
(1952) 12 CAL CK 0024

In the Calcutta High Court

Case No : Under Ch. V. Rule 2 of the Original Side Rules

Records (India) Limited

Date of Decision : 23-12-1952

Acts Referred:

Bengal Finance (Sales Tax) Act, 1941 — Section 10, 10(1), 10(2), 10(3), 10(4)
Bengal Finance (Sales Tax) Rules, 1941 — Rule 17, 18, 19, 20, 21
Companies Act, 1956 — Section 23(3), 23(4), 230, 230(1), 230(5)
English Companies Act — Section 264
Income Tax Act, 1961 — Section 29, 45

Citation : (1952) 12 CAL CK 0024

Hon'ble Judges : Chakravartti, C.J.;Sinha, J;Lahiri, J

Bench : Full Bench

Advocate : R. Chaudhuri, for the Appellant; S.M. Bose, General and Sankar Mitra, for the Respondent

Final Decision : Allowed

Judgement

Chakravartti, C.J.—This is a reference under Ch. V, Rule 2 of the Original Side Rules of a question of law under the Bengal Finance (Sales Tax) Act, 1941, read with the Indian Companies Act. The learned referring Judge, Banerjee J., has framed the question in the following words:

Whether sales tax is to be treated as a preferential debt within the meaning of Section 230 of the Indian Companies Act—from which date ? From the date of demand or the date when the sale price is received, or any other date ?

2. The question is not very precisely worded, but its true nature, or that of so much of it as is involved in the present case, will appear from the following facts.

3. On May 23, 1950, certain creditors of a private limited company, called Messrs. Records (India) Ltd., applied for its liquidation and that application was admitted on May 25, 1950, when an order for the appointment of a provisional liquidator was also made. A winding up order was next made on July 18, 1950, and Mr. S.N. Bhattacharya, a Barrister-at-Law practising in this Court, was appointed official liquidator. The liquidator had the list of creditors settled and

made some realisations and at that stage a certificate, demanding payment of a sum of Rs. 760-10-9 as arrears of sales tax due from the company for the four quarters ending on March 31, 1948, was served on him. As far as it appears from the papers before us, the Sales Tax authorities did not previously make any attempt to prove their claim in the liquidation. The assets of the company are sufficient to pay the preferential creditors in full, including the Sales Tax authorities if they are allowed to rank as such, but the Official Liquidator thought that they were not entitled to any preferential payment, but only entitled to share in the distribution as unsecured creditors. Accordingly, on May 8, 1952, he took out a Master's summons in respect of an application to be made by him to the Court for directions in regard to the payment of the sales tax demand and other directions. The application came to be heard by Banerjee J. who made the present reference.

4. The facts relating to the sales tax demand did not appear fully from the papers placed before us along with the reference, but they have been stated in a further affidavit filed under our directions by the Commercial Tax Officer who was in charge of the assessment. It is not necessary to set out all the details. For the purposes of the present case, it will be sufficient to state that the company has been a registered dealer since August, 1946, and was liable to furnish quarterly returns. It submitted returns for the four quarters in question on certain dates in 1947 and 1948 and along with those returns it submitted, as required by Section 10(3) of the Bengal Finance (Sales Tax) Act, receipts from the Reserve Bank of India for amounts of tax payable according to the returns. The total amount of tax thus paid for the four quarters, beginning on April 1, 1947, and ending on March 31, 1948, was Rs. 4,044-15-3 pies. The Commissioner of Commercial Taxes, however, was not satisfied that the returns were correct and complete and, accordingly, on August 28, 1948, he caused a notice of assessment to be issued to the company in Form No. VI under Sections 11(7) and 14(2) of the Act. In pursuance of that notice, an assessment was made on May 8, 1950, and the tax payable for the four quarters was determined at Rs. 4,804-8 as. In view of the payment of Rs. 4,044-15-3 pies already made, the balance due was Rs. 759-8-9 pies and a notice of demand for that amount in Form No. VII was served on the company on May 17, 1950, directing payment on or before June 30, 1950. No payment being made, proceedings for the recovery of the amount were commenced under the Bengal Public Demands Recovery Act, resulting in the service of a certificate on the Official Liquidator. The certificate is said to be for Rs. 760-10-9 pies and the small difference between that amount and the unpaid balance of the assessed tax was perhaps due to the addition of the costs of the certificate.

5. As already stated, the Official Liquidator contends that no preferential payment of the amount of the certificate can be claimed. Whether that view is right, depends on the true effect of Section 230(1)(a) of the Indian Companies Act on the facts of the present case. That section is expressed in the following terms:

230(1). In a winding up there shall be paid in priority to all other debts-

(a) all revenue, taxes, cesses and rates, whether payable to the States or to local authority, due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date.

6. "The date hereinafter mentioned" is, under Sub-section (5)(a) of the section, the date of the winding up order in the case of a compulsory winding up of a company which had not previously commenced to be wound up voluntarily, as is the case here.

