

(1989) 09 GAU CK 0032

In the Gauhati High Court

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

The India Carbon Limited

APPELLANT

Vs

The State of Assam and Others

RESPONDENT

Date of Decision : 15-09-1989

Acts Referred:

Income Tax Act, 1961 — Section 139, 214, 215
Negotiable Instruments Act, 1881 (NI) — Section 80
Sales of Goods Act, 1930 — Section 61
Assam Agricultural Income Tax Act, 1939 — Section 19, 53
Assam Agricultural Income Tax Rules, 1939 — Rule 11(2)
Assam Sales Tax Act, 1947 — Section 10, 34(4), 35A, 35A(1), 35A(2)
Assam Sales Tax Rules, 1947 — Rule 21(1), 42A, 42B
Central Sales Tax Act, 1956 — Section 14, 15, 2(3), 6, 8
Civil Procedure Code, 1908 (CPC) — Section 34
Constitution of India, 1950 — Article 14, 265, 269, 286, 300A
Government of India Act, 1935 — Section 297

Citation : (1990) 1 GLR 239

Hon'ble Judges : A. Raghuvir, C.J.; S.K. Homchaudhuri, J; B.L. Hansaria, J

Bench : Full Bench

Advocate : J.K. Bhattacharjee and A.K. Saraf, for the Appellant; G.P. Talukdar, D.P. Chaliha and U. Baruah, for the Respondent

Judgement

A. Raghuvir, C.J.—In this batch of eight writ petitions common questions are raised under the Central Sales Tax Act LXXIV of 1956 and Assam Sales Tax Act XVII of 1947. The eight writ petitions are filed by India Carbon Limited a dealer in coke and calcined coke of petroleum. In this batch no question affecting the liability of tax is raised. The issues raised relate to payment of interest for not paying tax on due dates. The numerous orders under which the Assessee is directed to pay interest for not paying the tax on due dates are as under:

2. Interest is imposed on the Assessee from November 1, 1974 to August 17, 1975 in the sum of Rs. 69,778.23 and Rs. 95,004.75 is demanded for the 1st quarter till August 17, 1975 and these orders are assailed in Civil Rule No. 305 of

1977. Interest from December 1, 1975 to December 5, 1975 imposed is Rs. 1,70,506.80 and for the period from May 1, 1975 to December 5, 1975 interest charged is Rs. 1,10 637.04. The (sic) for the two quarters is Rs. 2,81,143.84 which is assailed in Civil Rule No. 306 of 1977. Interest for the period from August, 1975 to August, 1976, from September 1, 1976 to September 27, 1976, from September 28, 1976 to September 30. 1976, from October 1, 1976 to October 28, 1976 is Rs. 2,35,414.22 for the 2nd quarter for November, 1975, December, 1975, June 1976 to September 1976, and October 1, 1976 to October 28, 1976 is Rs. 3,02,767.74. The total sum of Rs. 5,38,181.96 is assailed in Civil Rule No. 307 of 1977. Interest of Rs. 5,28,666.53 is imposed for August 1, 1976 to June 15, 1977, November 1, 1976 to June 16, 1977, June 16, 1977 to January 1, 1978, January 2, 1978 to March 26, 1978 and March 27, 1978 to December 12, 1978. The interest in the two quarters is assailed in Civil Rule No. 50 of 1980. Interest is imposed in Rs. 1,34,350.70 for the period from August 1, 1977 to March 26, 1978, from November 1, 1977 to March 26, 1978 and from March 27 to August 1, 1980 is assailed in Civil Rule No. 506 of 1980. Interest of Rs. 2,26,389.49 for the period from May 1, 1978 to March 16, 1979 and from March 17, 1979 to February 18, 1980 is assailed in Civil Rule No. 507 of 1980. Interest of Rs. 1,51,307.28 for the period ending March 31, 1976 from February 1, 1976 to December 28, 1976 and from May 1, 1976 to December 28, 1976 is assailed in Civil Rule No. 508 of 1980. Interest of Rs. 2,90,741.05 is for February 1, 1977 to March 26, 1978 from September 1, 1977 to March 26, 1978 and from March 27, 1978 to February 18, 1980, is assailed in Civil Rule No. 509 of 1980, These are the facts that are shown in these eight writ petitions.

