

(1989) 09 GAU CK 0016

In the Gauhati High Court

Case No : Civil Rule Nos. 305,306 and 307 of 1977 and 505, 506, 507, 508 and 509 of 1980

India Carbon Ltd.

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 13-09-1989

Acts Referred:

Assam Sales Tax Act, 1947 — Section 35A, 35A

Assam Sales Tax Rules, 1947 — Rule 42A, 42A

Central Sales Tax Act, 1956 — Section 15(a), 15(a), 9(2), 9(2)

Citation : (1990) 1 GLJ 31

Hon'ble Judges : B.L.Hansaria, J

Bench : Single Bench

Advocate : U.Barua, J.P.Bhattacharjee, G.K.Talukdar, A.K.Saraf, D.P.Chaliha,
Advocates appearing for Parties

Judgement

1. The petitioner is a limited company and carries on business of sale and supply of petroleum coke which is one of the goods declared to be of special importance in inter State trade or commerce by section 14 of the Central Sales Tax Act, 1956, hereinafter the Central Act, whose section 15 (a) has laid down that the tax payable in respect of sale or purchase of declared goods "shall not exceed 4% of the sale or purchase prices thereof?.

2. What has brought the petitioner to the Court is the imposition of interest due to non payment of tax on due dates. The imposition of interest has been assailed on four grounds : (1) section 9(2) of the Central Act does not visualise any payment of interest ; (2) if interest were to be charged by the force of section 35A of the Assam Sales Tax Act, 1947, hereinafter the State Act, which visualises imposition of minimum interest @ 6% the same would violate section 15 (a) of the Central Act which has put a limit of 4% in so far as the tax payable on the goods dealt with the petitioner is concerned; (3) charging of interest on the amount of the tax assessed because of what has been provided in Rule 42A of the Assam Sales Tax Rules, 1947, hereinafter the State Rules, is not permissible

inasmuch as Rules 4?A is ultravires section 35A; and (4) section 35A of the State Act is violative of Article 14 of the Constitution.

2, These points were agitated before a Division Bench of this Court consisting of Hon"ble Chief Justice and Hon"ble Justice Homchaudhuri. There being difference of opinion the same has been referred to me as contemplated by the High Court Rules.

3. To answer the first point agitated by the petitioner we may note section 9 (^) of the Central Act as it stood at the relevant time :

"9(2) Subject to the other provisions of this Act and the rules made there under, the authorities for the time being empowered to assess, reassess> collect and enforce payment of any tax under the general sales tax law of the appropriate State shall, on behalf of the Government of India, assess, reassess, collect and enforce payment of tax, including any penalty, payable by a dealer under this Act as if the tax or penalty payable by such a dealer under this Act is a tax or penalty under the general sales tax law of the State; and for this purpose they may exercise all or any of the powers they have under the general sales tax law of the State; and the provisions of such law, including provisions relating to returns, provisional assessment, advance payment of tax, registration of the transferee of any business, imposition of the tax liability or a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of the dissolution of such firm or partition of such family, recovery of tax from third parties, appeals reviews, revisions, references, refunds, penalties, compounding of offences and treatment of documents furnished by a dealer as confidential, shall apply accordingly".

4. It is submitted for the petitioner that there being no mention about charging of interest in the first part of section 9 (2) of the Central Act, the assessee is not liable to pay interest at all. In support of the submission reference has been first made to *Khemka & Co. vs. State of Maharashtra*, (1975) 35 STC 571 (SC) in which the question of imposing penalty for failure to pay tax within time was dealt with. In this connection the width and purport of section 9 (2) of the Central Act was gone into. This section permitted the appropriate State to assess, reassess, collect and enforce tax including any penalty payable by a dealer under the Central Act as if the tax or penalty payable was a tax or penalty under the general sales tax laws of the State, It was therefore contended that the penalty alone could be imposed which had been made payable by the provisions of the Central Act. As this Act did not visualise penalty for failure to pay tax within time it was held that no such penalty could be imposed on the ground that such a penalty was imposable under the general sales tax law of the State. It was pointed out by the majority that in the absence of any provisions in the Central Act for imposing penalty on account of failure to pay tax within time, the provision in the State Act to impose penalty In such a contingency cannot be regarded as legal. The decision in *Khemka & Co*, was followed in *Manganese Ore India Ltd. vs. Regional Assistant Commissioner*, (1976j 37 STC 489 (SC).

5. When the attention of the Court was drawn to these Decisions Hon"ble Chief Justice stated that there need not be a special provision in the Act to charge interest inasmuch as once tax is levied and it is not paid in due time interest becomes payable. In taking this view reference was made to *Khazan Chand vs. State of J & K*, AIR 1984 SC 762 and the following observation finding place in it was quoted :

"Thus, payment of interest in case of default in payment is a means of compelling an assessee to pay the tax due by the prescribed date. It is a mode of recovery of tax and well within the legislative power of the State."

