

(1995) 01 AP CK 0014

In the Andhra Pradesh High Court

Case No : Writ Petition No. 17002 of 1989

Delta Paper Mills Ltd.

APPELLANT

Vs

Collector of Central Excise, Guntur

RESPONDENT

Date of Decision : 27-01-1995

Acts Referred:

Central Excise Rules, 1944 — Rule 57A, 57B, 8, 8(1)

Central Excises and Salt Act, 1944 — Section 32(4), 5A(1), 8(1)

Citation : (1995) 1 ALT 288 : (1995) 77 ELT 544

Hon'ble Judges : S.V. Maruthi, J;M.N. Rao, J

Bench : Division Bench

Advocate : S. Ravi and K. Subrahmanya Reddy, for C.V. Rajeev Reddy, for the Appellant; P. Innayya Reddy for Central Govt., for the Respondent

Judgement

S.V. Maruthi, J.—These three Writ Petitions are disposed of by a common judgment as the issue involved is common to all these Writ Petitions.

2. In W.P. No. 17002 of 1989 the petitioner is the Delta Paper Mills Limited. It manufactures paper which is liable to Excise duty under the Central Excises and Salt Act, 1944 (in short "the Act"). The petitioner's appeal challenging the levy of Excise duty was pending before the Tribunal. Pending disposal of the appeal the second respondent by his order dated 2-1-1985 granted instalment facility to the petitioner for payment of Excise duty to the tune of Rs. 20,20,553.69. In the said letter the petitioner had been required to clear off the arrears of tax of Rs. 20,20,000.00 in 10 instalments. The first nine instalments were to be of Rs. 2,00,000/- each beginning in February, 1985 and the 10th instalment was to comprise the balance payable. The petitioner had been making payments in accordance with the instalment facility granted by the second respondent. However, by proceedings dated 4-6-1985 the second respondent directed that on the balance of Rs. 13.70 lakhs the petitioner has to pay interest at the rate of Rs. 17.5% per annum. It is also stated that in exercise of the powers conferred on him under Rule 230 of the Central Excise Rules, 1944, all the goods excisable

goods at the premises of the petitioner and also all the goods to be manufactured thereafter were detained until the payment of duty of Rs. 13.70 lakhs, plus interest at the rate of 17.5% per annum. On 10-2-1987 the petitioner received a communication from the second respondent stating that, the interest had been calculated at Rs. 1.56 lakhs and the petitioner had been required to pay the said amount at an early date. On receipt of the above communication, the petitioner addressed a letter to the second respondent on 19-2-1987 requesting for waiver of the interest. The petitioner also requested for a speaking order on its representation. The second respondent issued a speaking order on 26-2-1987 stating that there is no provision for waiver of interest under the Central Excise Act and the Rules and, therefore, demanded the interest. On appeal, the Collector set aside the orders of the second respondent dated 26-2-1987 holding that the second respondent did not make any reference to any provision under which the appellants were directed to pay interest and that there was no stipulation for payment of interest in the order granting instalment facility, therefore the collection of interest could not be upheld. There was a further appeal to the Appellate Tribunal by the department. The petitioner also filed cross-objections in the said appeal. The Tribunal by its order dated 11-9-1989 held that there was no provision for levy of interest and, therefore, the order of the second respondent calling upon the petitioner would not be an order of adjudication vesting a right of appeal in the petitioner. The Tribunal did not express any opinion about the correctness of levy of interest but set aside the order of Collector on the ground that the appeal was not maintainable. Hence the Writ Petition.

3. In Writ Petition No. 5479 of 1992 the petitioner is a manufacturer of Aerated waters excisable under the Act. Under Notification No. 177/86-C.E., dated 1-3-1986 it availed the benefits of MODVAT on the inputs used in the final products. The Notification was amended by a Notification No. 203/87-C.E., dated 9-9-1987 with the result the duty burden on Aerated waters sharply increased. The petitioner has challenged the Notification withdrawing the benefits of exemption from the payment of Central Excise duty in W.P. No. 265/88. Pending Writ Petition there was an interim direction on 12-1-1988 directing the petitioner to pay half of the demand. On 21-1-1988 the interim stay was vacated. On 1-11-1988 the department issued a demand notice directing the petitioner to pay the Basic Excise duty of an amount of Rs. 1,79,158.20 and the first respondent revised the arrears of demand to Rs. 6,35,651.24 after taking into account Rs. 49,000/- which was already paid and demanded payment of balance amount. Thereafter the Assistant Collector, Central Excise, Vijayawada, (second respondent herein) by his proceedings dated 27-7-1989 demanded payment of Rs. 5,42,750.94. The petitioner paid the entire duty of Rs. 6,84,651.24 by 24-10-1991. The first respondent directed the petitioner to pay the arrears with interest at the rate of 17.5% in terms of Finance Ministry's letter No. 15/209/84/IX-1, dated 20-4-1985 and that the Accountant General audit party had also pointed out that the arrears should be realised with interest at the rate of 17.5%.

