

(2000) 10 OHC CK 0006

In the Orissa High Court

Case No : Original Jurisdiction Case No. 9087 of 1997 and O.J.Cs. No's. 4176 of 1996, 12414 and 12415 of 1997, 12085, 12087 and 14939 of 1998, 3203 of 1999 and 2185 and 2186 of 2000

Idl Industries Ltd. and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 16-10-2000

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 12(8), 13(6), 14, 14C, 14D

Citation : (2004) 134 STC 62

Hon'ble Judges : B.N. Agrawal, C.J.; P.K. Mohanty, J.; P.K. Misra, J

Bench : Full Bench

Advocate : B.K. Mohanty, I. Mohanty, B.K. Sharma, S.K. Jee, A. Mohanty, I. Pradhan, G.K. Dash, Bibek Mohanty, B.K. Saha, M. Dasburma, K.C. Kar, S.K. Mishra, S.S. Patro, S.K. Jena, M. Mohanti, K.L. Sharma, S.R. Patnaik, Mishra, K.K. Jena, A.K. Jena, S. Mohanty and S.C. Dash, for the Appellant; L. Pangari, Senior Standing Counsel (C.T) and S.C. Lal, Amicus Curiae, for the Respondent

Judgement

P.K. Misra, J.—This batch of writ petitions has come up before this Full Bench on being referred by different division Benches. O.J.C. No. 9087 of 1997 was the first case to be so referred. The question formulated by the division Bench is as follows :

"Whether there can be any direction for grant of interest in a case where reassessment has been directed, notwithstanding the fact that reassessment has not been completed in view of provisions contained in sections 14 and 14-C of the Act."

Since the other writ petitions are said to involve similar points as O.J.C. No. 9087 of 1997, they were also referred to the Full Bench to be heard along with the said case. It may be stated here that the grievance of the petitioner in O.J.C. No. 9087 of 1997 has already been disposed of by the Full Bench by its order dated April 21, 1998. However, while doing so, the reference has been kept pending. In

the order dated April 21, 1998 it has been observed :

"The reference is kept pending, not for the purpose of this petition, but as a question of general importance is involved. Registry shall issue notice to the members of the Bar to assist this Court for replying the reference. All the cases pending before this Court on this point shall be placed before the Full Bench. List of such cases shall be furnished by the learned counsel for the petitioner/Revenue."

The prayer in O.J.C. No. 9087 of 1997 was to grant interest on the amount of refund due to the petitioner in terms of the direction of the apex Court in the order dated March 5, 1989 passed in SLP Nos. 1832-39 of 1989.

2. Now, let us see what prayers have been made in other writ petitions and what points have been referred to the Full Bench for decision.

In O.J.C. No. 4176 of 1996, the petitioner was to get refund of certain amount for the year 1992-93, payment of which was withheld by the Commissioner of Commercial Taxes in exercise of powers u/s 14-D of the Orissa Sales Tax Act, 1947 (for short "the Act") till disposal of the second appeal filed by the State. The said order was, however, quashed by this Court in O.J.C. No. 7740 of 1995 filed by the petitioner. Thereafter, the Commissioner issued a notice to the petitioner to appear before him for disposal of the claim for refund. Being aggrieved, the petitioner filed O.J.C. No. 4176 of 1996 with a prayer to quash the said notice and to direct the authorities to grant refund along with-interest u/s 14-C of the Act as early as possible. When the matter came up before the division Bench on February 11, 1998, it passed the following order :

As there is no time-limit fixed for processing the refund proceedings and this Court has only directed that it should be done within a reasonable period, we are of the opinion that a full hearing by a larger Bench is required for an authoritative decision on the question of time-limit for processing refund proceeding. We, therefore, refer this matter to the larger Bench.

....."

In O.J.C. No. 12414 of 1997, the petitioner was to get refund of certain amount for the period 1990-91 and 1991-92 under the Central Sales Tax Act, for which he made an application on August 5, 1995. He was, however, informed that the matter has been remitted back to the Sales Tax Officer for reassessment. As the Sales Tax Officer did not complete the reassessment, the petitioner approached this Court. It has been submitted by the petitioner that since the State has not provided any time bound period for completion of the reassessment proceedings, the provision giving powers to the authorities to withhold or not grant refunds till reassessment proceedings are completed is arbitrary and, therefore, direction should be given to the State to provide for a time-limit for completing the reassessment proceedings. The petitioner has prayed for quashing the second proviso to Section 14 and Section 14-D of the Act and for directing the authority

concerned to complete the reassessment as early as possible within a specific time. A prayer has also been made to grant the refund along with interest from the date of deposit of the refundable amount. The division Bench, by order dated September 16, 1998 has referred this matter to the Full Bench for hearing on the question of refund during the reassessment period.

Similar is the position in O.J.C. No. 12415 of 1997, which has been referred by the division Bench on October 15, 1999 with the following order :

"We are informed that the subject-matter of this writ petition is also the subject-matter of O.J.C. No. 14939 of 1998 and O.J.Cs. Nos. 12085-12087 of 1998 which are to come up before a Full Bench.

Let this matter be tagged to the aforesaid cases."

In O.J.C. Nos. 12085 and 12087 of 1998, the petitioner has prayed for a declaration that he is entitled to interest on the refundable amount at the rate mentioned in Section 12(4-a), i.e., 24 per cent from the date of deposit till the date of refund. A prayer has also been made to quash the second proviso to Section 14 and Section 14 -C of the Act. Both the cases were referred by the division Bench by order dated September 8, 1998 to be heard by the Full Bench along with O.J.C. No. 4176 of 1996.

The prayer in O.J.C. No. 14939 of 1998 is to declare that the petitioner is entitled to interest on the refundable amount from the date of deposit till the time as provided u/s 14-C of the Act. It has been referred to the Full Bench to decide the point regarding the date from which interest shall be calculated on the refundable amount.

In O.J.Cs. Nos. 2185 and 2186 of 2000, the petitioner has prayed for grant of stay of extra demand during the pendency of the second appeal before the Tribunal. Both these cases have been referred to the Full Bench by order dated March 16, 2000.

The prayer in O.J.C. No. 3203 of 1999 is to grant interest on the refundable amount during the pendency of the second appeal before the Tribunal. This case has also been referred to the Full Bench by order dated March 16, 2000 passed in O.J.C. No. 2185 of 2000.

3. From the above fact, it is seen that in some cases specific questions have been framed for decision of the Full Bench whereas in some others no such question has been framed. However, since the matters have already been referred it would be necessary for us to answer the questions. For this purpose, in addition to the questions already framed, the following questions arise for determination :

"(1) Whether sections 14 and 14-C, having not provided for payment of interest on the refundable amount from the date of deposit, are arbitrary and as such hit by articles 14 and 19(1)(g) of the Constitution of India ?

(2) Since no time-limit has been prescribed by the Act and the Rules made thereunder for completion of the reassessment proceeding after an assessment has been set aside, whether specific period/time can be fixed by the Court for the said purpose ?

(3) Whether Section 14-D of the Act empowering the Commissioner to withhold the refund is within the legislative competence of the State, and if so, whether interest is payable during the period when refund has been withheld by the order of the Commissioner u/s 14-D of the Act ?

(4) Whether a dealer, who has deposited the tax as per the orders of different authorities, is entitled to get interest by way of compensation on the amount of refund ultimately calculated on the basis of finalisation of assessment proceeding from the date of deposit till he is entitled to apply for refund as per the provision of Section 14-C of the Act, and if so, at what rate ?

(5) Whether there is an unprovided field during which period no interest is payable by the State, even though during such period interest is payable by the assessee as per Section 13(6) of the Act?

(6) What are the criteria which are required to be considered for grant of stay of realisation of the disputed amount of tax during the pendency of appeal, revision, reference, etc. ?"

4. Before proceeding further, we would like to mention here that Mr. B.K. Mohanty, Senior Advocate, being assisted by the other Advocates appearing for the petitioners, Mr. S.C. Lal, who appeared amicus curiae to assist the Court, and Mr. L. Pangari, Senior Standing Counsel of the Commercial Taxes Department, in course of their elaborate arguments, cited a plethora of decisions. We need not burden this judgment by referring to all of them. We would discuss only those decisions which have a nexus with or bearing on the points involved in the present matters.

5. Having settled the scope of the dispute in this batch of writ petitions, let us notice the provisions contained in Section 14 of the Act, which is quoted below :

"14. Refunds.--The Commissioner shall, in the prescribed manner, refund to a dealer applying in this behalf any amount of tax, penalty or interest paid by such dealer in excess of the amount due from him under this Act, either by cash payment or by deduction of such excess from the amount of tax, penalty or interest due in respect of any other period :

Provided that no claim to refund of any tax, penalty or interest paid under this Act, shall be allowed unless it is made within twenty-four months from the date on which the order of assessment or order imposing penalty, as the case may be, was passed or from the date of the final order passed on appeal, revision or reference in respect of the order earlier mentioned, whichever period is later :

Provided further that no claim to refund of any tax, penalty or interest paid

under this Act shall be allowed in cases where there is an order for reassessment, until the reassessment is finalised. (Underlining is ours)

6. While dealing with Section 14 of the Act, it is pertinent to mention that the second proviso to the said section was inserted by way of amendment by Act 23 of 1983 with effect from August 12, 1983. Prior to the insertion of this proviso, in the case of *Orient Paper and Industries Ltd. v. Sales Tax Officer* [1982] 50 STC 211, this Court held as follows :

"The claim for refund u/s 14, therefore, arises when payment by the dealer is in excess of the amount due from him under the Act. As we have already pointed out, but for the demand raised under assessment, nothing was due from the petitioners under the Act. The amount claimed by way of refund is relatable to the demand raised pursuant to assessments which, as already pointed out have been wiped out as a result of the decision by the second Appellate Tribunal. At present at the most, the petitioners had the liability to be reassessed. That liability is a contingent one. It may be, when reassessment is completed, some demand may be raised." (Underlining is ours)

7. Relying on a decision of the Allahabad High Court in *Purshottam Dayal Varshney and Another Vs. Commissioner of Income Tax and Others*, , which was a case under the Income Tax Act, this Court came to the following conclusion :

"In view of what we have said above, it follows that with the setting aside of the assessments by the Member, Additional Sales Tax Tribunal, the amounts paid by the assessee-petitioner against demands which have been set aside become refundable and the petitioner's applications, therefore, were not premature. The petitioner does not have to wait till reassessments are completed in order to claim refund."