5A. Reference was also made to *Ganeshdass Sri Ram vs. ITO* AIR 1988 SC 427. Because of these decisions the issue was held to be no more *res integra*. Hon"ble Honchaudhuri, J. also agreed with Hon"ble Chief Justice but on the ground that when section 9 (2) spoke about payment of tax ; the word "tax" took within its fold payment of interest also inasmuch as interest is not a penalty but compensatory in character and accretion to tax.

6. There is thus unanimity between the two Hon"ble Judges on this aspect of the case though for different reasons. According to me; tax and interest are different concepts as is being stated *liter* and so, it cannot be held that as the first part of section 9 (2) speaks about payment of tax, the same permits charging of interest also. But then, I have taken a view in *Jwala Prasad Sikaria vs. CIT* 1989 1GLJ 299 after referring to *State of Kerala vs. M Padmamibhan A* (1985 SC 356 and *Abhai Singh vs. Secretary, Ministry of Communication*, AIR 1987 SC 2177 in which reliance was placed on *Inglewood Pulp and Paper Co. Ltd. vs. New Burnswick Electric Power Corporation*, AIR 1928 PC 287 that interest is payable to an assessee on refund of tax amount even in absence of specific provision in the statute in this regard. For the reasons given in the aforesaid decision, I would take the same view in this batch of petitions also and would hold that interest is payable by the assessee on account of delay in payment of tax even though no specific provision has been made in the Central Act in this regard. 6A. On the question whether section 35A of the State Act is hit by section 15 (a) of the Central Act, the submission of Shri Bhattacharjee is that interest is also a part of the tax and so even if the minimum interest visualised by section 35A, which is 6% is imposed the same would violate section 15(a) of the Central" Act which has visualised payment of tax not exceeding 4%. In this connection reference has been made by Shri Bhattacharjee to *Mahalakshmi Sugar Mills vs. CIT*, (1980) 123 ITR 429 in which it was held by the Supreme Court that payment of interest as imposed by section 3(3) of the Sugarcane Cess Act, 1956 which had come up for consideration in the aforesaid case, was accretion to the cess the enlargement of the cess liability being automatic. Learned counsel thereafter referred to two decisions of this Court the first of which being *Commissioner of Income tax vs. Pheros and Co.*, (1989) 1 GLR 165 in which the decision rendered in *Mahalakshmi* was followed and it was stated that interest has to be regarded as "part and parcel" of the sale tax payable by the assessee. The same view was taken in

Assam Forest Products vs. CIT, (1989) 1 GLR 474 8 1989(1) GLJ 291.

7. Relying on these decisions Shri Bhattacharjee has submitted that charging of interest even at the minimum rate of 6% would make tax liability exceed 4% which is the limit imposed by section 15 (a) of the Central Act. To refute this contention on behalf of the assessee it has been contended by Shri Talukdar that though interest may be regarded as an accretion to tax, conceptually, tax, interest and penalty are different as pointed out in Associated Cement Company vs. Commercial Tax Officer, AIR 1981 SC 1887 This is what has been stated in this regard in para 23 of the judgment :

"... Tax, interest and penalty are three different concepts. Tax becomes payable by an assessee by virtue of the charging provision in a taxing statute. Penalty ordinarily becomes payable when it is found that an assessee has wilfully violated any of the provisions of the taxing statute. Interest is ordinarily claimed from an assessee who has withheld payment of any tax payable by him and it is always calculated at the prescribed rate on the basis of actual amount of tax withheld and the extent of delay in paying it. It may not be wrong to say that such interest is compensatory in character and not penal".

8. I have duly considered the rival contentions and according to me it would not be correct to say that interest is nothing but a tax in disguise. Conceptually interest being different from tax I would hold that charging of interest due to default in payment cannot be said to have increased the tax liability of the petitioner beyond 4% of which mention has been made in section 15 (a) of the Central Act. I would not therefore regard section 35A of the State Act as violative of section 15 (a) of the Central Act.

9. In so far as the third submission is concerned, the contention of Shri Bhattacharjee is that Rule 42A of the State Rules is ultravires section 35A of the State Act. To appreciate this submission of the learned counsel let us note both the provisions as they stood at the relevant time.

"35A. Interest payable by dealer(1) If any registered dealer does not pay into a Government Treasury the full amount of tax due from him under this Act on the basis of the return or his account books within the prescribed date, simple interest at the rate of six percent per annum from the first day of the month next following the said date shall be payable by the dealer upon the amount by which the tax so paid falls short of the amount of tax payable as per his return or account books. If such amount of tax and interest are not paid within thirty days from the date from which the interest is due, simple interest upto a maximum of twenty four percent shall be payable as the case may be".