On receipt of the said letter, the Superintendent of Central Excise was requested by a letter dated 2-11-1990 to send a copy of the Finance Ministry's letter referred to together with a copy of the Trade Notice or any Notification issued for information of the trade in this regard. On 13-2-1992 the first respondent issued another letter directing the petitioner to pay interest quantifying the same at Rs. 2,74,012.63, against which the present Writ Petition is filed.

4. In W.P. No. 7203 of 1992 the petitioner is a manufacturer of electrical lighting bulbs. It had entered into an agreement on 16-5-1977 with M/s. Hindustan Machine Tools Ltd. (in short "H.M.T.") appointing it as the sole selling agent for the sale of bulbs. The agreement had come into force with effect from 1-4-1978. Under the agreement the trade marketing commission was payable to the H.M.T. The Asstt. Collector by his order dated 9-12-1979 held that H.M.T. is a related person and the petitioner is not entitled to abatement of the marketing commission paid to H.M.T. and the petitioner is liable to pay Excise duty on the commission. The petitioner approached this Court by way of W.P. No. 416 of 1980 which was dismissed on 11-10-1984 directing the petitioner to approach the authorities by way of an appeal. The Collector (Appeals) disposed of the appeal on 28-12-1984 holding that the H.M.T. is not a related person. On further appeal to the Tribunal the petitioner did not succeed and the Tribunal held that the Central Excise duty is leviable on the wholesale price and it disallowed the marketing commission by its order dated 15-1-1985. Pursuant to which on 14-5-1985 the Assistant Collector quantified the duty payable by the petitioner at Rs. 9,49,196.87. The Assistant Collector gave rebate on duty already paid and balance was arrived at Rs. 8,00,000.00 and odd. The petitioner approached the Central Government seeking instalments, for which the Central Government accepted the request of payment of duty in instalments. However, they were directed to pay interest at 17.5% per annum compound at monthly rests. The entire duty was paid and interest, plus Rs. 32,979.68 basic duty, plus special duty remained unpaid, calculating the interest at 17.5% per annum a demand of Rs. 16,00,000/- odd was issued. The interest was calculated with effect from 15-1-1985 the date of judgment of the Tribunal. Hence the Writ Petition.

5. In all the three Writ Petitions the Counsel for the petitioners, viz., Mr. S. Ravi and Mr. Subrahmanya Reddy, submit that under Central Excise Act there is no provision for levying interest and, therefore, the levy of interest is in contravention of the provisions of the Act; that in the absence of the specific statutory provision empowering the authorities to levy interest and demand of interest is in violation of Article 265 of the Constitution; that Entry 84 of List I of the 7th Schedule of the Constitution empowers the Union of India to impose duty of Excise on tobacco and other goods manufactured or produced in India except (a) alcoholic liquors for human consumption (b) opium, Indian hemp and other narcotic drugs and narcotics but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry. Article 265 of the Constitution says that no tax shall be levied or collected except by authority of law. That there are three stages in the imposition of tax viz.,

there is declaration of the liability, that is the part of the statute which determines what persons in respect of what properties are liable and that next there is assessment; that the liability does not depend on assessment; that exhypothesi, has already been fixed; but assessment particularises exact sum which a person liable has to pay and lastly, come the methods of recovery, if the person taxed does not voluntarily pay. Counsel submit that the taxing power will comprehend within it the power to provide for collection of tax including prescribing methods of recovery of amounts of tax if the person liable to pay the tax does not voluntarily pay; that the power to make a law with respect to a tax includes the power to make provisions in the relevant statute with respect to all matters ancillary and incidental and also for collection of tax; that providing for payment of interest on delayed payment of tax is a method usually adopted in fiscal laws to ensure that the amount of tax which is due is paid by the prescribed time and provisions in that behalf form part of the machinery for collection of tax. Therefore, the Counsel submit that since the levy of interest is a part of recovery of collection procedure in the absence of authority of law, the imposition of interest is illegal and violative of Article 265 of the Constitution of India.