8. The aforesaid decision of this Court was followed in the case of *Orissa Road Transport Company Ltd. v. Sales Tax Officer* [1983] 54 STC 22. After these decisions were rendered, the Legislature thought it necessary to bring about amendment in Section 14. Accordingly, the second proviso was inserted in the year 1983. After the amendment of the Act by inserting the second proviso to Section 14, this Court had the occasion to interpret the said proviso in the case of *Oscar v. Sales Tax Officer* [1989] 75 STC 252. The dispute in the said case was whether a notice issued u/s 12(8) of the Act is covered by the word "reassessment" mentioned in the second proviso to Section 14. In para 6 of the judgment, this Court held :

"A bare perusal of the second proviso to Section 14 of the Act makes it abundantly clear that a claim to refund of any tax paid under the Act shall not be allowed where there is an order for reassessment, until the reassessment is finalised. The language of the second proviso is plain and unambiguous. It conveys the intention of the Legislature in no uncertain terms that an application for refund shall not be allowed in a case where there is an order for reassessment, until the reassessment is finalised. It is well-settled that the

words of a statute are ordinarily to be understood in the natural, ordinary, popular and grammatical meaning unless such a construction leads to an absurdity or the context or the object of the statute suggests a different meaning. In construing the provision of a statute it is essential for a court, in the first instance, to give effect to the natural meaning of the words used therein, if those words are clear enough. It is only in the case of any ambiguity that a court is entitled to ascertain the intention of the Legislature by construing the provisions of the statute as a whole and taking into consideration other matters and the circumstances which led to the enactment of the statute. This being the rule of interpretation, it is not possible for us to accept the contention of Mr. Ray, learned counsel for the petitioner, that the Legislature never intended to negate a claim of refund arising out of an order of the assessing officer by mere issuance of a notice for reassessment by the self-same assessing officer. If the Legislature did intend that which it has not expressed clearly or if the Legislature intended something very different, just opposite of what is said, it is certainly not for the Judges to invent something which they do not mean within the words of the text. It is not for the Judges to supply a meaning by doing violence to the plain language used in a statute howsoever harsh the plain interpretation may be for an assessee. In our considered opinion, the second proviso to Section 14 is not susceptible to any other construction than what we have already said notwithstanding the fact that in some cases an assessee getting a right to refund in the order of assessment, loses the said right by the very officer passing an order of reassessment until the said reassessment proceeding is finalised."

In para 8 of the judgment, this Court further held :

"The only other contention which survives for our consideration is whether a notice u/s 12(8) of the Act can be construed to be an order for reassessment within the meaning of the second proviso to Section 14. Relying upon a decision of the Calcutta High Court in the case of *Nepal Chandra Banerji v. Commercial Tax Officer, Jalpaiguri* [1977] 40 STC 23, Mr. Ray contends that an order is always a determination and finality of the proceeding whereas a notice is the beginning of the same and in that view of the matter issuance of a notice cannot be construed to be an order for reassessment. In our opinion, the aforesaid decision is of no assistance in construing the expression "order for reassessment" used in the second proviso to Section 14. The Legislature has not used the words "order of reassessment" and it is more clear by the expression used in the second proviso "until the reassessment is finalised". It, therefore, clearly stipulates that whenever there is an order for initiation of a reassessment proceeding, until the said proceeding is finalised claim of refund cannot be allowed. Issuance of a notice on the assessee u/s 12(8) of the Act cannot but be an order for reassessment and, therefore, during the continuance of such proceeding until the same is finalised, the second proviso to Section 14 would apply and claim of refund cannot be allowed. In this view of the matter, there is no infirmity in the order of the assessing officer passed in annexure-4 as well as in the order of the Commissioner passed in annexure-5."

9. The aforesaid decisions, however, do not throw any light on the challenge made by the present petitioners with regard to legislative competence for enacting the second proviso to Section 14 of the Act. The second proviso was inserted with the object, "in order to rationalise and streamline the administration of the sales tax law with a view to augmenting the resources of the State, preventing evasion of tax, simplifying the provisions of the law and affording better facilities to the trading community and keeping some judicial pronouncement in view".

10. On behalf of the petitioners, it is argued that on setting aside the assessment, the entire demand is extinguished. For this purpose reliance is placed on the observations made by this Court in the case of Orient Paper and Industries Ltd. case [1982] 50 STC 211 (Ori). On the other hand, it is contended on behalf of the Revenue that the direction for reassessment by setting aside the assessment does not extinguish the entire demand as there may be cases where some of the demands have been sustained and on some other points the matter has been set aside or remanded to the assessing officer for consideration. Therefore, an authority directing reassessment cannot direct for refund as it is not sure if reassessment would result in refund. Even if there would be a case of refund, there is no quantification of the amount of refund before the said authority. It is vehemently urged that refund cannot be presumed without a specific order in that regard by a higher authority.

11. The observation of the division Bench of this Court referred to above was based on the conclusion of the Allahabad High Court in Purshottam Dayal Varshney and Another Vs. Commissioner of Income Tax and Others, where interpreting Chapter XIX of the Income Tax Act, specially sections 241 and 244 of the said Act, it was concluded that the power withholding refund covers the cases where remand proceedings are pending after the assessment order is set aside. But as soon as an assessment order is set aside, the tax paid by the assessee under the assessment order becomes refundable to him. In the case of Commissioner of Income Tax, Hyderabad Vs. Chittor Electric Supply Corporation and another, , the apex Court had the occasion to consider the correctness of the decision of the Allahabad High Court in Purshottam Dayal Varshney and Another Vs. Commissioner of Income Tax and Others, and also to consider whether interest is payable or any amount has become refundable when the Assistant Commissioner of Income Tax has set aside the assessment and directed the Income Tax Officer to make fresh assessment. By placing reliance on the language of sections 237 to 240 and comparing the same with the language used in Section 220(2) of the Income Tax Act, the apex Court held that no amount is refundable when an order of assessment is set aside and the question of any amount becoming refundable arises when fresh assessment is made and the amount properly chargeable under the Act is ascertained. Dealing with the Allahabad High Court's decision, the apex Court stated :

"In Purshottam Dayal Varshney's case [1995] 94 ITR 198 : 1974 Tax LR 275, the

Allahabad High Court has taken the view that "if an assessment order is set aside, the notice of demand becomes ineffective and the tax already paid under such a notice of demand becomes refundable. If a fresh assessment is made, the tax determined as a result of the fresh assessment order again becomes due and payable only after a fresh notice of demand is served upon the assessee". With respect to the learned Judges, we are unable to agree with the said reasoning, which does not notice or take into account the principle of Section 237. As stated above, where an assessment is set aside and a fresh assessment is directed to be made, the assessment must be deemed to be still pending, which has to be completed. In such a case, therefore, the question of the amount becoming refundable does not arise. It arises only when a fresh assessment is made and the amount properly chargeable under the Act is ascertained."

12. Thus, the apex Court has overruled the decision of the Allahabad High Court in *Purshottam Dayal Varshney and Another Vs. Commissioner of Income Tax and Others*, . As the division Bench of this Court have relied on the said decision in *Orient Paper and Industries Ltd.*'s case [1982] 50 STC 211 and *Orissa Road Transport Company Ltd.*'s case [1983] 54 STC 22 (Ori), those decisions are also impliedly overruled. That means, without insertion of the second proviso to Section 14 of the Act, no refund could have been claimed by a dealer once an assessment is set aside by a higher authority. Thus, the point regarding legislative competence in enacting the second proviso to Section 14 loses its significance. In this connection, we would like to refer to the decision of the apex Court in *Burmah Construction Co. Vs. The State of Orissa and Others*, wherein the Supreme Court considered Section 14 of the Act as it existed then without the second proviso. While dealing with the power of the Legislature for enacting any provision, the apex Court held ;

"If the power to legislate in respect of tax comprehends the power to legislate in respect of refund of tax improperly or illegally collected, imposition of restrictions on the exercise of the right to claim refund will not be beyond the competence of the Legislature. Granting refund of tax improperly or illegally collected and the restrictions on the exercise of that right are both ancillary and subsidiary matters relating to the primary head of tax on sale of goods. The provisions of Section 14 of the Act are, therefore, not ultra vires the State Legislature."

In the aforesaid case, the Supreme Court relied on its earlier decision in *The Orient Paper Mills Ltd. Vs. The State of Orissa and Others*, . Therefore, the challenge to the legislative competence of the State Legislature in enacting the second proviso to Section 14 of the Act cannot be sustained.

13. In view of the above discussion, we answer the question referred to this Bench in O.J.C. No. 9087 of 1997 that no direction can be given for grant of interest in a case where reassessment has been directed and the same is not completed, in view of the provisions contained in sections 14 and 14-C of the Act, We also answer the question formulated by us that there is no lack of legislative competence in enacting the second proviso to Section 14 of the Act.

14. It is contended by the learned counsel for the petitioners that in view of the provisions of the Act, as no time-limit has been fixed for completion of the reassessment proceeding, the Revenue is unjustly enriching itself by retaining the refund and utilising the money of the dealer, which is ultimately found refundable after completion of all proceedings arising out of a reassessment proceeding as per the set aside order of the higher authority. In this context, it is submitted by the Revenue that tax liability is not enforceable until quantification is done by completion of reassessment, as held by the Supreme Court in *Kedarnath Jute Mfg. Ltd. v. Commissioner of Income Tax (Central), Calcutta* [1971] 28 STC 672. Similarly, the liability to refund is not enforceable until quantification is made by completion of reassessment. Therefore, it is submitted that any application made during the pendency of such reassessment proceeding is a nullity in absence of quantification of the demand and in view of the observation made by the apex Court in *Commissioner of Income Tax, Hyderabad Vs. Chittor Electric Supply Corporation and another*, . Relying on the decision of the apex Court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, ; *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, it is submitted that the right to refund under the statute is subject to the law laid down by the courts in this regard. In this connection, it is pertinent to refer to the decision in *Steel Authority of India Ltd. v. Sales Tax Officer* [1994] 94 STC 105 wherein a division Bench of this Court, while considering the time-limit within which reassessment should be completed, observed as follows :

"So far as early disposal of the proceedings is concerned, it cannot be gainsaid that though there is no time-limit prescribed for completing reassessment proceedings, but there has to be a finality given to every proceeding and reassessment proceedings should be completed within a reasonable time. What would constitute a reasonable time would vary from case to case. But an effort should be made to complete it within the time period provided for original proceedings, unless it is impracticable to do so. We are surprised to find that some of the reassessment proceedings are undisputedly pending for nearly a decade. It is stated that the Revenue involved in those proceedings are substantial, and pursuant to the direction given by various authorities, payments have been made by the assessee against the disputed demand. Keeping the matter in abeyance for long periods is no way beneficial either to the assessee or to the Revenue,"

15. The aforesaid observation of this Court, it is alleged, has no impact on the Revenue. Therefore, it is prayed that specific period should be provided for completion of reassessment proceedings. In this context, we may notice the Circular No. 27082/CT., dated September 1, 1994 issued by the Commissioner of Commercial Taxes, Orissa, which is to the following effect :

"It has been represented that the reassessments are being delayed invariably by the assessing officers causing avoidable harassment particularly in getting refund of the excess tax likely refundable to the dealers.