Rule 42A is in the following language : "42A. If a dealer does not submit the return and pay the amount of tax due from him within the dates specified in rule 41 (1) or the proviso thereto, he shall be liable to pay simple interest at the rate of six percent per annum on the amount or the tax assessed from the first day of the second month of the end of the quarter or period, as the case may be,

to which such return may relates; the rate of interest shall be 12 percent per annum from the first day of the third month and 24 percent per annum from the first day of the fourth and succeeding months of the period during which the tax payable for the quarter/period remains unpaid :

Provided that where a dealer has paid a part of the tax due on any date after the expiry of 30 days of the end of each quarter, he shall be liable to pay interest at the appropriate rates on the whole of the assessed amount of tax up to the date of payment and thereafter on the balance tax payable."

10. The contention of the learned counsel for the assessee is that though section 35A speaks of charging of interest on the basis of the return or the account books of the assessee. Rule, 42A visualises imposition of interest "on amount of the tax assessed?. It is, therefore, contended that Rule 42A is hit by section 35A. In this connection reference has been made to *New Assam Valley Tea Co Ltd. vs. Agriculture Income tax Officer*, 1976 ALR 46. There the relevant section laid down that interest could be charged upto the date of furnishing the return, the rule making authority however prescribed charging of interest up to the date of payment of the tax due. Because of this the relevant rule was held to be ultravires the Act. According to *Shri Talukdar* tax becomes due on the basis of the return or account book when assessment is made and as such Rule 42A is not beyond the provisions of section 35A.

11. A combined reading of section 35A and Rule 42A makes it clear that the latter has transgressed the provision finding place in the former inasmuch as according to the section interest becomes due on the amount determined on the basis of the return whereas under the Rule the interest has been made payable on the amount of the tax assessed. It is too well known that the amount assessed in many cases exceed the amount of return. As a rule cannot overstep a section, in my opinion, Rule 42A has to be read down in the sense that interest has to be determined on the basis of the return filed and not on the basis of the tax assessed. Another overstepping of the rule which has been brought to my notice is that the rule applies to all dealers whereas the section speaks of registered dealer. As to this the submission of *Shri Talukdar* is that as section 9 of the State Act visualises compulsory registration also not much difference has been created by the two different terminology used in the two provisions. Though this submission of *Shri Talukdar* has force inasmuch as the liability to submit return is on the person who is liable to pay tax in which case registration is compulsory and under section 10 of the State Act the Commissioner may himself register a particular dealer, yet the rule could not have imposed the liability on every dealer as the section speaks of registered dealer.

12. Coming to the last submission according to which section 35A. of the State Act is violative of Article 14 of the Constitution being discriminatory and unreasonable, it is worth pointing that this submission was not accepted by the Hon"ble Chief Justice whereas Hon"ble *Homchaudhuri, J.* did not express any opinion on this aspect of the case. It may however be mentioned that the attack

on the anvil of Article 14 is on the ground that section 35A of the State Act visualises charging of interest even upto the maximum of 24% p.a. if the assessee fails to pay tax in due time, whereas the assessee is entitled to receive interest @ 6% p.a. only on the amount refundable to him as provided by section 37 (3) of the Act. It has therefore been contended by Shri Bhattacharjee that two different yard sticks have been applied one in the case of amount due to the State and another to the amount due to the assessee; and thereby discrimination has been practiced. The differential treatment has also been characterised as unreasonable. In this connection my attention has been invited to the provisions of interest finding place in the Income Tax Act wherein the rate of interest is same both in case of tax due and refund due vide sections 214 and 215 and other sections of the Income Tax Act.

13. The submission seems to have force. I am however refraining from examining the contention as there is really no difference of opinion on this aspect of the case as the Hon''ble Chief Justice has not accepted the contention relating to the tax being discriminatory. Hon''ble Homchaudhuri, J. has not expressed any opinion on this score.

14. I would summarise my views as below on the four questions agitated by the assessee :

(1) Even if section 9(2) of the Central Sales Tax Act, 1956 does not visualise charging of interest expressly, the same can be realised.

(2) Section 35A of the Assam Sales Tax Act, 1947 is not hit by section 15 (a) of the Central Sales Tax Act, 1956, because of which interest can be realised.

(3) Rule 42A of the Assam Sales Tax Rules, 1947 is ultravires section 35A of the State Act to the extent that the former visualises charging of interest on the tax assessed as distinguished from the tax due as per return. As a result, interest can be realised only on the basis of tax due as per return, and that too from registered dealers.

(4) No opinion is being expressed on the question of unconstitutionality of section 35A of the State Act because there is no difference of opinion on this question as Hon''ble Homchaudhuri, J. has expressed no opinion on this aspect of the case