6. The learned Standing Counsel for the respondents submits that Rule 233 of the Central Excise Rules, 1944 empowers the Central Board of Excise and Customs (Principal Collectors) and Collectors to issue written instructions providing for any supplemental matters arising out of these Rules. Therefore, in exercise of the powers conferred under Rule 233 of the Central Excise Rules empowering the Central Board of Excise and Customs and Collectors issued general notice No. 154/85-ADJ-5, dated 29-4-1985, according to which the industry sole or individual units have been given the facility of making the payment of arrears of Central Excise Rules (sic. duty) in instalments by the Government, one of the conditions for allowing the facility of making the payment in monthly instalments and in some cases the units would pay interest at the rate of 12% p.a. on the amount from the date of the arrears become payable. The issue regarding the rate of interest was reconsidered in the meeting and it has now been decided that in all cases where the facility of paying Central Excise dues in instalments has been accorded by the Government, interest at 17.5% p.a. will be chargeable on monthly basis instead of 12% p.a. Thus at the end of each month the interest at 17.5% on the outstanding dues should be calculated and added to the outstanding dues. The said instruction were reiterated by the Ministry in its letter F. No. 289/10/91-CS. 9, dated 18-3-1991 under which the Government delegated the Principal Collectors of Central Excise to grant, in individual cases, the facility of payment of Central Excise dues upto 12 instalments on merits, subject to payment of simple interest at 17.5% p.a. compounded at the end of each month chargeable from the date of confirmation of the demand. The learned Standing Counsel relied on the Finance Ministry's communication which reads as follows :-

"The issue regarding rate of interest was reconsidered in the Ministry and it has

now been decided that in all cases wherever the facility of paying arrears of Central Excise dues in installment has been accorded by the Government, interest at 17.5% per annum will be chargeable on monthly basis instead of 12%. Thus at the end of each month, the interest at 17.5% on the outstanding dues should be calculated and added to the outstanding dues."

Counsel submits that in view of Rule 233 of the Central Excise Rules, the Union of India was issuing instructions from time to time imposing interest in case facility of payment of arrears in instalments was granted. The Central Board of Customs and Excise and the Principal Collectors are competent to issue supplementary instructions, the levy of interest is in accordance with law and Rules. Counsel also submits that the petitioners having availed of the facility of payment of arrears of tax in instalments cannot now turn round and say that they are not liable to pay the interest on the ground that the Act does not empower the levy of interest.

7. The question, therefore, is whether the Central Excises and Salt Act empowers the levy of interest on delayed payment of Central Excise duty.

8. In this context we may refer to the provisions of the Act and the Rules made under the Act. None of the provisions of the Central Excises and Salt Act provides for levy or interest on the arrears of the Central Excise duty. Rule 49(3) of the Act provides for the duty chargeable on removal of goods from the factory premises or from a particular place of storage empowers the Central Government by Notification any excisable goods to be removed by the factory without payment of duty subject to the conditions and limitations including the payment of interest on the balance of duty. Similarly under Rule 49A of the Rules empowers the collection of duty leviable on cellulosic spun yarn and cotton yarn alongwith the duty on cotton fabrics. The duty that is payable on cellulosic spun yarn and cotton yarn can be collected while duty is being collected on cotton fabrics. While collecting duty on cotton fabrics including the duty on cellulosic spun yarn that is payable on spun yarn and cotton facility plus interest at the rate of one and a half per cent on the amount of yarn duty is levied. By virtue of sub-rule (3) of Rule 49, the Central Government can allow the excisable goods to be cleared without payment of duty by a Notification and while permitting clearance of goods without payment of duty from the factory, one of the conditions to be imposed in payment of interest on the balance amount of duty. Similarly under Rule 49A since the duty is not paid when the yarn is cleared from the premises but paid when the cotton fabrics are cleared from the factory since there was a delay in payment of duty on yarn, interest at a particular percentage is levied on the amount of duty payable on yarn. Excepting these two cases, namely, Rule 49(3) and Rule 49A, there is no provision under which interest is payable in respect of delayed payment of Central Excise duty and when facility of payment of duty in instalments is accorded to a manufacturer. From the above, we have made it clear that the Act does not confer the power on the Central Excise authorities to impose duty (sic. interest) on delayed payment of Central

Excise duty or where the facility of payment of duty of arrears of Excise duty in instalments is accorded.