7. It is clear that in order to be entitled to priority, the amount of the certificate must first come under one or other of the categories mentioned in Section 230(1) (a). There can be no question that out of it, a sum of Rs. 759-8-9 p. is tax. But even that amount must satisfy two other conditions, viz., (i) it must have been due at the date of the winding up order and (ii) it must have become due and payable within twelve months before that date. If it satisfies both of those conditions, it cannot be denied preferential payment, but if it fails to satisfy either of them, it cannot claim priority. The small balance of Rs. 1-2 as must be left out of account, because whatever it may be, it is not tax, nor was it due at the date of the winding up order.

8. It will make for clarity if we bear in mind that we are not concerned in this case with sales tax in general, that is to say, the tax in its unassessed state when all that has happened is that the events in which a particular dealer becomes chargeable to the tax have taken place. The only amount with which we are concerned here is the amount of Rs. 759-8-9 p. and that amount is the balance due of tax which has been assessed. The only question which arises on the actual facts of the case, therefore, is, (i) was this amount of Rs. 759-8-9 p., which is due under an assessment, due at the date of the winding up order and (ii) did it become due and payable within twelve months before that date? The Official Liquidator who is denying its claim to priority can do so only if he can advance the date of its being due beyond the former date or retard the date of its becoming due and payable behind the latter.

9. Taking the first point first, Mr. Chaudhuri who appeared on behalf of the Official Liquidator did not support the case made by his client in his affidavit-in-reply that the relevant date was May 25, 1950, when the application for winding up was presented and a provisional liquidator appointed and that the last date of payment according to the notice of demand being June 30, 1950, the tax became due only thereafter and, therefore, after the relevant date. The section speaks quite clearly and definitely of the date of the winding up order and no earlier date is material. The date of the winding up order in the present case was July 18, 1950. Mr. Chaudhuri did not contend that the amount in question was not due on that date and indeed, he could not possibly so contend, because not only had the amount become chargeable before July 18, 1950, but before that date it had also been actually assessed and the date fixed for its payment had also

expired. The first condition laid down in Section 230(1)(a) is, therefore, satisfied.

10. The contention of Mr. Chaudhuri was that although the amount in question was a debt, being tax due, and it was due on the date of the winding up order, it was still not entitled to priority, inasmuch as it had not become due and payable within twelve months before the date of the order, but earlier. Asked when it became due and payable, Mr. Chaudhuri was unable to maintain the position first taken up by him that it became due and payable when the sales which gave rise to the tax were made and ultimately he submitted that it became due and payable when returns for the quarters concerned became due to be filed. The dealer in the present case was a registered dealer, liable to furnish quarterly returns and under Rule 21 of the rules framed under the Act, such returns were to be filed within thirty days from the expiry of each quarter. The last of the quarters concerned in the present case ended on March 31, 1948, and the return for that quarter was required to be filed on or before April 30, 1948. Accordingly, if the sales tax for a particular quarter became due and payable when the return for that quarter became due to be filed, the latest date on which the tax in the present case could be said to have become due and payable was April 30, 1948, by which date the return for the last of the four quarters had to be filed and that the date was much more than twelve months from the date of the winding up order.

11. A short answer to Mr. Chaudhuri's contention is that we are not concerned in this case, with the whole of the tax for which the company became liable on the sales made by it during the four quarters in question, but only with an amount of Rs. 759-8-9 p. That amount is due under an assessment made u/s 11(2) of the Act. Dealing with income tax, the Judicial Committee observed in the case of *Doorga Prosad Chamaria v. The Secretary of State* (1945) 49 C.W.N. 334 : (1945) 13 ITR 285 that the tax was due when a demand was made under Sections 29 and 45 of the income tax Act and that it then became a debt due to the Crown. It is true that in the case cited, the Judicial Committee was not considering the point of time at which income tax became due and payable and made the observation referred to above in connection with a different point, but there is no reason to think that the observation does not indicate the correct position and Mr. Chaudhuri did not contend that even so far as income tax was concerned, the proposition was not correct. If the principle enunciated as to income tax be applicable to the Bengal Finance (Sales Tax) Act, the amount of Rs. 759-8-9 p. became due only when the notice of demand was served, which was, on May 17, 1950, well within twelve months before the winding up order.