3. In our tax jurisprudence it is the State that levies taxes and penalties. Interest is also charged when taxes are not paid on the due dates. In the Constitution of India the State is interdicted not to levy of taxes (Article 265) or collected except by authority of law. That interdiction covers two aspects that no tax can be recovered unless a legislature levies a tax. What is levied unless quantified in law cannot be collected. There is no injunction in Article 265 as to imposition of penalty or charging interest. In this State of the Statute on numerous occasions questions were raised before Courts whether the revenue can impose penalty, without a specific provision in a Statute. In the instant case a like question is raised as to interest. The contention in simple terms is that interest cannot be charged unless there is a specific provision in the statute. The contention is raised u/s 9 of the Central Sales Tax Act and it is argued the language in that Section does not enable the revenue to charge interest. The argument is advanced even when tax is paid by the Assessee long after the due date.

4. As to the general law of interest there existed a very old enactment of the year 1839 entitled Interest Act XXXII of 1839. The Act consisted of one single section. That act remained on the statute book till 1978. In that year it was repealed. The single section in the repealed Act brought forth numerous thorny problems in interpretation. The Law Commission of India in its 63rd report recommended Act XXXII of 1839 be repealed. The Parliament of India accepted

the recommendation and repeated the Act and enacted. The Interest Act 14 of 1978. The Government of India enforced the 1978 Act from August 19, 1981.

5. Under the repealed Act of 1839 or under the New Act of 1978, interest is payable when there is an agreement to pay interest. Secondly interest is paid if there is a trade usage to pay interest. The third category of cases Courts order Interest to be paid on consideration of equities like in the cases of specific performance or when money belonging to (sic) person with whom there is a fiduciary relationship is illegally retained. Interest is also charged when a statute directs like in Section 80 of the Negotiable Instrument Act of 1881, Section 61 of Sale of Goods Act of 1930. Section 34 of the Code of Civil Procedure, 1908. These aspects were made clear under the repealed Act of 1839 by the Privy Council in AIR 1938 67 (Privy Council) That decision is followed by the Supreme Court in AIR 1938 SC 1521 (Executive Engineer, Irrigation, Galimala v. Abnaduta Jena). This is the background of the general law. The questions raised now in the instant cases may be looked into.

6. We see in the instant cases the Assessee is taxed under the Central Act of 1956. The quantification of tax and collection is done under the Assam Sales Tax Act of 1947. The bifurcation duties in different enactments is the hall mark of a federal polity. That is tax is levied under the Central enactment and quantification and collection is made under the State Act. This is what we have called bifurcation. Such bifurcation is common in all federal Constitution. See Clause 92 of the Constitution of Australia, Commerce Clause of American Constitution, Section 297 of the Government of India Act, 1935 and Article 269 of the Constitution of India in that the power to levy taxes on newspapers and advertisements is assigned to Parliament under entry 92 of list I. State is entrusted to levy taxes under entry 54 of list II on sale or purchase other than newspapers and advertisements. Article 269 empowered the Parliament to formulate principles to regulate the trade among the States. See in this context chapter XIII of the Constitution proclaims trade is free throughout the territory of India. Article 286 imposes restrictions on the power to levy taxes on the trade affecting exports and imports. This is the set up under the Indian Constitution. We may look at the history of these provisions.