9. Before referring to the authorities under Article 265 of the Indian Constitution, relied on by the learned Counsel for the petitioners, we may usefully refer to a passage in American jurisprudence, Volume 51 Taxation to Taxicabs, para 971 :-

"..... it is almost universal rule of the state Courts that delinquent taxes do not bear interest as such or by way of penalty, in the absence of express provision of law imposing liability therefor. This rule is founded upon two fundamental reasons : (1) that taxes are not debts in the ordinary sense of contractual obligations and are therefore not within the meaning of the General interest laws, and (2) that as impositions by Governmental authorities, they do not bear interest except by the express provisions of statute."

10. We may now refer to Article 265 of the Constitution of India which empowers the Parliament to levy tax. The relevant provision reads as follows :-

Art. 265 "No tax shall be levied or collected except by authority of law."

11. Article 265 deals with two stages of imposition of tax. The first stage is levy and the second stage is collection. As far as the levy is concerned, the Courts have interpreted that it includes the levy as well as assessment. Thus Article 265 postulates that before any tax can be levied and collected there must be a validly enacted law by an appropriate legislature imposing such tax and providing for its collection. Before referring to the interpretation placed by the Supreme Court on the construction of Article 265, we may refer an of-quoted passage in *Whitney v. Commissioner of Inland Revenue* 1926 AC 37 Referring to the stages of imposing of tax it was held by Lord Dunedin :-

Now, there are three stages in the imposition of a tax : there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

12. In *Rayalseema Constructions Vs. Deputy Commercial Tax Officer, Mannady Division, Madras 1 and Others*, referring to Article 265 of the Constitution it was observed :-

"Once the assessment has become final all that remains to be done is to collect the tax assessed."

"When the stage of collection is reached, all that the Article says is that the manner of collection must be authorised by the law. The State is prohibited from adopting illegal or arbitrary methods of collecting the tax already levied and assessed."

"The word "levy" is frequently used to include both of the first two stages

involved in the process of taxation, viz., the levy properly so-called and the determination of the amount of the tax. It appears to us that the words "levy" and "collection" are used in Article 265 of the Constitution in a comprehensive manner and that they are intended to include and envelop the entire process of taxation commencing from the taxing Statute to the taking away of the money from the pocket of the citizen. And, what Article 265 enjoins is that every stage in this entire process must be authorised by the law."

13. In *Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd.*, the Supreme Court while interpreting Article 265 observed as follows :-

"The term "levy" appears to us to be wider in its import than the term "assessment". It may include both "imposition" of a tax as well as assessment. The term "imposition" is generally used for the levy of a tax or duty by legislative provisions indicating the subject matter of the tax and the rates at which it has to be taxed. The term "assessment", on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be object of the tax in a particular case and determining its amount..... We think that, although the connotation of the term "levy" seems wider than that of "assessment", which it includes, yet, it does not seem to us to extend to "collection"."

14. In *Khazan Chand v. State of Jammu and Kashmir* (1984) 56 STC 214 (J&K) the question that arose for consideration was whether the State of Jammu and Kashmir has legislative power to provide for payment of interest in case of late payment of tax. While considering the scope of the legislative power of the State of Jammu and Kashmir to provide for payment of interest on the amount of tax due, the learned Judges referred to the passage *Witney v. Commissioner of Inland Revenue* (supra) and further held :-

"The taxing power of the State will also comprehend within it the power to provide for quantification of the liability of persons made liable to pay the tax. This is done by the provisions relating to assessment. The taxing power will also comprehend within it the power to provide for collection of tax including prescribing the methods of recovery of the amount of tax due if the person liable to pay the tax does not voluntarily pay it. The power to make a law with respect to a tax includes not only what has been set out above but also a power to make provisions in the relevant statute with respect to all matters ancillary and incidental to the levy, assessment, collection and recovery of tax."