To obviate such difficulties, guidelines were issued previously in C.C.T's Standing Order No. 56 of 1962 to complete reassessment within three months from the date of receipt of appeal order and maintain record of such cases in a register prescribed. Also the inspecting officers were instructed to examine this register and the reassessment cases in course of their inspection and report cases where there has been any deviation from the aforesaid instruction. But instructions are not being followed meticulously by the officers. As a result of this not only a great deal of harassment is being caused to the dealer and also the State is being deprived of getting legitimate tax due in cases where the reassessment results in demand".

It is not out of place to mention that the Sales Tax Officers act on the delegated power of the Commissioner. But, the above circular having not been issued under any statutory provision and the circular having not mentioned what would be fate of the reassessment proceedings if they are not completed within the period mentioned therein, i.e., three months, the said circular is unenforceable. But being a benevolent circular, we hope, the assessing officers would take notice of the same. In cases of violation of the instructions given in the circular, appropriate administrative action should be taken against the erring officers in order to compel enforcement of the circular.

16. Coming back to the prayer of the petitioners to fix a time-limit for completion of reassessment proceedings, we would say that we cannot prescribe such period while exercising our jurisdiction under article 226 of the Constitution of India. This Court has no power like article 142 of the Constitution. Considering all these, we sincerely hope, the State Legislature in all fairness will step in to mitigate a genuine lacuna in the statute.

17. The next question is in relation to Section 14-D of the Act, which reads as under :

"14-D. Power to withhold refund in certain cases.--Where an order giving rise to a refund is the subject-matter of an appeal or further proceeding under this Act, the Commissioner may, if he is of the opinion that the grant of refund is likely to adversely affect the Revenue, withhold the refund till such time as he deems proper."

Some of the present petitioners have prayed for issuing a mandamus for quashing the aforesaid section apart from challenging the refusal to grant interest during the period when refund was withheld by virtue of exercise of power by the Commissioner under the said section. In O.J.C. No. 3203 of 1999 the petitioner, who was entitled to refund on the basis of the order of the first appellate authority, made an application for refund as provided u/s 14-C of the Act, but the refund was withheld by the Commissioner by exercising his power u/s 14-D. This order of the Commissioner passed u/s 14-D of the Act was challenged by the petitioner in O.J.C. No. 14020 of 1996, disposed of on August 6, 1997. When the petitioner claimed interest for the period during which refund

was withheld, the same was refused on the ground that the matter was pending adjudication before this Court and as such no interest is payable for the said period. This order of refusal to grant interest during the tenure u/s 14-D has been challenged by the petitioner.

18. We have already quoted Section 14-D. This provision for withholding the refund is purely discretionary. Such power has been given to the Commissioner so as to protect the interest of the Revenue till such time as he deems proper. A reading of Section 14-D would show that the power of the Commissioner cannot be exercised beyond the period provided in the first part of the said section, i.e., beyond the disposal of the appeal/revision/reference/further proceeding. Therefore, unless we read the whole section and give a literal meaning to the expression "till such time as he deems proper" there will be arbitrary and unbridled power, which cannot be sustained in view of the restriction under articles 14 and 19(1)(g) of the Constitution. Such a power will also be violative of article 265 of the Constitution. It is pertinent to note that similar provision was there in Section 241 of the Income Tax Act, 1961 before its substitution by the Direct Tax Laws (Second Amendment) Act, 1989 with effect from April 1, 1989. Section 241 of the Income Tax Act read as follows :

"241. Power to withhold refund in certain cases.--Where an order giving rise to a refund is the subject-matter of an appeal or further proceeding where any other proceeding under this Act is pending, and the assessing officer is of the opinion that the grant of refund is likely to adversely affect the Revenue, the assessing officer may, with the previous approval of the Chief Commissioner or Commissioner, withhold the refund till such time as the Chief Commissioner or Commissioner may determine."

If we compare Section 241 of the Income Tax Act with Section 14-D of the Act, it would be seen that the provision in both of them is the same. The only difference is that under the Income Tax Act, it is the assessing officer with the previous approval of the Chief Commissioner or Commissioner, who can withhold the refund, whereas under the Act it is the Commissioner who has been given such power. The constitutional validity or vires of Section 241 of the Income Tax Act was challenged on a number of occasions, but it was consistently held that the same is within the power of the Legislature as this power is ancillary to the main power for levying tax. Reference may be made to the decision of the Andhra Pradesh High Court in Andhra Pradesh State Road Transport Corporation Vs. Commissioner of Income Tax, . An appeal from the said decision was dismissed by the Supreme Court in Andhra Pradesh State Road Transport Corporation Vs. Income Tax Officer, Hyderabad, , it was, however, made clear that the power u/s 241 of the Income Tax Act has to be exercised in a judicious manner. It is pertinent to note that under the Income Tax Act, Section 244(2) provides that where a refund is withheld u/s 241, interest shall be payable on the amount of refund ultimately determined to be due as a result of appeal or further proceeding for the period commencing after the expiry of three months from the

end of the month in which the order referred to in Section 241 is passed. No such provision is thereunder the present Act.

19. As is evident from Section 14D of the Act, the power of the Commissioner can be exercised only when any appeal or further proceeding is pending and grant of refund would be prejudicial to the interest of the Revenue. This condition will not be satisfied after all the proceedings are over, and there will be no prejudice to the interest of the Revenue in case after such proceedings the matter is decided in favour of the assessee. So, the expression "till such time as he deems proper" has to be interpreted keeping in view the condition precedent for invoking the power u/s 14-D. Therefore, in our opinion, the power of the Commissioner to withhold refund till such time as he deems proper cannot, at any rate, be stretched beyond the finalisation of the appeal or further proceeding. The expression "till such time as he deems proper" cannot be termed as unlimited and unbridled and the power cannot be exercised at the whim and caprice of the Commissioner. Such power can only be exercised on satisfaction of the condition that the order giving rise to refund is the subject-matter of an appeal or further proceeding and that the refund is likely to adversely affect the Revenue. Therefore, challenge to the constitutional validity of Section 14-D has no substance as the power under the said section can be exercised with the ancillary power for levying tax under entry 54 of List II of the Seventh Schedule to the Constitution.

20. Before parting with the question, we would like to bring on record a division Bench decision of this Court in *Tata Sponge Iron Ltd. v. Sale's Tax Officer* [1998] 110 STC 221. There, the dealer was entitled to certain refund on the basis of the order passed by the assessing officer. The dealer went in appeal on certain other points. At the same time, he also filed an application for refund. It may be stated here that the Revenue had not challenged the order of refund. Refund was, however, refused for which the dealer approached this Court. Considering the facts and circumstances of the case, this Court held that refund could not have been rejected only because of the pendency of the appeal filed by the assessee when no appeal or cross-objection was filed by the Revenue. In coming to this conclusion, this Court relied on its earlier decision in *Shyamsunder Sahoo v. State of Orissa* [1994] 92 STC 28, wherein it was held that the Tribunal has no jurisdiction or power to enhance the assessment in the absence of appeal or cross-objection filed by the Revenue. The Bench in *Tata Sponge Iron Ltd.'s* case [1998] 110 STC 221 (Ori) opined that the ratio of the aforesaid decision should apply to the first appeals also. In paragraph 9 of the judgment (at pp. 223-224) in *Tata Sponge Iron Ltd.* [1998] 110 STC 221, it was held :

"We, therefore, hold that if refund application is filed, it should not be rejected only on the ground that the appeal filed by the assessee is pending when no cross-objection or appeal has been filed by the Revenue, as the refund flows from the original order of assessment. We further hold that even when the appellate authority remands a case for fresh assessment, it shall only be

confined to the assessment already made and shall not touch the refund order passed by the assessing authority. We are unable to agree with the submission of the Revenue that unless reassessment is completed, no refund can be ordered inasmuch as the refund order by the assessing authority has nothing to do with the appeals unless there is a cross-appeal."

21. From the above discussion, it is clear that where the refund order is not challenged by the Revenue before the higher forums, even though the assessee challenges the same, essentially for enhancement of the amount of refund, refund cannot be withheld in exercise of the power u/s 14-D inasmuch as the Revenue admits the refund by not challenging the same. In that case, it cannot be said that grant of refund is likely to adversely affect the Revenue.

22. Now, let us come to the point whether for the period during which refund is withheld by virtue of exercise of power u/s 14-D, interest is payable as provided u/s 14-C. Section 14-C of the Act reads :

"14-C. Payment of interest on refundable amounts.--Amounts refundable u/s 14, if not refunded within ninety days from the date of receipt of the application in that behalf from the dealer, shall carry interest at the rate of eighteen per cent per annum for the first ninety days and thereafter at the rate of twenty-four per cent per annum, with effect from the date of expiry of the period specified above."

23. A bare reading of the aforesaid provision would make it clear that once refund is due and the assessee has filed an application, the very moment ninety days period is over, he is entitled to get interest at the rates prescribed therein. In case any appeal or further proceeding is pending, for which the refund has been withheld by the Commissioner on finalisation of the said appeal or further proceeding, the assessee is entitled to get interest on the amount of refund determined in the appeal or further proceeding on the basis of the date of his making the application for refund. Therefore, the action of the Revenue in refusing to grant interest for the period during which power u/s 14-D of the Act was exercised is untenable in law.

24. The Revenue also concedes to ,the aforesaid position, as is evident from paragraph 14.3 of their written notes, which reads as under :

"Since refund is due and is withheld under the section, the assessee is entitled to interest in the event of success in appeal or further proceeding, on the actual amount ultimately determined to be refunded, for the period of delay u/s 14-C."