12. There seems to be no reason why the principle should not apply to sales tax due under an assessment, because the position as to assessed tax under the two Acts is precisely the same. Under both the Acts, the liability to pay the relevant tax accrues before an assessment is made-under the Bengal Act and in the case of a registered dealer, as soon as a taxable sale is made and under the Indian Act, as soon as a person's income reaches the taxable limit. Returns are to be

filed under both the Acts. Under the income tax Act, an assessment is made u/s 23, then a notice of demand is to be served on the Assessee u/s 29, specifying the amount of tax payable under the order of assessment and, u/s 45, the amount is to be paid within the time mentioned in the notice or if a time is not so mentioned, within the other period mentioned in the section, failing which the Assessee is to be deemed to be in default. Under the Bengal Act, an assessment is made u/s 11(7), read with Rule 54, then a notice of demand is to be served under Rule 55 and, u/s 11(5), the amount of the demand must be paid by such date as may be specified in the notice. It is true that under the Indian Act, an assessment is to be made in all cases, but under the Bengal Act only when no return is furnished or when the return furnished appears to be incorrect and incomplete, but those two cases are provided for in the Indian Act in Section 23(4) and Section 23(3) and the effect of an assessment and the steps to be taken subsequently are common to all types of assessment under the section. In the case before the Judicial Committee, the assessment was one u/s 23(4). In view of the complete identity between the provisions of the two Acts regarding assessed taxes, I see no reason why the principle enunciated by the Judicial Committee should not apply to the sum of Rs. 759-8-9p. involved in the present case which is due under an assessment. Mr. Chaudhuri contended that there was some difference between the two Acts in that an Assessee, not paying the assessed income tax within the time mentioned in Section 45 of the income tax Act, was to be deemed a defaulter, whereas there was no such provision in the Bengal Act or the rules framed thereunder. I do not think that it was the presence of the words "in default" in Section 45 which was the reason for the Judicial Committee's view that the tax was due when a demand was made under Sections 29 and 45, for in the first place, if a person liable to pay a debt does not pay it by the date fixed for payment, he becomes a defaulter without any statute declaring him to be so and, in the second place, what their Lordships say is that the tax becomes due when a notice of demand is made and not that it becomes due when it is not paid by the date fixed for payment and thereby a default is committed. But, in any event, Mr. Chaudhuri was not right in saying that neither the Bengal Act, nor the rules framed thereunder, spoke of default, because Rule 56 which provides for the steps to be taken for the recovery of the tax if it is not paid by the date specified in the notice, describes the Assessee as "the defaulting dealer". Lastly, the principle that where a tax has to be assessed, it does not become either due or payable till at least an assessment is made, is one of general application *Rs Pratt. Ex parte Inland Revenue Commissioners v. Phillips* [1950] 2 A.E.R. 540, 548. I am, accordingly, of opinion that there is nothing in the Bengal Finance (Sales Tax) Act to exclude the operation of the principle laid down by the Judicial Committee oil tax assessed under it. It follows that in the present case, the amount of Rs. 759-8-9p. became due on May 17, 1950, when the notice of demand was served on the company and since it remained due on July 18, 1950, when the winding up order was made, it is entitled to priority u/s 230(1)(a) of the Indian Companies Act, read with Sub-section (5)(a) of the section.

13. Since we are concerned with no other amount, the above is sufficient to dispose of the case, but Mr. Chaudhuri contended that there was another and a fundamental reason why the principle laid down by the Judicial Committee could not apply even to assessed tax under the Bengal Finance (Sales Tax) Act. If I understood him a right, what he intended to say was that under the Bengal Act, the tax did not become due and payable as a result of an assessment or by virtue of the issue of a notice of demand, but it became both due and payable independently of any assessment and automatically, as soon as the submission of a return became due. If so, even when an assessment was made, such assessment was only a proceeding for the ascertainment and quantification of the tax which had already become due and payable. If some tax was paid along with the returns but on an assessment being made, a further amount was charged, such further amount bore no different character, but was a part of the whole amount, chargeable in law on the sales, which had become due and payable before the assessment.

14. No practical question can ever arise u/s 230(1)(a) of the Indian Companies Act with regard to amounts of sales tax paid along with the returns. Having been paid, they do not survive as debts and there can be no question of any priority being claimed in respect of them in a liquidation. It is, therefore, *prima facie* futile to enquire about the true character of any amount of sales tax other than amounts due under assessments, except perhaps in a case where a return has been submitted u/s 10(3), but no payment or full payment according to the return has been made as required by the section and there has also been no assessment. That a case where a return is made without full payment according to it, may occur, is indicated by Section 11(3) of the Act. In such a case, if a winding up order is made before an assessment has taken place, a practical question may arise as to whether the admitted liability under the return is a debt and if it is, when it became or becomes due and payable. But if the principle laid down by the Judicial Committee applies, the answer will be obvious, because a winding up order may be made even after a return under the income tax Act, showing a taxable income, has been filed and before an assessment has been made and even in such a case, the tax chargeable according to the return will not be entitled to preferential payment, because tax becomes due only when, after an assessment, a demand for payment is made. It appears from the provisions of Section 11(3) of the Bengal Act that no assessment is necessary for the balance of tax due according to a return and that a notice of demand may issue forthwith, but the tax cannot become due before the demand is made on the same principle as has been applied to tax due under an assessment. It is, however, not necessary for the purposes of the present case to consider the incidents of an unpaid liability appearing on the face of a sales tax return, because there is no such liability in the present case. But the extreme argument of Mr. Chaudhuri that all sales tax, whether subsequently assessed or not, become due and payable as soon as the relevant returns become due to be furnished must be dealt with.