15. It was also held :

"Providing for payment of interest in case of delayed payment of tax is a method usually adopted in fiscal legislation to ensure that the amount of tax which is due is paid by the prescribed time and provisions in that behalf from part of the recovery machinery provided in a taxing statute."

16. In *M/s. Ujagar Prints v. Union of India* : [1989]179ITR317a(SC) the Supreme Court consisting of five Judges observed as follows :-

"The term "levy" appears to us to be wider in its import than the term "assessment". It may include both of a tax as well as assessment. The term "imposition" is generally used for the levy of a tax or duty by legislative provision indicating the subject matter of the tax and the rates at which it has to be taxed....."

17. In *Ashok Singh Vs. Assistant Controller of Estate Duty, Calcutta and others*, the question arose under the Estate Duty Act. It was held :

"The word "levy" had been interpreted by the Supreme Court in the case of *Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd.*, , as embracing within it the process of assessment and also the imposition of tax."

18. In *Ashapura Mineral Co. v. State of Gujarat* (1993) 89 STC 289 the Court referred to the observations made by the Supreme Court in *Associated Cement Co. Ltd. v. Commercial Tax Officer* (1981) 48 STC 466 and it was observed that the interest be 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 actual amount of tax withheld and extent of delay in paying it and that such interest is compensatory in character and not penal. The learned Judges referred to the judgment in *Khazan Chand v. State of Jammu and Kashmir* (supra) wherein it was observed that payment of interest in case of default in payment of tax is a means of compelling an assessee to pay tax by a prescribed date. It was further observed that the liability to pay interest arises when tax becomes due, either as a result of furnishing of declaration or return by the dealer or on assessment or reassessment as the case may be; that the interest is made payable on that amount of tax which ought to have been paid earlier, i.e., within the prescribed time or the specified period and which has not been paid; that interest is made payable because Government to that extent is deprived of the use of money which otherwise it could have got at an early point of time and that on the contrary, provision for payment of interest being a method for collecting or recovering its revenue, it is for the State to decide what is most efficacious for this purpose, and the defaulter has no moral right to make any grievance in this behalf.

19. In *J.K. Synthetics Ltd. v. Commercial Taxes Officer* 1993 (68) E.L.T. 246 (Tri.) it was held :

"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 payment.".....

"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....."

"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 adjective law."

20. In *A. Venkata Subba Rao Vs. State of Andhra Pradesh*, the question that arose for consideration was whether the surcharge levied on the stocks held by the plaintiffs was valid. In that context it was observed :

"..... It would then be in effect a tax imposed by an executive fiat without any legislative sanction on the capital value of the stocks of foodgrains held on a particular date."

21. In *Harivansh Lal Mehra Vs. State of Maharashtra*, the question that arose for consideration was whether there is any liability to pay Customs Duty when someone sends goods from Goa to Bombay in 1962. It was contended on behalf of the State that Customs Duty was leviable on the basis of certain administrative instructions. Repelling the said contention it was held that no tax or Duty can be levied or collected except by authority of law; that hence no Customs Duty was leviable on the basis of any administrative instructions and that every levy of Customs Duty or any other tax must be sanctioned by law.

22. In *Mothey Gangaraju, Zamindar and Sons Vs. State of Andhra Pradesh*, it was observed :-

"We are therefore unable to uphold the claim for interest on alleged general equitable grounds."

"The State which levied the sales tax is not liable to pay interest thereon to the assessee from the date of collection to the date of decree under which it has refunded with interest from the date of decree, the tax collected illegally. The proviso to Section 1 of the Interest Act, 1839, does not recognise any claim to interest on what are known as general equitable grounds. As the tax is levied in exercise of a sovereign power the analogy of a creditor and debtor cannot also be admissible by way of damages u/s 73 of the Contract Act. Further, relief of interest cannot be given by the Court by way of restitution in the exercise of inherent powers u/s 151, Civil P.C."

23. In *Ferro Alloys Corpn. Ltd. Vs. A.P. State Electricity Board and another*, the question that arose for consideration was whether the interest is payable on security deposit on advanced consumption deposit. It was observed :-

"Strictly speaking, the word "interest" would apply only to two cases where there

is a relationship of debtor and creditor. A lender of money who allows the borrower to use certain funds deprives himself of the use of those funds. He does so because he charges interest which may be described as a kind of rent for the use of the funds".

"Accordingly, it is held that the claim for interest cannot be legally founded either on common law or equity."