25. Here, we would like to take note of the decision of this Court in Oscar v. Sales Tax Officer [1989] 75 STC 252. In that case, a division Bench of this Court has held that where there is a notice for reassessment, the same shall be deemed to be an order for reassessment and as such no refund should be granted till finalisation of the reassessment proceeding initiated u/s 12(8) of the Act. But, in Commissioner of Income Tax, Hyderabad Vs. Chittor Electric Supply

Corporation and another, , the Supreme Court has held that till the order in the reassessment proceeding is passed, no refund is due as there is no excess payment. Applying the ratio laid down by the Supreme Court, it can be said that by issuance of the notice of reassessment, the original assessment is not extinguished, and if any order of refund is there by virtue of the earlier proceeding, the same cannot be denied depending on the second proviso to Section 14. What is required to be inquired into is whether the dealer has paid any excess amount over and above the amount of tax payable by him. Thus, the notice of reassessment u/s 12(8) of the Act can, by no stretch of imagination, be held to be an order of reassessment mentioned in the second proviso to Section 14. The dictionary meaning of the word "order", inter alia, is "an authoritative direction, mandate ; a decision of a court or Judge made or entered in writing". Therefore, the decision rendered in Oscar [1989] 75 STC 252 (Ori) does not lay down the correct law and a dealer can claim refund of the excess amount paid by him over and above the determined amount even if a notice of reassessment u/s 12(8) of the Act is issued. In that case the Commissioner, even if he considers that the grant of such refund would be prejudicial to the interest of the Revenue, cannot withhold such 12(8) of the Act is not a further proceeding mentioned in Section 14D of the Act. Another division Bench of this Court in the case of Nikunja Kishore Naik v. Commissioner of Commercial Taxes (1993) 75 CLT 677 was considering the question whether the Commissioner can withhold the refund u/s 14-D when notice of reassessment u/s 12(8) of the Act was issued. The Bench held (at page 679) :

"A bare reading of provision makes it clear only in case where order giving rise to a refund is the subject-matter of an "appeal or further proceeding under the Act", the Commissioner has option to withhold refund if he is of the opinion that grant of refund is likely to adversely affect the Revenue. The expression "further proceeding" obviously relates to a stage subsequent to appeal. In other words, it encompasses proceedings before the Tribunal or High Court or the apex Court as prescribed in the Act. They cannot certainly be relatable to any other proceeding. In the instant case, admittedly no appeal or a proceeding of a stage subsequent to appeal is pending. Therefore, exercise of power u/s 14-D of the Commissioner is unauthorised."

We approve the decision in Nikunja Kishore Naik (1993) 75 CLT 677 as laying down the correct law with regard to the power of the Commissioner to withhold refund during the pendency of proceeding u/s 12(8) of the Act, as that would not come within the purview of the subject-matter of "appeal or further proceeding".

26. In view of the above discussion, we conclude that Section 14-D of the Act is intra vires the Constitution, and interest is payable on the refundable amount during the period or periods such refund is withheld at the rate provided u/s 14-C of the Act.

27. We have already quoted the relevant provisions of the Orissa Sales Tax Act which have bearing on the questions referred to us and/or formulated by us. The

crux of the questions is with regard to payment of interest on the excess amount paid by a dealer, which is found refundable from the date of payment till such refund is granted by the department. The refundable amount can be determined by the assessment order, first appellate order, Tribunal's order or High Court's order. The question is once the amount of refund is determined, whether the assessee can be denied interest on such refund, even if further proceeding is taken. In this connection, learned counsel for the petitioners draws our attention to sections 243, 244 and 244A of the Income Tax Act, which provide as under :

"243. Interest on delayed refunds.--(1) If the assessing officer does not grant the refund,--

(a) in any case where the total income of the assessee does not consist solely of income from interest on securities or dividends, within three months from the end of the month in which the total income is determined under this Act, and

(b) in any other case, within three months from the end of the month in which the claim for refund is made under this Chapter, the Central Government shall pay the assessee simple interest at fifteen per cent per annum on the amount directed to be refunded from the date immediately following the expiry of the period of three months aforesaid to the date of the order granting the refund.

Explanation.--If the delay in granting the refund within the period of three months aforesaid is attributable to the assessee, whether wholly or in part, the period of the delay attributable to him shall be excluded from the period for which interest is payable.

(2) Where any question arises as to the period to be excluded for the purposes of calculation of interest under the provisions of this section, such question shall be determined by the Chief Commissioner or Commissioner whose decision shall be final.

(3) The provisions of this Section shall not apply in respect of any assessment for the assessment year commencing on the 1st day of April, 1989 or any subsequent assessment years.

244. Interest on refund where no claim is needed.--(1) Where a refund is due to the assessee in pursuance of an order referred to in Section 240 and the assessing officer does not grant the refund within a period of three months from the end of the month in which such order is passed, the Central Government shall pay to the assessee simple interest at fifteen per cent per annum on the amount of refund due from the date immediately following the expiry of the period of three months aforesaid to the date on which the refund is granted.

(1A) Where the whole or any part of the refund referred to in Sub-section (1) is due to the assessee as a "result of any amount having been paid by him after the 31st day of March, 1975, in pursuance of any order of assessment or penalty and such amount or any part thereof having been found in appeal or other proceeding under this Act to be in excess of the amount which such assessee is

liable to pay as tax or penalty, as the case may be, under this Act, the Central Government shall pay to such assessee simple interest at the rate specified in Sub-section (1) on the amount so found to be in excess from the date on which such amount was paid to the date on which the refund is granted :

Provided that, where the amount so found to be in excess was paid in instalments, such interest shall be payable on the amount of each such instalment or any part of such instalment, which was in excess, from the date on which such instalment was paid to the date on which the refund is granted :

Provided further that no interest under this Sub-section shall be payable for a period of one month from the date of the passing of the order in appeal or other proceeding :

Provided also that where any interest is payable to an assessee under this sub-section, no interest under Sub-section (1) shall be payable to him in respect of the amount so found to be in excess.

(2) Where a refund is withheld under the provisions of Section 241, the Central Government shall pay interest at the aforesaid rate on the amount of refund ultimately determined to be due as a result of the appeal or further proceeding for the period commencing after the expiry of three months from the end of the month in which the order referred to in Section 241 is passed to the date the refund is granted.

(3) The provisions of this Section shall not apply in respect of any assessment for the assessment year commencing on the 1st day of April, 1989, or any subsequent assessment years.

244A. Interest on refunds.--(1) Where refund of any amount becomes due to the assessee under this Act, he shall, subject to the provisions of this section, be entitled to receive, in addition to the said amount, simple interest thereon calculated in the following manner, namely :

(a) Where the refund is out of any tax collected at source u/s 206C or paid by way of advance tax or treated as paid u/s 199, during the financial year immediately preceding the assessment year, such interest shall be calculated at the rate of one per cent for every month or part of a month comprised in the period from the 1st day of April of the assessment year to the date on which the refund is granted :

Provided that no interest shall be payable if the amount of refund is less than ten per cent of the tax as determined under subsection (1) of Section 143 or on regular assessment ;

(b) in any other case, such interest shall be calculated at the rate of one per cent for every month or part of a month comprised in the period or periods from the date or, as the case may be, dates of payment of the tax or penalty to the date on which the refund is granted.

Explanation.--For the purposes of this clause, "date of payment of tax or penalty" means the date on and from which the amount of tax or penalty specified in the notice of demand issued u/s 156 is paid in excess of such demand.

(2) If the proceedings resulting in the refund are delayed for reasons attributable to the assessee, whether wholly or in part, the period of the delay so attributable to him shall be excluded from the period for which interest is payable, and where any question arises as to the period to be excluded, it shall be decided by the Chief Commissioner or Commissioner whose decision thereon shall be final.

(3) Where, as a result of an order under Sub-section (3) of Section 143 or Section 144 or Section 147 or Section 154 or Section 155 or Section 250 or Section 254 or Section 260 or Section 262 or Section 263 or Section 264 or an order of the Settlement Commission under Sub-section (4) of Section 245D, the amount on which interest was payable under Sub-section (1) has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and in a case where the interest is reduced, the assessing officer shall serve on the assessee a notice of demand in the prescribed form specifying the amount of the excess interest paid and requiring him to pay such amount ; and such notice of demand shall be deemed to be a notice u/s 156 and the provisions of this Act shall apply accordingly.

(4) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989 and subsequent assessment years."

28. Learned counsel for the petitioners also brings to our notice the provisions of certain other statutes which grant interest on the refundable amount from the date of payment. Basing on the provisions of the Income Tax Act and those statutes, it is submitted that by not granting interest, though the State has enjoyed the money collected by virtue of pretended valid order, which is ultimately found to be not tenable, the value of the money refunded is depreciated and the dealer is uncompensated as well, which is inequitable. Such retention of money is without any authority of law and is hit by Article 256 of the Constitution.

29. In reply, Mr. Pangari, learned Senior Standing Counsel (C.T.), submits that in view of Section 13(6) of the Act, interest is payable by a dealer only on the amount ultimately found due, from the end of 30 days of service of demand notice u/s 13(4). Such interest is charged much later, though there was an obligation to pay the tax earlier. In this connection, he draws our attention to the decision in *The Kedarnath Jute Mfg. Co. Ltd. Vs. The Commissioner of Income Tax, (Central), Calcutta*, wherein it has been held that the moment a dealer makes either purchases or sales which are subject to taxation, the obligation to pay the tax arises and taxability is attracted, although the liability cannot be enforced till the quantification is effected by assessment proceedings. According

to him, by this process, the dealer defers its legal dues payable till the assessment proceeding is completed. But, for such delay, no interest is levied on him. He further submits that similarly, the liability to refund the amount is not enforceable until the quantification is done by reassessment. He also submits that refund cannot be presumed without specific order to that effect.

30. Learned counsel for the petitioners submits that retention of money, which is collected but subsequently found refundable, by taking recourse to Section 14, requires to be balanced by grant of compensation as the State has enjoyed the benefit of using the money with impunity. According to the learned counsel for the petitioners, such collection and retention are without the authority of law. We are afraid, we cannot agree with the proposition that in each and every case, when an assessment order is made, or an appeal or reference is decided against the assessee, the same is without the authority of law and as such hit by Article 265 of the Constitution. In this connection, we would like to place on record the observations made in *The Kedarnath Jute Mfg. Co. Ltd. Vs. The Commissioner of Income Tax, (Central), Calcutta*, that when the officers are exercising their powers, the same cannot be held as without the authority of law. Therefore, this submission of the learned counsel for the petitioners is contrary to the ratio laid down in the above case and is not tenable. It is to be noted that where taxes are demanded and if there are some mistakes or errors of fact or law, those are corrected by higher authorities. Till such orders are passed by the higher authorities correcting the mistakes of fact or law, the demand remains as valid. As such, the State can validly enjoy the money paid against such demand.

31. Learned counsel for the petitioners then submits that interest is only payable by virtue of Section 14-C after 90 days from the date of filing the refund application. As such, a dealer is not compensated for the additional payment made by him till then. For this uncovered field or time, there is no provision under the statute, unless Section 14 is read down, to pay any interest on the additional amount, which is found refundable. According to the learned counsel for the petitioners, for the sake of equity, a dealer is entitled to be compensated for such uncovered field or time.