15. In order to examine the soundness of the contention, it is necessary to refer to the relevant provisions of the Act and the Rules. The Act to be considered is the Act, as it stood before its amendment by Act XLVIII of 1950, because that amending Act did not come into force till November 5, 1950.

16. It will be sufficient to refer to the provisions relating to registered dealers who are liable to furnish quarterly returns. u/s 4 of the Act, read with Sections 5 and 6, all dealers whose gross turnover during the year immediately preceding the commencement of the Act exceeded the taxable quantum, are liable to pay tax on all sales made by them, except those specifically exempted under the Act, and so are all dealers liable, whose gross turnover may exceed the taxable quantum subsequently, as soon as two months from the end of the period during which it first so exceeded, expire. The liability may cease in certain circumstances mentioned in Sub-section (3) of the section. u/s 7, no dealer, while being liable to pay tax under the Act, can carry on business without getting himself registered. u/s 10(2), every registered dealer must furnish such returns by such dates as may be prescribed and under Rule 21, the class of dealers to which the company in the present case belongs, are to furnish returns quarterly within thirty days from the expiry of each quarter. u/s 10(1), the tax payable under the Act must be paid "in the manner hereinafter provided "at such intervals as may be prescribed". u/s 10(3) every registered dealer must, before he furnishes returns, pay into the Treasury or the Reserve Bank of India, "the full amount of tax "due from him under the Act according to such returns"" and file, along with the returns, a receipt showing the payment of such amount. Under Rule 36, every dealer for whom quarterly returns have been prescribed, must pay the tax due for any quarter before furnishing the return for that quarter. When a mistake or omission is discovered in a return, a revised return may be furnished u/s 10(4) before the date of the next return and when further tax is payable according to such revised return, it must be accompanied by a receipt showing the payment of the extra amount. Section 11(1) provides that if no return is furnished by a registered dealer by the prescribed date or if the return furnished appears to the Commissioner to be incorrect and incomplete, he shall make an assessment within twelve months after the expiry of the period concerned and may impose a penalty, if he is satisfied that the default was made without reasonable cause. u/s 11(3), the tax must be paid by such date as may be specified in the notice of demand or by the date to which the time for payment may be extended or by instalments, if allowed.

17. Mr. Chaudhuri put his contention in the following way. It was Section 10(1) of the Act which directed payment of the tax and the tax was to be paid "in the manner hereinafter provided". The only provision regarding the manner of payment was contained in Section 10(3) and, according to that section, the tax for the period covered by each return was to be paid before the return was furnished and the return was to be accompanied by a receipt for the full amount of the tax. Accordingly, the tax became due and payable, at the farthest, on the date when the return became due and no assessment or notice of demand was

required. Section 11 was only a provision to be applied in case of a default in the payment of a tax already due, but it was not the proceeding under that section which had the effect of making the tax due and payable. Mr. Chaudhuri drew attention to the fact that Section 230(1)(a) of the Indian Companies Act contained two words, "due" and "payable", the first, in the context of the present case, having reference to the time when the liability to pay the tax accrued and the second having reference to the time when the tax liability had to be discharged. In support of his last contention, he referred to the decision in *In re Aviedale Garage Company Ltd., Anglo South American Bank Ltd. v. The Company* [1933] 1 Ch. 64, where it was observed by Hanworth M.R. that the words "due" and "liable" in Section 264 of the English Companies Act, which corresponds to Section 230 of the Indian Act, were "meant to refer to a liability in respect of which there had "to be a payment".

18. The learned Advocate-General contended that Section 10(1) stood apart from other Sub-sections of the section and when it said that the "tax payable under this Act shall be paid in the "manner hereinafter provided", it meant the true tax under the Act; Section 10(3), on the other hand, spoke only of "tax due "under this Act according to such returns" and what it contemplated was not tax truly payable under the Act at all, but only what the dealer believed to be payable by him. It was only an estimated sum offered by the dealer himself. The tax really payable under the Act was dealt with in Section 11(3)(b) and that became due and payable only when, after an assessment, a demand was made.

19. I do not think the case cited by Mr. Chaudhuri is of much assistance to him. It was concerned with a local rate and with regard to rates, it is well-settled that they become payable as soon as they are "made and published", whether they are demanded or not. *Davis v. Burrell and Law* [1851] 10 C.B. 821. As Cockburn C.J. said in *R. v. Price* (1880) 5 Q.B.D. 300, "the rate itself is an order to pay". With regard to a rate, therefore, there has to be a payment as soon as it accrues due and it was for that reason that the Court of Appeal held in the case cited by Mr. Chaudhuri that an increase of a rate in respect of a period prior to a receiving order, but made on appeal after the order, which, under a certain statutory provision, took effect as from the commencement of the period, became due and payable before the receiving order and was, therefore, entitled to priority. The principle applicable to a tax which has to be assessed is different. Nor was Mr. Chaudhuri right in saying that Section 10(3) was the only provision where the manner of paying the tax was laid down. Even assuming the sum paid according to the return is tax "payable under the Act" in the true sense of the term, there is another provision regarding the manner of payment contained in Section 11(3). If Mr. Chaudhuri's contention was correct, there would be no provision as to the manner of payment of the further amount of tax payable under the Act where an incorrect and incomplete return was furnished.