"We are also unable to accept the argument advanced on behalf of consumers that because the Electricity Boards charge interest on belated payments, interest must be paid on security deposits. Interest on belated payments is by way of penalty. That has no bearing."

24. It emerges from the above that under Article 265 of the Constitution of India no tax shall be levied or collected without an authority of law and that Article 265 contemplates two stages - one is levy of tax and other is collection of tax and that levy of tax includes declaration of liability and assessment, namely, quantification of the liabilities. After the quantification of the liability follows the collection of tax and it should be only by an authority of law. The authority of law should be only by a legislative fiat but not by an executive fiat. Levying of interest is one of the modes of recovery of tax or collection of tax to compel the assessee to pay the tax in time. In other words levy of interest is a part of collection of tax and, therefore, it is covered by the second limb of Article 265. If it forms part of collection of tax under Article 265, it should be by an authority of law. The delinquent taxes do not bear interest as such or by way of penalty, in the absence of express provision of law imposing liability expressly for the reason that taxes are not debts in the ordinary sense of contractual obligations and, therefore, not within the meaning of the general interest clause; that as impositions by governmental authorities, they do not bear interest except by the express provision of statute and once the assessment has become final all that remains to be done is to collect the tax assessed and when the stage of collection is reached the manner of collection must be authorised by law and the State is prohibited from adopting illegal or arbitrary methods of collecting tax already levied and assessed. The word "levy" is used to include both first two stages involved in the process of taxation, viz., the levy properly so-called and the determination of the amount of the tax and the words "levy" and "collection" are used in Article 265 of the Constitution in a comprehensive manner and that they are intended to include and envelop the entire process of taxation commencing from the taxing Statute to the taking away of the money from the pocket of the citizen. And, what Article 265 enjoins is that every stage in this entire process must be authorised by the law. The term "levy" includes assessment but not collection. The taxing power of the State will also comprehend within it the power to provide for quantification of the liability of persons made liable to pay the tax. It also comprehends within it the power to provide for collection of tax including prescribing the methods of recovery of the amount of tax due if the person liable to pay the tax does not voluntarily pay it.

The power to make a law with respect to a tax includes not only what has been set out above but also a power to make provisions in the relevant statute with respect to all matters ancillary and incidental to the levy, assessment, collection and recovery of tax. Providing for payment of interest in case of delayed payment of tax is a method usually adopted in fiscal legislation to ensure that the amount of tax which is due is paid by the prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing statute. Interest be ordinarily claimed from an assessee who has with-held payment of any tax payable by him and it is always calculated at the prescribed rate on the basis of actual amount of tax withheld and extent of delay in paying it and that such interest is compensatory in character and not penal. The payment of interest in case of default in payment of tax is a means of compelling an assessee to pay tax by a prescribed date. Interest is made payable on that amount of tax which ought to have been paid earlier, i.e., within the prescribed time or the specified period and which has not been paid; that interest is made payable because Government to that extent is deprived of the use of money which otherwise it could have got at an early point of time and that on the contrary, provision for payment of interest being a method for collecting or recovering its revenue, it is for the State to decide what is most efficacious for this purpose, and the defaulter has no moral right to make any grievance in this behalf. The 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 recovered under law and it cannot be recovered by way of damages for wrongful detention of the amount. 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 adjective law. The tax is levied in exercise of a sovereign power, therefore, the analogy of a creditor and debtor cannot also be admissible and consequently the question of recovery by way of damages u/s 73 of the Contract Act does not arise. We have already referred to the provisions of the Central Excise Act under which none of the provisions empower the imposition of interest for the delayed payment of tax.

25. Now we may refer to the decisions relied on by Mr. S. Ravi, counsel for M/s. Delta Paper Mills Ltd.

26. In *Narinder Chand Hem Raj and Others Vs. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and Others*, the Supreme Court held :-

"Article 265 of the Constitution lays down that no tax can be levied and collected except by authority of law. Hence the levy of a tax can only be done by the authority of law and not by any executive order."

27. In *B.C. Banerjee v. State of M.P.* AIR 1997 SC 517, it was held :-

"No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the

imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rule making authority has no plenary power. It has to act within the limits of the power granted to it."