32. In this connection, we would like to quote the conclusion of the apex Court in the case of *J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another*, . In that case, which was under the Rajasthan Sales Tax Act, the apex Court was dealing with the question as to what is the amount due for the purpose of levying interest and from which date interest is payable by a dealer. In para 14 of the judgment (at page 437 of STC ; 2404 of AIR), it was held :

"Let us look at the question from a slightly different angle. Section 7(1) enjoins on every dealer that he shall furnish prescribed returns for the prescribed period within the prescribed time to the assessing authority. By the proviso the time can be extended by not more than fifteen days. The requirement of Section 7(1) is undoubtedly a statutory requirement. The prescribed return must be

accompanied by a receipt evidencing the deposit of full amount of "tax due" in the State Government on the basis of the return. That is the requirement of Section 7(2). Section 7(2A), no doubt, permits payment of tax at shorter intervals but the ultimate requirement is deposit of the full amount of "tax due" shown in the return. When Section 11B(a) uses the expression "tax payable under Sub-sections (2) and (2A) of Section 7, that must be understood in the context of the aforesaid expressions employed in the two sub-sections. Therefore, the expression "tax payable" under the said two sub-sections is the full amount of tax due and "tax due" is that amount which becomes due ex hypothesi on the turnover and taxable turnover "shown in or based on the return". The word "payable" is a descriptive word, which ordinarily means "that which must be paid or is due, or may be paid", but its correct meaning can only be determined if the context in which it is used is kept in view. The word has been frequently understood to mean that which may, can or should be paid and is held equivalent to "due". Therefore, the conjoint reading of Sections 7 (1), (2) and (2A) and 11B of the Act leaves no room for doubt that the expression "tax payable" in Section 11B can only mean the full amount of tax which becomes due under Sub-sections (2) and (2A) of the Act when assessed on the basis of the information regarding turnover and taxable turnover furnished or shown in the return. Therefore, so long as the assessee pays the tax which according to him is due on the basis of information supplied in the return filed by him, there would be no default on his part to meet his statutory obligation u/s 7 of the Act and, therefore, it would be difficult to hold that the "tax payable" by him "is not paid" to visit him with the liability to pay interest under Clause (a) of Section 11B. It would be a different matter if the return is not approved by the authority but that is not the case here. It is difficult on the plain language of the section to hold that the law envisages the assessee to predict the final assessment and expect him to pay the tax on that basis to avoid the liability to pay interest. That would be asking him to do the near impossible."

From this, it is clear that interest is payable by a dealer on the amount which is ultimately found due over and above the tax payable on the basis of the return, or in other words, over and above the admitted tax.

33. We would be failing in our duty if we do not notice the decision of the apex Court in the case of Calcutta Jute Manufacturing Co. and another Vs. Commercial Tax Officer and others, , a case under the Bengal Finance (Sales Tax) Act. Constitutional validity of Section 6B of the said Act, which imposes tax on turnover, was challenged before the High Court, which had granted interim injunction restraining the State from recovering such tax on turnover. Ultimately, the provision was held to be intra vires. The question before the apex Court was whether the dealer was liable to pay interest for the period when stay was granted by the High Court. In para 17 of the judgment (at page 441 of STC ; 2924 of AIR), the apex Court held :

"The contention that as the courts granted injunction restraining the State from

recovering the tax amount as per Section 6B would raise a presumption that the court was then satisfied of the bona fides of the contention is too fragile for depriving the State of the statutory right of interest incorporated in Section 10A of the Act. Interim orders are passed by the High Court on a variety of considerations, one among being the strained financial position of the person approaching the court. Merely because the court granted interim orders it cannot be inferred that court was then satisfied of a strong prima facie case for the appellants. On the contrary, it is well nigh settled that there is always a presumption in favour of constitutionality of a legislative Act. The presumption cannot be the other way around."

34. Learned counsel for the petitioners submits that for the reasons of equity, interest is payable on the refundable amount from the date of payment even though the statute is silent. It is contended that under the Central Excise Act, there is no provision for payment of interest either to the assessee or to the department. But, for reasons of equity, courts have directed to pay interest. In support of this contention, our attention is drawn to *Elpro International Ltd. Vs. Joint Secretary, Govt. of India, Ministry of Finance and Others*, , *Union of India Vs. Coromandel Prodorite Ltd.*, , *Indian Cable Company Ltd. Vs. CEGAT*, , *Assistant Collector of C. Ex. Vs. Calcutta Chemical Company Ltd.*, and *Union of India (UOI) and Others Vs. Assam Timber Treating Works and Another*, .

35. In reply, learned Senior Standing Counsel (C.T.) submits that in view of the decision of the apex Court in *Mafatlal Industries* [1998] 111 STC 467, no interest is payable, as it is not provided in the statute, even while disposing of writ applications.

36. On the other hand, learned counsel for the petitioner, in support of his contention regarding grant of interest for reasons of equity, relies on the decision of the Supreme Court in *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, , wherein it has been held :

"It is now a well-settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the Legislature, the court may modify the language used by the Legislature or even "do some violence" to it, so as to achieve the obvious intention of the Legislature and produce a rational construction, vide *Luke v. Inland Revenue Commissioners* 1963 AC 557. The court may also in such a case read into the statutory provision a condition which, though not expressed, is implicit as constituting the basic assumption underlying the statutory provision."

37. It is submitted that if the Legislature would have been told that the State earns interest on the delay or default in payment of tax by the assessee, it would have provided for payment of interest by the State on the refundable amount from the date of payment. In absence of such express provision, the court should read into the statutory provisions and impose conditions on the basic assumption

underlying the same and on a fair and reasonable construction. It is submitted that on the above principle, the provision of Section 14 of the Act may be read down as providing interest from the date of payment. It is also submitted that though it may cause hardship to the State, but if the court fixes a reasonable rational compensation or interest, it will compel the taxing authorities to expedite disposal of the proceedings including appeal and reassessment. It is also submitted that equity has two sides in case of contesting parties. Wherever the courts have granted benefits of compensation or interest outside the statute on the ground of equity, they have done so because of the imposing burden on a tax-payer. Repelling the argument advanced by Mr. S.C. Lal, who appeared amicus curiae that non-existent rights are not capable of being enforced, learned counsel for the petitioners submits that the logic or equity for granting such compensation and/or interest is because of existence of Sections 12(4a) and 13(6) of the Act. He also submits that though the Supreme Court warned that the rule of equity has no place in tax matters, it has not precluded the court from interpreting the provision reasonably and in consonance with justice. For this proposition, he relies on the decisions in *Madurai District Central Co-operative Bank Ltd. Vs. Third Income Tax Officer, Madurai*, , *R.B. Jodha Mal Kuthiala Vs. The Commissioner of Income Tax, Punjab, Jammu and Kashmir, Himachal Pradesh and Patiala*, , *Commissioner of Wealth-tax, Bihar and Orissa Vs. Kripashankar Dayashanker Worah*, , *Commissioner of Income Tax, West Bengal I Vs. Central India Industries Ltd.*, and *Mrs. M.P. Gnanambal Vs. Commissioner of Income Tax*, . Learned counsel for the petitioners also draws our attention to the decisions of the Supreme Court in *Commissioner of Income Tax, Bangalore Vs. J.H. Gotla, Yadagiri*, and *Commissioner of Sales Tax, U.P. Vs. Auriaya Chamber of Commerce, Allahabad*, wherein it has been held that though equity and taxation are often strangers, attempts should be made to see that they do not remain always so, and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal constructions.

38. In reply to these submissions, learned Senior Standing Counsel (C.T.) submits that the provision for interest is a substantive provision. In the case of *India Carbon Ltd. v. State of Assam* [1997] 106 STC 460, the Supreme Court has held that any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law. But, it must also be realised that 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 cannot be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount. Interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in that behalf. He also submits that in a taxing statute, there is no room for any intendment and/or presumption. One must look fairly at the language used. As has been held in *Baidyanath Ayurved Bhawan (Pvt) Ltd., Jhansi Vs. The Excise Commissioner, U. P.*

and Others, , in interpreting a taxing statute, the court should not ordinarily concern themselves with the policy behind the provisions or even with its impact. In that case, the apex Court referred with approval to the observations made by Rowlatt, J., in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64 (at p. 71) which were as follows :

".....in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

39. Learned Senior Standing Counsel (C.T.) then submits that it is not for the court to supply a meaning by doing violence to the plain language used in Section 14 of the Act howsoever harsh the plain interpretation may be for an assessee and the court is not competent to supply the omission by engrafting on it or introducing in it under the guise of interpretation, by analogy or implication, something what it thinks to be a general principle of justice and equity. For this proposition, he relies on a decision of the Supreme Court in *The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur*, . In paragraph 12 (at page 418 of STC ; 104 344 of AIR), it has been held :

"If the Legislature wilfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a *casus omissus* in a statute, the language of which is otherwise plain and unambiguous, the court is not competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation, by analogy or implication, something what it thinks to be a general principle of justice and equity. To do so" (at p. 65 in *Prem Nath L. Ganesh Dass Vs. Prem Nath L. Ram Nath and Others*, , per Tek Chand, J.) "would be entrenching upon the preserves of Legislature", the primary function of a court of law being *jus dicere* and not *jus dare*."

He further submits that it is the duty of the court to give full effect to the declarations and intents of the Legislature in the scheme and language of a statute. In *The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur*, , the Supreme Court has observed :

"We have said enough and we may say it again that where the Legislature clearly declares its intent in the scheme and language of a statute, it is the duty of the court to give full effect to the same without scanning its wisdom or policy, and without engrafting, adding or implying anything which is not congenial to or consistent with such expressed intent of the law giver ; more so if the statute is a taxing statute."

He also submits that the court must proceed on the assumption that the Legislature did not make a mistake and that it intended to say what it said. In other words, court cannot presume deficiency and supply the omission. In support of this contention, he places reliance on a decision of the Supreme Court in *P.K. Unni Vs. Nirmala Industries and others* [OVERRULED], . Relying on

another decision of the Supreme Court in *The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another*, he submits that courts do not sit as super Legislature. It is not the duty of the court to enlarge the scope of the legislation or the intention of the Legislature when the language of the provision is plain and unambiguous. In the case of *Union of India v. Deoki Nandan Aggarwal* AIR 1992 SC 96, the Supreme Court has observed as follows (para 14, pp. 101-02) :

"It is not the duty of the court either to enlarge the scope of the legislation or the intention of the Legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the Legislature the court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the Legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities."

40. Learned Senior Standing Counsel (C.T.) further submits that all claims of refund have to be preferred and adjudicated under the statute, including writ petitions. In *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, it has been held (at p. 549) :

"The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it override it. The power under Article 226 is conceived to serve the ends of law and not to transgress them."