20. In my opinion, there is great force in the contention of the learned Advocate-General that the words "according to such "returns", occurring in Section 10(3),

cannot be disregarded and that the use of those words to qualify the phrase "tax due... "under this Act" indicates that the payment contemplated by the section is only an interim payment towards the tax according to the dealer's own estimate of what he is liable to pay, but not payment of "tax payable under the Act", as such. Mr. Chaudhuri pointed out that if the return was correct and complete and a full payment was made according to the return, there was to be no assessment at all and no notice of demand. I do not see how that circumstance shows that the tax becomes due and payable when a return falls due. A debt may be paid before it becomes payable. It is not without significance that in referring to the amount of tax due under an assessment, Section 11(3) does not speak of the amount of tax assessed, less the tax paid, but speaks of "the amount of tax assessed "less the "sum, if any, paid by the dealer in respect of the said "period." The amount paid according to the return is not given the name of tax. Mr. Chaudhuri referred to Form No. VII, the form of the notice of demand, and pointed out that there at least, in the part assigned to the computation, the expression "less tax paid" was used. That is true, but the form cannot prevail over the section and further, earlier in the form itself, reference is made to the fact that there has been an assessment and it is added that, "accordingly", a particular sum, which is obviously the whole amount of tax due on the sales during the period, "is payable". To my mind, it is clear that the tax becomes really payable as such only at that point of time when the tax is declared to be payable and the balance outstanding demanded. The learned Advocate-General was perhaps not strictly correct in saying that Sub-section (1) of Section 10 stood by itself, because the manner provided for in Sub-section (3) is also a manner of paying the tax. But it is paying it on account, as it were, on the dealer's own estimate of the possible liability, subject to adjustment if need be and the provision for such payment is no indication that the tax has already become due and payable. It may well be that the dealer over-estimates his liability or even makes a payment, although in fact there is no taxable turnover and no liability to pay anything at all. If Mr. Chaudhuri's contention be correct and whatever is paid according to the return and before the return is furnished, is tax due and payable, the amount wrongly paid in the above circumstances would also be tax due and payable under the Act which is plainly absurd. Indeed, it is not possible to see how the amount paid u/s 10(3) according to the return can be tax payable under the Act, in the true sense of the term. The tax is payable on the taxable turnover. The taxable turnover is to be determined by making the various deductions specified in Section 5 of the Act. The Assessee can certainly make the deductions as best as he can, on his own understanding of the provisions of Section 5 and on his own view of the facts, but before the deductions are checked and finally settled as allowable or disallowable and the taxable turnover is thereby determined, no tax due and payable under the Act can come into existence. One of the items of deduction, for example, is sales of goods which are shown to the satisfaction of the Commissioner to have been despatched by or on behalf of the dealer outside West Bengal. The true amount of deduction allowable under this head and which will in fact be allowed, cannot

obviously be known at the stage of making the payment u/s 10(3) and it would be strange if the Act yet intended that the tax payable under the Act would become due and payable at the time the return became due to be filed. In my opinion, the Act does not so intend.

21. I have discussed the contention of Mr. Chaudhuri at some length on the lines he himself adopted, but in my opinion it is capable of a short and simple answer. There can be no doubt that Section 230(1)(a) of the Indian Companies Act contemplates concrete debts, because it deals with the order in which the debts shall be paid by the liquidator. It can have no concern with mere liabilities of a problematic character or liabilities, unascertained and unquantified and incapable of present payment. If sales tax becomes due and payable as soon as the return for the period concerned becomes due to be furnished, it must become due and payable at that point of time even in cases where, actually, the dealer furnishes no return. If before the winding up order was made and within twelve months thereof, a return or returns became due, then, although no return may have been actually furnished, there will still be an amount of sales tax due and payable. The Official liquidator ought to pay it and it is entitled to priority u/s 230(1)(a). But clearly there is nothing to show what the debt is or if there is any debt at all and there is nothing by which the commercial tax authorities can prove the debt, although, according to the reasoning of Mr. Chaudhuri, there is a debt which is due and payable. In my opinion, the absurdity of such a situation is clear proof that at least for the purposes of Section 230(1)(a), a tax debt is due and payable only when it has been ascertained, quantified and notified to the Assessee with a demand for payment and that seems to me to be the effect of the Sales Tax itself, as much as of the income tax Act.