28. In *Prem Nath Khandelwal v. Asstt. Collector, E.D.* (197) 77 ITR 949 the Calcutta High Court held :-

"The Estate Duty Act of 1953 makes no provision for automatic running of interest as in the English Act, and such interest does not begin to run unless there be an order u/s 70 of the Estate Duty Act. In the present case the order u/s 70 of the Act was made after the assessed amount of duty was paid up and as such nothing was due on the date the order was made on which the interest could be levied and as such Section 70 of the Estate Duty Act, 1953, in terms did not apply. The impugned order asking the petitioner to pay interest on the estate duty and the recovery proceedings were illegal."

29. In *Income Tax Officer, "A"-Ward, Indore Vs. Gwalior Rayon Silk Manufacturing (weaving) Co. Ltd.*, the question that arose for consideration was; exemption was granted from payment of Income Tax by the Income Tax Commissioner in respect of weaving division of the assessee for ten years, but then deferred the decision regarding the staple fibre division until the factory started functioning in 1954. The assessee moved the High Court against the order refusing to grant exemption from payment of Income Tax in respect of staple fibre division. He succeeded in the Writ Petition, but on appeal it was set aside and upheld the order of the Commissioner refusing to grant exemption. As a result of which, a huge amount of Income Tax became due from the respondent and provisional assessments were made for the years 1959-60 to 1964-65 and the amount was arrived at Rs. 6.6 crores which was payable by the firm. The effect of the order of the High Court upholding the Commissioner's power refusing to exempt from payment of Income Tax that the amount exempted became payable at once and was accordingly demanded by the Income Tax Commissioner. The respondent instead of paying the amount tried to negotiate with the revenue for certain concessions. After a series of correspondence the assessee paid a sum of Rs. 3 crores and wanted the balance of Rs. 3.60 crores to be paid in instalments. The assessee further undertook to pay interest on the arrears at the rate of 5% per annum, even though under sub-section (2) of Section 220 of the Income Tax Act, 1961, it was required to pay interest at the rate of 4% only. In view of these favourable terms offered by the assessee, the Income Tax Officer acceded to its request by his letter dated January 16, 1965. The assessee had agreed to pay the arrears in instalments. After the request of the assessee was granted by the Income Tax Officer, sub-section (2) of Section 220 of the Act was amended by the Finance Act, 1965, by which the rate of interest was increased from 4% to 6% per annum. In view of this amendment, the Income Tax Officer by his letter dated January 10, 1966 informed the assessee that on the unpaid balance of tax arrears the respondent

would be liable to pay interest at the rate of 6% per annum with effect from April 1, 1965 instead of 5% as agreed to by the Income Tax Officer in his previous letter. Consequently, a notice of demand u/s 156 of the Act was served on the respondent demanding interest at the rate of 6% per annum pursuant to the amendment issued u/s 220(2) of the Act. It was challenged. It was held :-

"Thus, it is manifest that the Income Tax Officer could not have passed any order against the statutory provisions of sub-section (2) of Section 220 either with or without the consent of the assessee. Even the order of the Income Tax Officer dated January 16, 1965, accepting the offer of the assessee to pay interest at the rate of 5% per annum was legally invalid, because if the rate of interest fixed by the statute was 4% the parties could not be allowed to contract out of the statute. The only relief, therefore, which the assessee could get is that it was liable to pay interest at the rate of 4% and not 5% per annum for the period January to March, 1965. But from April 1, 1965, it was bound to pay interest at the rate of 6% per annum as found by the Income Tax Officer."

30. In *Gulbanu Razack Vs. Assistant Commissioner of Income Tax (Investigation)*, this Court was considering a case where the amounts belonging to persons other than the assessee were seized. The question that arose for consideration was while refunding the amount so seized whether the Income Tax authorities are bound to pay interest. It was held :-

"No interest can be awarded under the Income Tax Act, 1961, unless provision is made in the Act to cover the contingency. When the Legislature has laid down the procedure in the 1961 Act for claims being preferred by third parties and their adjudication by the departmental authorities u/s 132(5) or Section 132(11) of the Income Tax Act, 1961, the legislature cannot be said to be unaware of the possibility of consequential claims for interest by such third parties in cases of refund. When no provision is contained in the Act to cover the cases of non-assessees, the Court cannot make an award of interest."

31. It was also observed :-

"The interest cannot be awarded in such cases u/s 4 of the Interest Act, 1978."