41. Elucidating his point regarding the nature of interest and maintainability of claim to interest on refund under a taxing statute, learned Senior Standing Counsel (C.T.) submits that interest is generally understood as a charge or debt. It is either allowed by law or agreed to between the parties. In the *Black's Law Dictionary*, interest for use of money has been explained as follows :

"Interest is the compensation allowed by law or fixed by the parties for the use or forbearance of borrowed money (*Jones v. Kansal Gas and Electric Co.* 222 Kar 3390, 565 P.2d 597, 604). Basic cost of borrowing money or buying on instalment contract. Payments a borrower pays a lender for the use of money. Cost of using credit or funds of another. A corporation pays interest on its bonds to the bondholders."

"Conventional interest" and "legal interest" have also been explained in the said

dictionary thus :

Conventional interest :

"Interest at the rate agreed upon and fixed by the parties themselves, as distinguished from that which the law would prescribe in the absence of an explicit agreement."

Legal interest :

"A rate of interest fixed by statute as either the maximum rate of interest permitted to be charged by law, or a rate of interest to be applied when the parties to a contract intend an interest to be paid but do not fix the rate in the contract. Even in the latter case, frequently this rate is the same as the statutory maximum rate permitted. Term may also be used to distinguish interest in property or in claim cognisable at law in contrast to equitable interest."

42. It is submitted that in equity interest may be recovered in certain cases where a particular relationship exists between the creditor and the debtor. Interest is also payable where there has been misconduct or improper delay in payment, or in the case of money obtained or retained by fraud. It may also be allowed where the defendant ought to have done something which would have entitled the plaintiff to interest at common law, or has wrongfully prevented the plaintiff from doing something which would have so entitled him. However, payment of tax is not under a contract between the taxpayer and the State. There is plain repugnance between contract and taxation. Taxation is the very antithesis of contract. On the question of award of interest in respect of payments made pursuant to the interim orders of the court, learned Senior Standing Counsel (C.T.) submits that any payment made, whether or not against an interim order, is a payment towards tax and in this regard there is no contract between the tax-payer and the State. Therefore, there is no question of payment of interest from the date the amount was paid till the matter is decided, in case it is decided in favour of the assessee. Such payment was made against an existing demand and there was no liability of refund on the date of payment. After the matter is finally adjudicated, if it goes in favour of the assessee, he can file the refund application as provided u/s 14-C of the Act and he will be entitled to the statutory interest provided therein.

43. He further submits that there is no right, to damages. As has been held in *India Carbon Ltd. etc. Vs. State of Assam*, , in the absence of contract of usage, interest cannot be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount. By granting interest as a condition for payment of certain amount, the payment made against legal demands are converted into loans, which the court should not do as, such interim payments are not unauthorised collections. The order of interim payment with condition of interest abrogates the provisions of the Act and the Rules made thereunder. Relying on the decision of the Supreme Court in *R.K. Garg v. Union of India* AIR 1981 SC 2138, learned Senior Standing Counsel (C.T.) submits that

the court must respect the provisions of the statute. In the cases at hand, provision for payment of interest on the refundable amount has been made u/s 14-C of the Act, and the court should refrain from granting further interest. In this connection, he also relies on the decision in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, . He further submits that award of interest in the interim matter of stay is not permissible on equitable grounds or in common law. In this connection, he draws our attention to the decision of the apex Court in *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, , wherein it has been held:

".....the inherent powers are not in any way controlled by the provisions of the Code as had been specifically stated in Section 151 itself. But those powers are not to be exercised when their exercise may be in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. This restriction, for practical purposes, on the exercise of those powers is not because those powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the Legislature for orders in certain circumstances is dictated by the interests of justice."

Lastly, learned Senior Standing Counsel (C.T.) submits that there is no void in the statute regarding payment of interest on the refundable amount including the amount paid pursuant to interim orders of stay if the same is ultimately found to be refundable. Therefore, the court should not impose further conditions regarding payment of interest/compensation while directing the assessee to pay some amount as a condition precedent for stay.

44. Much reliance has been placed by the learned counsel for both sides on the decision of the Supreme Court in *Mafatlal Industries Ltd. v. Union of India* [1998] 111 STC 467. The decision has been rendered by a Constitution Bench consisting of nine honourable Judges. In that decision, many earlier decisions have also been taken note of, one of which is *Dhulabhai v. State of Madhya Pradesh* [1968] 22 STC 416, wherein the apex Court discussed at length the question when does a suit lie for recovery of taxes imposed and collected under a taxing enactment and enunciated seven propositions. Propositions 1, 2, 5, 6 and 7, which are relevant for our purpose are quoted below :

"(1) Where the statute gives a finality to the orders of the special Tribunals, the civil courts" jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) and

(4).....

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case, the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set does apply."

45. The aforesaid propositions in *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, , were based on two earlier decisions in *K.S. Venkataraman and Co. Vs. State of Madras*, and *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, . After a thorough discussion, the apex Court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, held :

"The words "in excess of the constitutional limits" must, therefore, be understood in the context of the ratio of the above two decisions. So far as the words "illegally collected" in proposition No. 5 are concerned, it is obvious that they go along with the preceding words, i.e., where a tax is collected in disregard of the constitutional limitations, it will be a tax illegally collected and a suit lies. It would not be reasonable to understand the words "illegally collected" dissociated from their context or in a manner contrary to the ratio of *Kamala Mills Ltd. Vs. State of Bombay*, , which was expressly referred to and followed in this decision."

Quoting the decision in *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, , wherein it was observed :

"A tax is intended for immediate expenditure for the common good and it would be unjust to require its repayment after it has been in whole or in part expended, which would often be the case, if the suit or application could be brought at any time within three years of a court declaring the law under which it was paid to be invalid, be it a hundred years after the date of payment. Nor is there any

provision under which the court could deny refund of tax even if the person who paid it has collected it from his customers and has no subsisting liability or intention to refund it to them, or, for any reason, it is impracticable to do so."

The apex Court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, , held in para 40 of the judgment (at p. 508) as follows :

"The appeals were, however, dismissed holding that since the appellant has failed to claim the relief of refund in the first writ petition filed by him, he is disentitled from doing so by way of a separate subsequent writ petition. It was observed that it is not open to the appellant to split up his claim for refund and file writ petitions in a piece-meal fashion. The decision is significant for pointing out the irrational and unjust consequences of the holding in *Bhailal Bhai case* [1964] 15 STC 540 (SC) and *Aluminium Industries case* [1965] 16 STC 689 (SC), which implicitly followed *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, . The decision is also significant for pointing out the adverse impact on public interest inherent in holding [see *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, again] that the plea that the State has expended the taxes on public purposes is no defence to a claim for refund."

46. Then the apex Court in *Mafatlal case* [1998] 111 STC 467 referred to the decision in *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, , where constitutionality of Section 46 of the Bombay Sales Tax Act was challenged basing on an earlier decision of the Supreme Court in *R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad*, . The challenge was repelled. The following observations of Krishna Iyer, J. made in *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, was quoted with approval :

"The professed object of the law is clear. The motive of the Legislature is irrelevant to castigate an Act as a colourable device. The interdict on public mischief and the insurance of consumer interests against likely, albeit, unwitting or ex abundanti cautela excesses in the working of a statute are not merely an ancillary power but surely a necessary obligation of a social welfare State. One potent prohibitory process for this consummation is to penalise the trader by casting a no-fault or absolute liability to "cough up" to the State the total "unjust" takings snapped up and retained by him "by way of tax" where tax is not so due from him, apart from other punitive impositions to deter and to sober the merchants whose arts of dealing with customers may include "many a little makes a mickle". If these steps in reasoning have the necessary nexus with the power to tax under entry 54, List II, it passes one's comprehension how the impugned legislation can be denounced as exceeding legislative competence or as a "colourable device" or as "supplementary, not complementary"..... In our view, the true key to constitutional construction is to view the equity of the statute and sense the social mission of the law, language permitting, against the triune facets of justice highlighted in the Preamble to the Paramount Parchment, read with a spacious signification of the listed entries concerned."

47. A decision of the Canadian Supreme Court in *Canadian Pacific Airlines Limited v. British Columbia* [1989] 59 DLR (4th) 218, was placed before the apex Court in *Mafatlal* [1998] 111 STC 467. In that case, the Canadian Supreme Court had held that the C.P. Air could recover the social service tax paid on purchases of equipments and parts, but the tax paid by it on alcoholic beverages is not recoverable for the reason that the latter tax was imposed on passengers who consume the liquor. On going through the said judgment, the apex Court opined that it was not a case of tax levied and collected under an invalid statute but a case where the tax was collected wrongly by misinterpreting the provisions of the statute, in which situation, the taxes are refundable according to the decision in *Air Canada*. The apex Court did not feel it necessary to refer to the opinion of the learned Judges of the Canadian Supreme Court as there was no suggestion that any contrary principle was enunciated. However, the apex Court observed as follows (at p. 515) :

"The law in Canada appears rather paradoxical to an Indian lawyer. It says that while taxes collected under an unconstitutional statute need not be refunded (even if the burden of tax has not been passed on to a third party), taxes collected by mis-interpretation/ mis-applying the provisions of a statute ought to be refunded. This circumstance emphasises how the jurisprudence in each country has developed differently. We, on our part, have to evolve appropriate principles to meet the emerging situations, keeping in mind the development of law in our own country, our own circumstances and above all, our own constitutional philosophy. At the same time, we express our broad agreement with the approach and thinking of the majority Judges in *Air Canada* case (1989) 59 DLR (4th) 161."

48. In para 59 of the judgment in *Mafatlal* [1998] 111 STC 467, the apex Court quoted the observations made by the Australian High Court in *Commissioner of State Revenue v. Royal Insurance Australia Ltd.* (1995) 69 ALJ 51 ; (182) CLR 51. Rejecting the State's plea that inasmuch as the plaintiff has passed on the burden of illegally collected tax to others, it is not entitled to restitution, the following observations were made :

".....That consequence suggests that, if the economic argument is to be converted into a legal proposition, the proposition must be that the plaintiffs recovery should be limited to compensation for loss or damage sustained. The third is that an inquiry into and a determination of the loss or damage sustained by a plaintiff who passes on a tax or charge is a very complex undertaking. And finally, it has long been thought that, despite Lord Mansfield's statement in *Moses v. Macferian* (1760) 2 BOM 1005, the basis of restitutionary relief is not compensation for loss or damage sustained but restoration to the plaintiff of what has been taken or received from the plaintiff without jurisdiction."