22. The above is the result of a negative approach to the question. Looking at the matter from the positive point of view, it is clear that in a case where the full amount of tax according to the returns was paid at the time when the returns were furnished, there cannot be any further tax claim or tax debt except on the basis of an assessment, since made. In such a case, the appropriate amount of tax according to the returns having been paid, the dealer does not think that there is anything more to pay and the department also cannot claim anything further forthwith. At that stage, therefore, there is no tax debt due and payable, at least none that is payable in the sense of having to be paid. It is only when an assessment is made thereafter and the amount paid according to the returns is found to have been insufficient that a further liability emerges and it is only when a demand is made for the discharge of the liability, that a debt, due and payable, comes into existence. The only two types of tax debts under the Sales Tax Act that may possibly come to be considered u/s 230(1)(a) of the Indian Companies Act are (i) the balance of tax due according to a return and (ii) the tax due under an assessment. In both cases, the debt becomes payable only when a notice of demand is served.

23. For the reasons given above, I am unable to accept the contention of Mr.

Chaudhuri that the entire amount of sales tax for the four quarters concerned, including the amount of Rs. 759-8-9 p. now in question, became due and payable partly on and partly before April 30, 1948, when the return for the last of the four quarters became due to be furnished. In my opinion, out of the amount of the certificate, an amount of Rs. 759-8-9 p. became due and payable on May 17, 1950, when the notice of demand was served and, therefore, it is entitled to preferential payment u/s 230(1)(a) of the Indian Companies Act, satisfying as it does both the conditions laid down in the section.

24. The reference is answered in the above manner. The rest of the application of the Official Liquidator will be dealt with by the Company Judge. The State of West Bengal will have the costs of this reference-such costs and the costs of the Official Liquidator to come out of the assets of the Company.

25. Certified for counsel.

26. Lahiri, J. I entirely agree with my Lord the Chief Justice and have nothing to add.

27. Sinha, J. This application first came up before Banerjee J. who thought that it involved a question of great importance. Accordingly, he referred it to a larger bench. The exact point involved is a short one and relates to a tax imposed by the State of West Bengal on the gross turnover of a dealer selling or supplying goods within the State where such turnover within the prescribed period exceeded the taxable quantum. It is governed by the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as "the Act"), as amended from time to time. The "taxable turnover" is arrived at by taking the gross turnover within the prescribed period and making various allowances under Sections 5 and 6 of the Act. The result is the "taxable turnover", and the tax is calculated thereon at the prescribed rates. Every man who goes to a shop and buys an article is of course familiar with this item of taxation. It is entered with alacrity by the dealer at the bottom of the Bill under the heading "Sales Tax", and the purchaser pays it, ruefully if he is a mere man, or with a justifiable glow of pride if he is a citizen who likes to feel that he is doing his bit to keep the wheels of administration running. It has, however, been held authoritatively that in paying what is styled as "Sales Tax" the purchaser is paying no tax at all. The tax is leviable not on him but the dealer, who merely increases price and seeks to pass on the burden to the purchaser. Whether the dealer, in his turn, pays it over to the Government as "Sales Tax"-properly so called-is, however, entirely a different story. But the instant problem before us arises from the fact that the dealer in this case was a limited company, "Records "(India), Ltd." which has gone into liquidation by an order of this Court dated July 18, 1950. Prior to the winding up proceedings which commenced on May 25, 1950, the company had filed returns on April 2, 1948, and July 7, 1948, for sales tax for four quarters, viz., 1-4-47 to 31-3-48, and paid the money as per the returns filed. The returns were, however, found by the assessing authorities to be insufficient and the company was assessed under Sections 11 of the Sales Tax Act and a notice was issued to them in Form

No. VII for the balance due, namely, Rs. 759-8-9. This notice was served on the company on May 17, 1950. Section 230(1) of the Indian Companies Act runs as follows:

In a winding up there shall be paid in priority to all other debts-(a) all revenue, taxes, cesses and rates, whether payable to the Crown or to a local authority, due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date ;

28. The point, therefore, arises in this way. The payment of sales tax would be a priority debt if it can be said to have become due and payable on May 17, 1950, being within a period of 12 months from the date of the winding up order. If, however the sales tax can be said to have become due and payable at any point of time beyond twelve months from the date of the winding up, there would be no priority and the debt would rank equally with other debts. Before I deal with the question in relation to the facts of this case, I must set out the scheme of the Act and the rules framed thereunder, so far as it is relevant for our purposes. Section 4 of the Act is the charging section which makes the tax payable when the gross turnover exceeds the taxable quantum. This section is subject to the provisions of Sections 5 and 6. Section 5 prescribes the rate of tax and defines the expression "taxable turnover". Section 6 specifies the list of goods which are exempted from the sales tax. We then come to Section 10 which is very important for our purposes. Section 10 runs as follows:

10. (1) Tax payable under this Act shall be paid in the manner hereinafter provided at such intervals as may be prescribed.