32. It was further observed :

"The interest was not payable under the common law or in equity or u/s 4(1) of the Interest Act, 1978."

33. In *State of Andhra Pradesh v. Mothey Gangaraju* (1963) 14 STC 112 Justice Venkatesam, held :-

"The statutory provisions governing the case did not permit the interest being awarded on the excess tax collected, and the interest could not also be awarded under the provisions of the Interest Act."

The above judgment was confirmed in *M. Gangaraju & Sons v. State of A.P.* (supra).

34. In Ballarpur Industries Ltd. and another Vs. Union of India and others, .] the Bench consisting of two Judges while considering the power of the Central Excise authorities to impose interest observed as follows :-

There is no statutory provision under Central Excise for claiming interest on the unpaid amount of the assessed tax like the one available under Income Tax Act, 1961. There has been a bona fide dispute between the assessee and the Department regarding the correct assessment and moreover also in view of the changing law laid down by the Supreme Court, the Department is not entitled to interest."

35. From the above it follows that no interest can be levied by an executive order and interest should be imposed only by a legislative enactment and in the absence of which no interest is leviable.

36. The learned Standing Counsel for the respondents submits that the power under Article 226 is discretionary and even if the Court finds that the assessment was void, the Court may not direct repayment having regard to the conduct of the party, is acquiescence and absence of proof that he suffered injury. He relied on the judgments reported in New India Industries Ltd. and another Vs. Union of India and another, and in the M.P. Mittal Vs. State of Haryana and Others, . He submits that the Court should refuse to grant relief where the petitioner seeks to invoke its Writ jurisdiction in order to secure a dishonest advantage or perpetuate unjust gain.

37. He also relied on the judgment reported in Commissioner of Income Tax Vs. Lalit Prasad Rohini Kumar, . But this judgment is not relevant to the facts of the present case. We may refer to the observations made by the learned Judges :-

"The Division Bench of the Karnataka High Court, however, noted that in Section 243 of the I.T. Act, the word, "tax" has been defined to mean any tax and super-tax chargeable under the provisions of the Act and does not bring in within its scope penal interest levied for belated return or non-payment of advance tax. But levy of penal interest u/s 139 or Section 215 of the Act was merely in the regular assessment order."

38. From the above observation, it is clear that the learned Judges were dealing with a case where whether the order of penal interest can be made while passing the assessment order u/s 243 of the Income Tax Act. We may point out under the Income Tax Act the authorities are empowered to levy interest on delayed payment of tax. Interest cannot be awarded u/s 4 of the Interest Act, 1978 as it is not payable under the common law or in equity.

39. The learned Standing Counsel for the respondents also relied on the judgment of the Delhi High Court in 1987 (12) ECR 36 , where it was held :-

"The charging of interest (in connection with advance tax as well as delay in submission of the return) is an integral process of the assessment except where the ITO chooses to determine the liability for interest by an independent order."

This judgment has no relevance as under the Income Tax Act power is conferred on the authorities to levy interest by the various provisions of the Act on the delayed payment of Income Tax.

40. The contention of the learned Standing Counsel for the respondents that the Central Board of Indirect Taxes and Collectors are empowered to issue supplemental instructions under Rule 233 levying interest cannot be accepted in view of the catena of decisions referred to above stating that the interest is levied as a part of collection in case of delayed payment of tax and it is a method usually adopted in fiscal legislation to ensure that the amount of tax which is due is paid by the prescribed time and provisions in that behalf from (sic. form) part of the recovery machinery provided in a taxing statute and without authority of law no intent (sic. interest) can be levied on delayed payment of imposition.

41. The judgment in 1987 (12) ECR 36 , is not relevant as it is a case dealing with binding nature of instructions under Rule 233 of the Central Excise Rules which are beneficial to the assessee, the authorities are bound to follow the same.

42. The contention of the learned Standing Counsel for the respondents that having taken the advantage of the payment of tax in instalments in some cases, they cannot go back and deny their liability to pay interest also cannot be countenanced as there cannot be any estoppel against a statute. When the statute does not empower the authorities to collect interest on delayed payment of Central Excise Duty, the petitioners cannot be clothed with the liability of interest on the ground that they have asked for instalments for payment of Central Excise Duty.

43. For the reasons mentioned above, the petitioners are entitled to succeed and the Writ Petitions are, therefore, allowed accordingly without costs.