49. In para 64 of the judgment in *Mafatlal* [1998] 111 STC 467, the apex Court noticed the decision of the Supreme Court of United States of America in *United States v. Jefferson Electric Manufacturing Company* 78 L Ed 859. There, Section

424 of the Revenue Act, 1928 provided that "no refund shall be made of any amount paid by or collected from any manufacturer, producer or importer in respect of the tax imposed by sub-division (3) of Section 600 of the Revenue Act of 1924, or sub-division (3) of Section 900 of the Revenue Act of 1921, or of the Revenue Act of 1918 unless(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount although collected from the purchaser or lessee, was returned to him." The said provision was attacked as violative of the due process clause in the Fifth Amendment to the United States Constitution. The attack was repelled.

50. Approving the decision in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, , held :

".....It must be held that Section 11-B (both before and after amendment) is valid and constitutional. In *Kamala Mills case* [1965] 16 STC 613, this Court upheld the constitutional validity of Section 20 of the Bombay Sales Tax Act, 1946 (set out hereinbefore) on the ground that the Bombay Act contained adequate provisions for refund, for appeal, revision, rectification of mistake and for condonation of delay in filing appeal/revision. The court pointed out that had the Bombay Act not provided these remedies, and yet barred the resort to civil court, the constitutionality of Section 20 may have been serious doubt, but since it does provide such remedies, its validity was beyond challenge. To repeat--and it is necessary to do so--so long as Section 11-B is constitutionally valid, it has to be followed and given effect to. We can see no reason on which the constitutionality of the said provision--or a similar provision--can be doubted."

It was further held :

".....where a statute creates a special right or a liability and also provides the procedure for the determination of the right or liability by the Tribunals constituted in that behalf and provides further that all questions about the said right and liability shall be determined by the Tribunals so constituted, the resort to civil court is not available--except to the limited extent pointed out therein."

51. In *Mafatlal* [1998] 111 STC 467, the apex Court also held that any action taken in accordance with the provisions of the Central Excise Act would be an action taken under the authority of law within the meaning of Article 265 of the Constitution. Therefore, any claim for refund of excise duty can be made only under and in accordance with Rule 11 or Section 11-B, as the case may be, in the forums provided by the Act, and no suit can be filed by invoking the provisions of the Contract Act. As regards the jurisdiction of the High Courts and the Supreme Court, it was held :

"So far as the jurisdiction of the High Court under Article 226--or for that matter, the jurisdiction of this Court under Article 32--is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however,

equally obvious that while exercising the power under Article 226/Article 32, the court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."

In para 69 of the judgment in *Mafatlal* [1998] 111 STC 467 (at page 522), the apex Court also held :

"The very collection and/or retention of tax without the authority of law entitles the person, from whom it is collected, to claim its refund. A corresponding obligation upon the State to refund it can also be said to flow from it. This can be called the right to refund arising under and by virtue of the constitutional provisions, viz., Article 265. But, it does not follow from this that refund follows automatically. Article 265 cannot be read in isolation. It must be read in the light of the concepts of economic and social justice envisaged in the Preamble and the guiding principles of State policy adumbrated in Articles 38 and 39--an aspect dealt With at some length at a later state."

Ultimately, the apex Court concluded :

"We are also of the respectful opinion that *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, is not right in saying that the defence of spending away the amount of tax collected under an unconstitutional law is not a good defence to a claim for refund. We think it is, subject to this rider : where the petitioner-plaintiff alleges and establishes that he has not passed on the burden of the duty to others, his claim for refund may not be refused. In other words, if he is not able to allege and establish that he has not passed on the burden to others, his claim for refund will be rejected whether such a claim is made in a suit or a writ petition. It is a case of balancing public interest vis-a-vis private interest. Where the petitioner-plaintiff has not himself suffered any loss or prejudice (having passed on the burden of the duty to others), there is no justice or equity in refunding the tax (collected without the authority of law) to him merely because he paid it to the State.

It further concluded :

"That "the material resources of the community" are not confined in public resources but include all resources, natural and man-made, public and private owned is repeatedly affirmed by this Court. (See *The State of Karnataka and Another Vs. Shri Ranganatha Reddy and Another*, , *Sanjeev Coke Manufacturing Company Vs. Bharat Coking Coal Limited and Another*, and *State of Tamil Nadu and Others Vs. L. Abu Kavur Bai and Others*,). We are of the considered opinion that Sri Parasaran is right in saying that the philosophy and the core values of our Constitution must be kept in mind while understanding and applying the provisions of Article 265 of the Constitution of India and Section 72 of the Contract Act (containing as it does an equitable principle)--for that matter, in construing any other provision of the Constitution and the laws. Accordingly, we hold that even looked at from a constitutional angle, the right to refund of tax

paid under an unconstitutional provision of law is not an absolute or an unconditional right. Similar is the position even if Article 265 can be invoked--we have held, it cannot be--for claiming refund of taxes collected by misinterpretation or misapplication of a provision of law, rules, notifications or regulation."

52. In *Mafatlal* [1998] 111 STC 467, the apex Court was interpreting Section 11-B of the Central Excise Act, which has been given retrospective operation. The views expressed by the apex Court have to be viewed in the light of the provisions contained in the Central Excise Act. The provision contained in Section 11-B of the Central Excise Act is similar to that in Section 14-C of the Act. But in the Central Excise Act, there is no provision like Section 14 of the Act regarding claim of refund. Under the Act, even if a matter is set aside and the assessee had paid the total disputed demand, there is no provision for completion of the reassessment proceeding within any stipulated time. Similar is the case where notice u/s 12(8) of the Act is issued for reopening the assessment within the stipulated period. In view of all these deficiencies, this Court has held that the reassessment proceeding should be completed within a reasonable time, say, three years as provided for the original assessment. The Commissioner has also issued a circular to complete such proceeding within three months. Despite all these, reassessment proceedings are not completed either within the time or frame-work intended by this Court or within the time specified by the Commissioner's circular. This causes undue hardship to an assessee as, even if he has paid the dues fully or in part, he would not get any interest on the refundable amount in view of the provision contained in Section 14 of the Act. In this view of the matter and also in view of the fact that when tax is ultimately found due from the assessee, interest is chargeable u/s 13(6) after expiry of 30 days from the date of service of demand notice, whereas no interest is payable to the assessee, who has already made payment, on the refundable amount, the question that arises is whether this Court can direct for payment of any compensation, damage or interest to the assessee. But, we are afraid, we cannot read down Section 14 in any manner to provide interest to an assessee from the date of payment till a favourable adjudication.

53. Articles 226 and 32 provide for safeguarding the provisions of law, and give an extraordinary power to look to equitable considerations. While exercising these powers, the courts have in appropriate cases imposed conditions for payment of interest on the conditional amounts directed to be paid from the date of payment provided the assessee has got a decision in his favour. Reference may be made to *Kuil Fireworks Industries Vs. Collector of Central Excise and another*, wherein the court has granted interest on the amount which has been subsequently found not due from the dealer from the date of deposit till the date of refund. This exercise of power by courts cannot be faulted in view of the rigorous provision contained in the Act. Therefore, considering the facts and circumstances of the case and keeping in mind the decisions cited by the parties, we are of the opinion that when conditional amount is directed to be paid out of

a disputed amount, a condition may be imposed awarding interest from the date of such payment till a favourable decision is given to a dealer, i.e., in case such payment or part of it is found refundable. For equitable and justiceable consideration, similar direction should also be given that in case of failure of the dealer in appeal or further proceeding, he would be liable to pay interest on the amount for which stay has been granted by an authority over and above the conditional amount paid by the dealer. We answer the question in the following manner :

"Under the provisions of the Act, no interest is payable on the refundable amount from the date of payment till the adjudication favourable to the dealer, and Section 14 cannot be read down to provide interest for such period. We, however, hold that on conditional payments made by the assessee against a disputed demand pursuant to the orders of the High Court and the apex Court, the concerned court may impose condition for payment of interest to the assessee as well as to the State, at least at the bank rate of interest on long term fixed deposits."

54. It is submitted on behalf of the petitioners that in case of default in payment of the demanded dues, the dealer is saddled with interest as provided in Section 13(6) of the Act on expiry of 30 days from the date of service of demand notice. But, no provision has been made for payment of interest by the State in case of default in payment of the refundable amount. Section 13(6) is quoted below :

"13. Payment and recovery of tax and penalty.--(1)

(6) In case a dealer makes default in payment of any amount for the payment of which a notice has been issued under Sub-section (4), by the date of expiry of the period allowed under that sub-section, he shall pay interest on the said amount at the rate of eighteen per cent per annum from the said date for the first three months and thereafter at the rate of twenty-four per cent per annum.

55. Learned Senior Standing Counsel (C.T.), in reply to the above contention, submits that the power of a sovereign cannot be compared with that of a citizen. Further, no equity can be claimed by a citizen in taxation matters.

56. In this context, we have already dealt with the cases of J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, and Calcutta Jute Manufacturing Co. and another Vs. Commercial Tax Officer and others, . These decisions indicate that there may be a liability for payment of interest for the delay in payment of admitted tax. But, as far as the demanded tax is concerned, interest is payable unless the amount is stayed by an order of any authority. To the extent the amount is paid, no interest u/s 13(6) is payable by a dealer even if such amount of tax is demanded from the dealer by an appropriate order of an authority. We have dealt with at length the question of equitable consideration with regard to taxing provision. As no equity can be claimed by a citizen, the grievance of the petitioners that on the amount paid by a dealer, which is ultimately found to be refundable in full or in

part, interest is payable cannot be accepted subject to our conclusion in the foregoing paragraph. As has already been held, the court cannot legislate. Therefore, though there is an unprovided field with regard to grant of interest to a dealer, we cannot issue a direction for payment of such interest on the simple analogy of comparison of Section 13(6).

57. In two of the cases, i.e., O.J.Cs. Nos. 2185 and 2186 of 2000, the petitioner has prayed for grant of stay of extra demand of tax during the pendency of the second appeals before the Tribunal. Both the cases have been referred to the Full Bench by order dated March 16, 2000 to lay down the principles for grant of full or part stay or for rejection of stay.