(2) Such dealers as may be required so to do by the Commissioner by notice served in the prescribed manner and every registered dealer shall furnish such returns by such dates and to such authority as may be prescribed:

Provided that, if any dealer establishes to the satisfaction of the Commissioner that his average taxable turnover does not exceed ten per centum of his average gross turnover, the returns to be furnished by such dealer under this Sub-section shall be annual returns.

(3) Before any registered dealer furnishes the returns required by Sub-section (2), he shall, in the prescribed manner, pay into a Government Treasury or the Reserve Bank of India the full amount of tax due from him under this Act according to such returns, and shall furnish along with the returns a receipt from such Treasury or Bank showing the payment of such amount.

(4) If any dealer discovers any omission or other error in any return furnished by him, he may at any time before the date prescribed for the furnishing of the next return by him furnish a revised return ; and if the revised return shows a greater amount of tax to be due than was shown in the original return, it shall be accompanied by a receipt showing payment in the manner provided in Sub-section (3) of the extra amount.

Section 11 is the assessment section. But here there is a marked departure from the assessment in case of income tax. In the case of income tax, an assessment must always be made and as has been pointed out by the Privy Council in *Durga Prosad v. Secretary of State* AIR [1945] (P.C.) 64, although income tax may be popularly described as due for a certain year, it is in law only due when notices under Sections 29 and 45 of the income tax Act have been served. But assessment u/s 11 of the Act only arises if no returns are furnished by a registered dealer or if the Commissioner is not satisfied that the return furnished was correct or complete. If the dealer files a correct return and deposits the proper amount, nothing further remains to be done u/s 11.

Section 26 grants to the Provincial Government, the power to make rules and rules have been framed in the exercise of such powers.

29. According to the learned Advocate-General, who appears for the Commercial Tax Officer to oppose the application, sales tax does not become either due or payable until the assessment has been made u/s 11 of the Act and notice in form VII of the rules has been served upon the dealer. Such a notice was served on May 17, 1950, and u/s 230(1)(a) of the Indian Companies Act, the tax would clearly have priority if this argument is accepted. He submits that Section 10 of the Act merely permits the dealer to tax himself and file a return after depositing the amount which, he thinks, is due and payable. He points out that the payment is entirely at his own risk, and the dealer is not discharged from liability either by filing a return or depositing the amount according to the return. It is merely an opportunity granted to the dealer to pay up before the amount has become due and payable and thus avoid an assessment u/s 11, including the perils of penalties imposed therein. According to him, there is no difference in this respect between the payment of sales tax or the income tax. In both cases, the tax cannot be said to be due and payable until an assessment has been made and a demand notice has been served.

30. According to Mr. Chaudhuri, appearing for the Official Liquidator, there is a clear distinction between the words "due" and "payable". In order to come under the mischief of Section 230 of the Indian Companies Act, the tax must not only have been "due" but also "payable". That this is so is of course undeniable, but the question remains as to when it becomes "due" and when again "payable". Mr. Chaudhuri has not been very clear as to when, according to him, the sales tax becomes due. As I understand him, he argues that a tax is due and payable when a person is compelled to pay it, and this, u/s 10, is the point of time exactly before he has to file his return u/s 10 of the Act. Learned Counsel has put great stress upon the wording of Section 10(1) which runs as follows:

Tax payable under the Act shall be paid in the manner hereinafter provided at such intervals as may be prescribed.

31. It is argued that the section clearly lays down when the tax payable under the Act was to be paid, so that it was unnecessary to enter into any further

investigation. It is pointed out that the word "hereinafter" can only refer to the provisions of Sub-section (3) and the reference is quite clear, as the only interval prescribed is in Rules 17 to 25 of the Act and refers to the return to be made. u/s 10(3), the amount is to be paid before the return is filed. In fact, under Rule 43, unless a receipt of payment is produced, no return can be accepted. It is further pointed out that Sub-section (5) requires that the "full amount of tax due "from him under the Act according to such return" shall be paid. The learned Advocate-General argues that the word "hereinafter" may well refer to the payment u/s 11(3). He is, however, faced with the difficulty that nowhere is any interval prescribed in the Act or rules about payment of the amount u/s 11(3). That amount is payable immediately upon the notice being served or within such extended date, or in such instalments as the Commissioner may allow. Such time cannot, however, be said to be "prescribed" either by the Act or the rules. He further points out to Form VII where the entire tax due is assessed, and the demand is for the entire amount, less such sums as might have been paid with the return. He also points out the qualification "according to such return" in Sub-section (3) of Section 10. In my opinion, neither of the views put forward by learned Counsel is entirely correct. The cumulative effect of Sections 4, 5 and 6 of the Act is that the tax becomes due as soon as the gross turnover within the taxable period exceeds the taxable quantum. It is true that the dealer is entitled to certain deductions u/s 5 and exemptions u/s 6, but all that is taken into account in arriving at the "Taxable turnover". Such an adjustment must have to be calculated and in all probability is calculated by the dealer just before drawing up the return. But that process cannot hold up the tax being due. Regarding income tax the position is quite different. There is no provision in the income tax Act exactly corresponding to Section 10 or 11 of the Sales Tax Act. In this connection, it must be remembered that advance payment of tax is quite a different thing to payment u/s 10. Under Rule 46, sales tax may also be paid in advance. income tax may also be paid in advance but anything paid in excess of the amount eventually found due bears interest, which clearly shows that the amount could not have become either due or payable, when it was paid. The next question is, when is sales tax "payable"? The argument of Mr. Chaudhuri appears at first sight to be quite attractive, but will not bear a close scrutiny. It is true that Section 10 speaks of the payment of the "tax payable under the Act", and the specified time is exactly prior to filing a return. But does it necessarily mean that the whole tax becomes payable at that point of time and no other?