7. At the inception of the Constitution Article 286 was divided in three clauses. There also existed an explanation to the first clause. The scope and ambit of the explanation was considered by the Supreme Court in (1955) 4 STC 133 (SC) State of Bombay v. United Motors (India) Ltd. In limiting the scope of the explanation a test called delivery cum consumption was applied and products of such sales were called explanation sales. The scope of explanation sales was reconsidered in (1955) 6 STC 446 (Bengal Immunity Co. Ltd. v. State of Bihar). Clauses (2) and (3) of Article 286 it was held are not exceptions to explanation sales. It was held sales covered by Clauses (2) and (3) cover cases other than explanation sales. Thus in the course of these two cases explanation sales turned out to be a real villain of the piece in the first five years of the Constitution.

Further in Bengal Immunity case the United Motors was reversed, As a sequel many States were required to refund large amounts of sales tax collected from non-resident traders.

8. The Parliament obviated such a contingency by the Sales Tax Laws Validation Act, 1956 (Act VII of 1956). Later on the recommendation of the Taxation Enquiry Commission (1953-54) the appropriate provisions in the Constitution were amended by the Sixth Amendment of the Constitution. Article 269 was amended to explain what is inter-state sales. Article 286 was suitably amended Entry 92A was introduced in the Union List substituting entry 54 in the State List by a new entry. The Central Sales Tax Act LXXIV of 1956 was enacted with which we are concerned in these cases. The mischief of explanation sales was thus set at rest. After these amendments of the Constitution and enactment of Central Sales-Tax Act explanation sales has not resurfaced.

9. In the Central Sales Tax Act what is inter-State Sales is defined. The scope of sales transacted outside any State is explained. What sales take the character of sales in the course of export or import is explained. Rate of tax leviable on inter-State sales is specified. Goods of special importance for the trade in the country are enumerated. All these aspects are set out in the Central Sales Tax Act. The Act also contained provisions as to penalty and interest in Section 9. The language employed in the Section 9 was assailed in the Court as to hold Section 9 does not enable the revenue to demand penalties Numerous views were expressed by Courts, It is not necessary to refer the cases as the controversy is now set at rest by decisions of the Supreme Court. We may explain the controversy by reference to one difficult case which dealt this subject in Commissioner of Income Tax, Andhra Pradesh Vs. Bhikaji Dadabhai and Co.,

10. That case arose from the former princely State of Hyderabad which merged with the Union of India in 1949. A notice was served on an Assessee on December 12, 1949 to demand penalty under the Hyderabad Income Tax Act which Act was repealed by the Finance Act of 1950. The Assessee contended the income tax Officer had no authority or power on October 31, 1951 to impose penalty in view of the changed set up and also due to the repeal of the Hyderabad income tax Act. The contention rested on the language used in a provision in the repealed Act wherein the word penalty was not used.

11. The State High Court agreed with the contention of the Assessee. The view of the State High Court was overturned on appeal by the Supreme Court. The language employed in the central law and the Repealing Act were considered in that case and what is explained by the apex Court is important. Penalty the Supreme Court held is additional tax to be collected from the dishonest or contumacious Assesseees, This is to mean penalty is part of tax levied whenever it is imposed. It was further explained that if there was power to levy tax that power was sufficient to levy penalty. That reasoning was seriously assailed in Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra, In that case the revenue adopting the ratio in Hyderabad case argued penalty is an "additional

tax" Khemka's case was before a Bench of five Judges. More than two opinions were expressed in the case. Two Judges held against the reasoning spelt out in the Hyderabad case. A third Judge (one among the five Judges) observed there was uncertainty in the views expressed by the Supreme Court therefore the Assessee to get the benefit of uncertainty. The other two Judges followed the ratio in Hyderabad case. Thus in Khemka's case by majority it was held there must be express provision in the Statute to impose penalty. The decision in Hyderabad case was overturned and from that stand point of Khemka's decision the language in Section 9 of the Central Sales Tax was found defective. In *Manganese Ore (India) Ltd. Vs. The Regional Assistant Commissioner of Sales Tax, Jabalpur*, the view in Khemka's case was followed.