58. Let us take the case of grant of stay of any disputed demand raised by the State of Orissa, Once the assessee pays the amount, the same shall be retained by the State till the litigation is over. The assessee will be entitled to file an application for refund only when refund will accrue on finalisation of the appeal or further proceeding. He will not get any interest on the refundable amount, which will be calculated on the basis of his date of making the refund application irrespective of the date of payment of the amount. To give a concrete example, an assessment has been raised by treating certain transactions as taxable sales. The first appellate authority as well as the second appellate authority has confirmed the order of assessment. It is only on reference that the question has been decided in favour of the assessee. Subsequently the Tribunal has passed order on the basis of the answer given by this Court to the question referred. At this point of time, the dealer can claim for refund, that too no interest will accrue on the refundable amount for the first 90 days from the date of filing application for refund. During all the time, the State has retained the money which it is not entitled to retain in accordance with law, as has been decided by the High Court in reference. So, the question arises, whether this procedure of refund can be taken as a factor for deciding the balance of convenience while considering the question of stay of payment of the disputed extra demand. This point also raises a question whether there will be irreparable loss caused to the dealer by not staying the disputed demand. To give another example, a dealer has made certain transfer of machineries outside the State and the machineries have been sold in the respective States and proper local taxes have been collected on such sales. The dealer has claimed these transfers of stock as branch transfers u/s 6A of the Central Sales Tax Act. The assessing officer has disallowed the branch transfers, treated them as inter-State sales and demanded tax at the rate of 16 per cent. It may be remembered that if the dealer has effected inter-State sale to a registered dealer, he could have been required to pay tax at the rate of 4 per cent on obtaining declaration form and he would not be required to pay any tax in the State where the sale of goods has been effected. In such a case, the dealer has not collected any tax on its alleged inter-State sale and the local tax collected by him has been paid in the respective States. In such a case, it will cause irreparable loss unless stay is granted, at least to the extent of the local tax paid by him in other States deducted from the demand at concessional rate

of tax on turnover of sale to the registered dealers, which will be in reality 4 per cent if opportunity is given to the dealer to collect the declaration forms. The court or authority may grant stay or conditional stay or refuse to stay depending on these factors. Examples are numerous, with which we do not want to burden this judgment.

59. We will now deal with some decisions rendered by the apex Court as well as by this Court with regard to grant of stay. In case of Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, , the dealer claimed that he was entitled to exemption of certain percentage of excise duty, which was disputed by the department. When the matter was moved in a writ application, the High Court granted stay on furnishing bank guarantee. The apex Court deprecated the practice of granting interim stay on furnishing bank guarantee. The Bench consisting of O. Chinnappa Reddy, A.P. Sen and E.S. Venkataramiah, JJ., concluded as follows (at page 334):

"All this is not to say that interim orders may never be made against public authorities. There are, of course, cases which demand that interim orders should be made in the interests of justice. Where gross violations of the law and injustices are perpetrated or are about to be perpetrated, it is the bounden duty of the court to intervene and give appropriate interim relief. In cases where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, a court may well be justified in granting interim relief against public authority.

Having concluded thus, the Bench has further observed :

"There can be and there are no hard and fast rules. But prudence, discretion and circumspection are called for. There are several other vital considerations apart from the existence of a prima facie case. There is the question of balance of convenience. There is the question of irreparable injury. There is the question of the public interest. There are many such factors worthy of consideration. We often wonder why in the case (of) indirect taxation where the burden has already been passed on to the consumer, any interim relief should at all be given to the manufacturer, dealer and the like."

It has also been observed in the same judgment :

"But since the law presumes that public authorities function properly and bona fide with due regard to the public interest, a court must be circumspect in granting interim orders of far reaching dimensions or orders causing administrative, burdensome inconvenience....."

60. In the aforesaid case, the apex Court had in mind that the amount had been collected from the purchasers as it is an indirect tax. Therefore, the observations have to be read in that context.

61. Hardship and balance of convenience are also factors to be taken into consideration for grant of stay, which is evident from the decision of the apex

Court in Calcutta Jute Manufacturing Co. [1997] 106 STC 433. There, the apex Court was concerned with payment of interest on the amount which had been stayed by the courts as ultimately the dealer lost the case. In paragraph 17 (page 442 of STC) of the judgment (at page 2924), it has been concluded :

"Interim orders are passed by the High Court on a variety of considerations, one among being the strained financial position of the person approaching the court. Merely because the court granted interim orders it cannot be inferred that court was then satisfied of a strong prima facie case for the appellants. On the contrary, it is well nigh settled that there is always a presumption in favour of constitutionality of a legislative Act."

62. In the case of Empire Industries Limited and Others Vs. Union of India and Others, , a Bench of the Supreme Court consisting of honourable S. Murtaza Fazal Ali, honourable A. Varadarajan, J., and honourable Sabyasachi Mukharji, J. (as he then was), observed as follows (with honourable Varadarajan, J., concurring) :

"It is a matter of common knowledge that the interim orders passed by particular courts on certain considerations are not precedents for other cases which may be on similar facts. An argument is being built up now-a-days that once an interim order has been passed by this Court on certain factors specially in fiscal matters, in subsequent matters on more or less similar facts, there should not be a different order passed nor should there be any variation with that kind of interim order passed. It is submitted at the Bar that such variance creates discrimination. This is an unfortunate approach. Every Bench hearing a matter on the facts and circumstances of each case should have the right to grant interim orders on such terms as it considers fit and proper and if it had granted interim order at one stage, it should have the right to vary or alter such interim orders. We venture to suggest, however, that a consensus should be developed in matter of interim orders.

If we may venture to suggest, in fiscal matters specially in cases involving indirect taxes where normally taxes have been realised from the consumers but have not been paid over to the exchequer or where taxes are to be realised from consumers by the dealers or others who are parties before the court, interim orders staying the payment of such taxes until final disposal of the matters should not be passed. It is a matter of balance of public convenience. Large amounts of taxes are involved in these types of litigations. Final disposal of matters unfortunately in the present state of affairs in our courts takes enormously long time and non-realisation of taxes for long time creates an upsetting effect on industry and economic life causing great inconvenience to ordinary people. Governments are run on public funds and if large amounts all over the country are held up during the pendency of litigations, it becomes difficult for the Governments to run and becomes oppressive to the people. Governments' expenditures cannot be made on bank guarantees or securities. In that view of the matter as we said before, if we may venture to suggest for

consideration by our learned brethren that this Court should refrain from passing any interim orders staying the realisations of indirect taxes or passing such orders which have the effect of non-realisation of indirect taxes. This will be healthy for the country and for the courts."

63. A reading of this decision indicates that their Lordships were concerned with the amount of indirect taxes collected from the consumers but not paid by the dealers who were before the court. So, the ratio laid down by the aforesaid decision has to be understood and interpreted in that context.

64. Keeping all these judgments in view, a Bench of this Court in *Tata Robins Fraser Limited v. Sales Tax Officer* [1989] 75 STC 277, observed as follows (at page 281) :

"We are unable to accept the contention of the learned Standing Counsel that while considering the legality and propriety of a conditional order of stay passed by the Commissioner, this Court would not be required to examine *prima facie*, the contentions of the assessee with regard to the validity of the order of assessment. Certainly no finding can be given in that respect in view of the pendency of the appeal before the Assistant Commissioner, but while examining the question of stay, this Court can, and in our view, must consider the *prima facie* nature of the case, the balance of convenience, the loss and injury to be suffered by either party if stay is granted in one case and if the stay is refused in the other, and all other germane matters."

65. The aforesaid ratio was followed in another decision of this Court in *Dredging Corporation of India Ltd. v. State of Orissa* [1991] 82 STC 235, wherein it has been observed :

"While granting or refusing stay, capability of a person who has been saddled with extra demand is a determinative factor. Merely because realisation of demand may be in the public interest, yet a Government of India undertaking which claims to be in financial distress should not be affected in the manner to render its operations unworkable."

66. The aforesaid discussions would clearly indicate that there is no straitjacket formula for grant of full or conditional stay or for refusal of stay. As has been enumerated in the earlier paragraphs, many factors have to be weighed in mind while considering the question of stay. But the most important factors are the *prima facie* case and hardship of the assessee. This is evident from the decision of the Supreme Court in *Calcutta Jute Manufacturing Co.* [1997] 106 STC 433. Another important factor that has to be taken into consideration is whether tax has been collected by the dealer or not. Under the provisions of the Act, if any tax has been paid, the same is required to be deposited into the Government treasury, though the dealer can subsequently demand refund of the excess amount paid by him during the assessment and appeal proceeding. Non-deposit of such amount will visit the dealer with penalty. So, under the provisions of the Act, or the Central Excise Act, if any person has collected any tax, he cannot

retain it, and as such, payment or otherwise of tax is an irrelevant factor for consideration with regard to stay of extra demand of sales tax in the State of Orissa. We fully approve the ratio laid down in *Tata Robins* [1989] 75 STC 277 (Ori) and the same principle should be applied by this Court and the quasi-judicial authorities while dealing with stay matters.

67. Direction for full or part stay or rejection of stay depends on a number of factors. As presently we are dealing with indirect taxes, it has to be seen whether burden of tax has been passed on to the consumer or next purchaser by the assessee seeking the remedy of stay. The second relevant factor is existence of strong/weak or no prima facie case. The third aspect is hardship to the assessee, which is also relatable to the factor whether tax has been collected or not. The fourth factor is balance of convenience and/or irreparable injury. Public interest is also another important factor for consideration while dealing with the question of stay.

68. In view of the foregoing discussions, we answer the questions referred to us/ formulated by us in the following manner :

(1) No direction can be given for grant of interest in a case where reassessment has been directed and is pending.

(2) Sections 14 and 14-C, even though they have not provided for payment of interest on the refundable amount from the date of deposit, are intra vires and are not violative of Articles 14 and 19(1)(g) of the Constitution.

(3) Even though there is no time prescribed for completion of the reassessment proceeding after assessment has been set aside, this Court has no power to specify a period for completion of such proceeding as the High Court has no power like Article 142 of the Constitution.

(4) The provision contained in Section 14-D of the Act empowering the Commissioner to withhold refund is within the legislative competence of the State Legislature. But during the period such refund is withheld, interest is payable to the dealer as provided u/s 14-C of the Act.

(5) No direction can be given specifying a period during which the refund proceeding should be processed and disposed of. But interest would be payable to the dealer for the delay in granting refund. If the delay is attributable to the negligence and/or inaction of any person, interest shall be recovered from such person.

(6) When a dealer is directed to deposit some amount as per the orders of the High Court and the Supreme Court, he is entitled to get compensation by way of interest on the amount of refund ultimately calculated from such date at such rate as is directed by the said Courts.

(7) Though there is an unprovided field during which period no interest is payable by the State, no direction can be given by this Court unless it is covered

by question No. 5 above.

(8) The conditions mentioned in the case of Tata Robins [1989] 75 STC 277 (Ori), such as prima facie nature of the case, balance of convenience, loss and injury to be suffered by either party and other germane factors have to be taken into consideration while dealing with the interim matters of stay of the disputed demands under the provisions of the Act-69. Now that we have answered all the questions, the cases may be placed before the appropriate division Bench/Benches for disposal in accordance with law.

B.N.Agrawal, C.J.

70. I agree.

P.K. Mohanty, J.

71. I agree.