32. In my opinion, two things are conditions precedent to a debt becoming "payable". Firstly, the amount must be a specific sum and secondly it must become legally recoverable or, in other words, the creditor must acquire the right to enforce immediate payment. When a dealer files his return u/s 10, he has himself determined the amount payable by him and paid it. To the extent he has admitted liability, the amount becomes immediately payable and indeed Section 10 prescribes that he is bound to pay it at once into a Government Treasury or the Reserve Bank of India and under Rule 43 he must attach a copy of the

receipted challan to his return, or else the return will not be accepted. Therefore, both the tests are satisfied. The amount is a specific sum and no question of recovery arises as it has already been paid. Suppose the dealer has filed a correct return and paid in the entire sum, no further question can arise of proceeding u/s 11. Can it be said then that no part of the "tax" due under the Act had become payable when it was paid? I do not think so. Under no circumstances can it be called advance payment, which it must necessarily be, if it had not become payable when it was paid. If, however, he has paid in excess, the excess amount is not a payment under the Act at all and I do not think any question arises as to whether it was payable or not. But in so far as the admitted amount is concerned, the question is purely academic so far as Section 230 of the Indian Companies Act is concerned. No question of priority arises in connection with the amount already admitted and paid. To that extent the debt has ceased to exist. Question of priority will only arise as to that part of the tax not paid, that is to say, the difference between the tax as assessed u/s 11, and that already paid. This amount alone will be demanded under the notice served under that section, in Form No. VII. This also is the amount which forms the subject-matter of dispute in the present case. The amount of Rs. 759-8-9 for which the Sales Tax authorities claim priority, is the balance due after giving credit for the amounts paid u/s 10, with the return. When is such a sum "payable"? Applying the tests I have set out above, it clearly becomes payable after service of notice u/s 11(3), which is in Form VII. A dealer might file a proper return and pay the proper tax in which case the proper amount has become payable and has been duly paid. But the risk is entirely his own. If he fails to file a return or files a return showing a sum less than what is properly due, the balance has to be determined by assessment. In case he has not filed a return at all, the entire sum so assessed has to be recovered, but where he has filed a return and paid part of the amount, the debt has already disappeared to that extent and the balance only has to be recovered (together with penalties, if any). But a mere assessment will not do, because Section 11(3) prescribes a notice to be served. In such a case, the matter becomes closely analogous to the payment of income tax and the balance becomes due only after service of the notice u/s 11(3), which under the rules must be in Form VII. The position may, therefore, be summarized as follows: (1) Sales tax from a dealer chargeable under the Bengal Finance (Sales Tax) Act, 1941, is "due", immediately upon his gross turnover exceeding taxable quantum during the period prescribed by the Act. For determining the taxable turnover, all due allowances must be made under Sections 5 and 6 of the Act: But as soon as there is a taxable turnover, the tax is due. (2) But the sales tax payable under the Act becomes "payable" as follows:

- (a) Where the dealer has filed his return u/s 10(2), and as a condition-precedent paid in, the amount admitted in the return, when the return was filed, and to the extent admitted therein. This, however, will not apply to any excess paid because to that extent it is not a tax payable under the Act and the question does not arise;
- (b) Where the dealer has not filed a return or filed a return which is not

correct or complete, then as to the amount assessed u/s 11(1) and (2), or the amount so assessed less the amount already paid u/s 10(3) together with penalties, if any, payable under the Act, immediately upon the notice u/s 11(3) being served upon him in the prescribed form.

33. In this particular case, notice in Form VII was served on the company on May 17, 1950, which is well within twelve months prior to the date of the winding up order and clearly, therefore, the Government is entitled to priority in payment thereof.

34. I, therefore, agree with the order made by my Lord the Chief Justice.

35. Reference answered to the effect that the amount of sales tax which became due and payable on the date of service of notice of demand, was entitled to preferential payment.

36. Attorney for Official Liquidator: N.C. Bural and Pyne.

37. Attorney for the State of West Bengal: N.C. Mitra.