12. The Parliament of India immediately amended the Section 9 of the Central Sales Tax Act. The amended Section 9 was again assailed in *Shiv Dutt Rai Fateh Chand and Others Vs. Union of India (UOI)* and Another, This time the Supreme Court held the vice pointed out in Khemka's case was removed by the Parliament. This course of the history of Section 9 appears to have inspired the Assessee in the instant cases to launch the present batch of cases. The attempt now made in this group of cases is to argue what is true of penalties is equally true of interest in all fiscal ejections. That is the lis to be answered in this batch of cases.

13. The contention of the Assessee in the instant case is there ought to a specific provision to charge interest in the Central Sales Tax Act of 1956. The fact that there is provision to charge interest in the Assam Act does not cure the defect. The revenue contends what is true of penalty is not relevant for charging interest. In my view the contention of the revenue is well founded. Now the cases cited by the contestants may be considered.

14. The first case cited is *Central Provinces Manganese Ore Co. Ltd. Vs. Commissioner of Income Tax*, in that interest u/s 139 and 215 of the Income Tax Act, 1961 was held: "Levy of interest is part of the process of assessment" (p. 966). In that case imposition of penalty and its nature was also explained and the difference between penalty and interest was shown-"it is not correct to refer to levy of such interest as a penalty". The expression penal interest it was pointed out was an inaccurate expression. Interest it was explained was levied by way of compensation and not by way of penalty. In another case *Mahalaxmi Sugar Mills Co. Vs. Commissioner of Income Tax, Delhi*, which was a case under the U.P. Sugarcane Cess Act, 1956. The incidents of cess was explained in the case and it was stated interest was in the nature of compensation for delay in payment of cess and not a penalty (p. 434). In *AIR 1981 SC 1837 (Associated Cement Co. Ltd. v. Commercial Tax Officer, Kotla and Ors.)* the third case in which Section 11B of the Rajasthan Sales Tax Act 29 of 1954 was interpreted by majority of 2: 1 in interpreting Section 11B of Act. In this case there was difference of opinion among the Judges. But difference is not relevant to present issue. The controversy was on the cognate subject whether interest was

chargeable. There is discussion as to the nature of interest consistent with the decision cited earlier.

15. The case *Khazan Chand and Others Vs. State of Jammu and Kashmir and Others*, arose under the J & K General Sales Tax Act 20 of 1962. The issue was whether interest was illegally charged. The principal question in that case was of vires of Jammu & Kashmir Sales Tax Act. The Supreme Court held: "Thus, payment of interest in a case of default in payment of tax is a means of compelling an Assessee to levy the tax due by the prescribed date. It is a mode of recovery of tax and sell within the legislative power of the State". Therefore when interest was charged it was held the enactment is not arbitrary and unreasonable. This finding was recorded in the context Article 14 of the Constitution. The plea of discrimination was rejected. Lastly in *Ganesh Dass Sreeram Vs. Income Tax Officer, "A" Ward, Shillong and Others*, the conclusion indicated that the revenue was vested with the power to charge interest u/s 139 and 215 of the income tax Act of 1961.

16. The amended Section 9 of the Central Sales Tax Act by Central Act 1976 at first was adverted to by the learned Counsel of the Assessee. The counsel contended the words relevant to interest were not properly used therefore interest cannot be charged under Central Act. We have earlier referred to the Supreme Court cases wherein it was held that when tax is levied and not paid on the due date interest is payable. There need not be a special provision in the Act to charge interest and that issue is no more *res Integra*. The first contention of the Assessee there fore fails. It is not necessary to advert to the language of Section 9 which was laboriously adverted in this Court as we are rejecting submission as indicated in the earlier discussion. With this we may turn now to the provisions in the Assam Sales Tax Act.

