or inaction, from the last date on which it had to be paid as per Sub-

section (2) or Sub-section 2(A) of Section 7, as the case may be, read with the Rules. An assessee cannot contend that interest does not accrue

u/s 11B(a) on the tax payable by him where the time to file the return has elapsed until he actually files a return admitting the liability to pay such tax

or until assessment is made.

We are of the view that the statutory liability u/s 11B(a) arises wherever there is default in payment of the tax within the period allowed by law

irrespective of any doubt which an assessee may be entertaining about the liability to pay the tax.

It is not disputed in this case that freight charges had to be included in the taxable turnover of the assessee mentioned in the returns that were filed

within the prescribed time u/s 7(1) of the Act and that the tax payable in respect of freight charges should have been paid as required by Sub-

section (2) of Section 7 before the returns were filed. The fact that the question relating to the liability of the assessee to pay sales tax in respect of

the freight charges was decided by the Supreme Court subsequently does not in any way affect the question which arises for consideration in this

case. The decision of this Court did not create any new liability. It only declared

that such a liability was existing at the relevant point of time. Since it is clear that the amount of tax due in respect of the freight charges which was payable under Sub-section (2) of Section 7 was not paid within the period allowed, Section 11B is clearly attracted and the liability to pay interest as required by it arises.

13. u/s 7(2) of the Act, each petitioner was bound to file his quarterly return within thirty days from the expiry of the quarter. Filing of this return

ought to have been preceded by the deposit of the amount of tax due on it; an amount that would be recoverable from him had he filed a true

return of his taxable turnover. His liability to pay the sales tax due on it arose when he filed the return and not on the happening of any subsequent

event, including the acceptance or rejection of his return by the assessing authority, or on the assessment made by the assessing authority where he

had not even filed the return. An assessment made by the assessing authority would be merely as ex post facto declaration of his aforesaid liability

to pay the sales tax. There is no provision in Section 7 or elsewhere in the Act, whereunder the assessing authority is required to issue a prior

notice of demand to an assessee falling under any of the four categories mentioned heretofore, in order to charge him with the liability to pay the

sales tax due from him. Section 8 no doubt speaks of a prior notice of demand, but it implies only that notice which the assessing authority is under

the Act required to serve upon an assessee to create a legal liability in him to pay the tax assessed. A contrary interpretation is bound to defeat the

very purpose of the Act which is manifestly to ensure timely payment of the tax due, for, an assessee in that case will be able to postpone the

payment of the tax due from him with impunity, by either not depositing it before the filing of the return, or by not filing the return at all. Interest

being the compensation for the delay in the payment of tax, it must accrue from the date the sales tax falls due for payment.

14. It was also argued that the provision regarding payment of interest having been made in the Act for the first time on 9th May, 1978, by

amending Section 8 by virtue of the Jammu and Kashmir Taxation Laws (Amendment) Act, 1978, no interest could have been levied at least on

the tax due in respect of the first quarter of the year which commenced from 1st April, 1978. We find no force in this argument either. The first

quarter had no doubt started on 1st April, 1978, but it had expired on 31st July, 1978, i.e., more than two months after Section 8 came to be

amended. Consequently, when the time to file the first quarterly return had reached, the law to pay interest on delayed deposit of sales tax had

already come into force.

15. In the result, all the petitions fail, which are dismissed accordingly, but in the circumstances of the case, without any order as to costs. The

orders staying recovery of the sums demanded from the petitioners are hereby vacated.

Mufti Baha-Ud-Din Farooqi, C.J.

16. The facts of these cases have been stated in detail by my brother and I need not repeat the same here. The main contention raised on behalf of

the petitioners was that the interest would become due from the date of the expiry of the period specified in the demand notice served on the

dealer u/s 8 of the Jammu and Kashmir General Sales Tax Act. For this, emphasis was laid on the provisions of Sub-sections (1) and (2) of

Section 8. But these provisions cannot be read in isolation. The reason is that the provisions of Sections 7 and 8 together form a legislative scheme

for the realisation of the tax due under the Act and as such, the provisions of the two sections must be read together to appreciate and determine

the contention raised before us. Section 7(2) requires every dealer to furnish quarterly returns of the taxable turnover as also to deposit the tax

payable on the basis of such returns. On a proper construction of Section 7(2) the return so filed must disclose a true and correct statement of the

taxable turnover and the amount deposited by way of tax must be equal to the full amount which he is liable to pay on the basis of such return.

Cases are conceivable where a dealer does not file any return or files a return which is not a true return, or though, it is a true return, he has not

deposited the full amount of the tax which he is liable to pay either because the amount calculated falls short of the amount due on the taxable

turnover under the Act or because he has claimed impermissible deductions while calculating such tax. In such cases, the assessing authority is

required to make an assessment in accordance with the procedure prescribed in Sub-sections (6) to (10) of Section 7 and determine the amount

of tax due from the dealer. The assessment is in the nature of a declaration that

the tax was due from the dealer at the relevant time. In this context, when Section 8 speaks of the notice of demand, it does not imply that a demand is to be created under the said section. On the other hand, what it implies is, that the dealer shall be informed of the amount of tax declared to be due from him at the relevant time and that the same shall be recovered from him with interest at the rates and in the manner provided in Section 8 beginning from the date it had fallen due u/s 7(2). There is intrinsic evidence in Section 8 to support this interpretation. The evidence is available in Sub-section (3) which clearly provides that a tax due on the basis of quarterly returns under Sub-section (2) of Section 7 shall be paid before the expiry of the last date for filing such return and that in case of default the provisions of Sub-section (2) of Section 8 shall, inter alia, apply meaning thereby that the arrears shall be recoverable with interest in accordance with Sub-section (2) reckoned from the date of the last date for filing the returns. In the circumstances, the contention raised on behalf of the petitioners that the interest shall be leviable on the expiry of period specified in the notice served u/s 8 has no merit in it and must fail. In other respects, I have nothing to add to the judgment proposed by my learned brother.

17. In the result, I agree with him that the petitions deserve to be dismissed and I order accordingly.