17. The Assessee next attacked Section 35A of the Assam Act is ultra vires of Section 15(a) the Central Sales Tax Act read with Article 286 of the Constitution of India. It is urged petroleum coke is a commodity of special importance under the Central Act therefore rate in no event can exceed 4%. If interest is allowed to be charged u/s 35A it is urged in which case tax will exceed 4% on declared goods. Therefore Section 35A is ultra vires of the Constitution.

18. Originally in the Assam Sales Tax Act there was no specific section for charging interest. The Assam Sales Tax (Amendment) Act XIV 1967 amended the Act with effect from October 18, 1967. Section 35A was inserted containing three Sub-sections for charging interest. Sub-section (4) was inserted by amending Act VI of 1968. Later on by Assam Act XX of 1977 (from December 15, 1977) the entire Section 35A was repealed. A new Section 35A was substituted containing 7 Clauses with two explanations to Clause (7).

19. Under the substituted Section 35A for non-payment of tax interest is charged at 6% from the 1st day of the month next following upon the amount by which the tax so paid falls short of the amount of tax payable on the basis of return or

account books. If the tax is not paid within 30 days from the due date simple interest not exceeding 24% is payable in case in which dealer has not maintained the accounts books or suppressed. Interest is payable for non-payment of instalment of tax as extended by the proviso to Section 36(1) from the 1st day of the month next following the said date, meaning, the date earlier referred to in Section 35A(3) on the short fall.

20. It is argued Section 3A when it was inserted by way of temporary measure authorising levy of surcharge the of specified goods under the Central Act. The temporary measure is recounted to support the plea that substituted Section 35A is ultra vires. This contention founded on historical grounds we hold is not decisive. The contention advanced by the Assessee in my view cannot on countenanced.

21. It is next urged Section 35A authorises imposition of interest at the maximum rate of 24%. This rate is arbitrary and unreasonable. The Assessee in this regard relied on two cases of this Court 1976 Assam Law Reports Volume 8 page 46 (New Assam Valley Tea Co. Ltd. v. The Agricultural income tax Officer, Assam) a case which considered the Assam Agricultural income tax Rules of 1939 and another case reported in (1988) 2 GLR. 285 (Bhauram Jodhraj & Co. v. State of Assam) in that Assam Finance (Sales Tax) Rules, 1956 were considered. There is no discussion in the two cases touching on the arbitrary character of interest or the unreasonableness of the imposition. Besides in the earlier discussion we have pointed out the case, of Khazan Chand and Others Vs. State of Jammu and Kashmir and Others, The graduated levy of interest was held not arbitrary or unreasonable. In view of that decision it is not necessary to discuss further "he cases of this Court. The contention that Section 35A confers arbitrary or unreasonable provision therefore cannot be accepted.

22. It was next pointed out u/s 37(3) the State pays interest at 6% for the delayed payment by the State to the Assesseees and in the case of the Assesseees interest is charged at the rate of 24% for a similar delayed payment therefore in this set up of the two provisions the Assessee argued the principle of equality enshrined under Article 14 of the Constitution of India is violated. This contention is not raised in the writ petitions naturally the State in opposition did not come out with the necessary material to oppose the plea. We may however mention that this plea is put in the reverse order in the instant cases. The statutory provisions in appropriate case may enable the Assessee to argue 24% of the interest is to be paid for the delay in payment by the State to the Assessee as recited in Section 35A.

23. The Assessee next assailed Rule 42A of Rules which was introduced for the first time on September 10, 1958 and later was deleted by the Assam Sales Tax (Amendment) Rules, 1968 with effect from October 2, 1967. Between the period October 1, 1967 to January 1, 1968 there was no Rule but from the latter date the Assam Sales Tax (Amendment) Rules, 1971 Rule 42A was incorporated with retrospective effect from January 1, 1968. Rule 42A was finally repealed by

Notification from July 26, 1983.

24. On comparison of the pattern of repealed Section 35A. or substituted Section 35A we see the pattern in Rule 42A is similar. The plea advanced in this regard is Rule 42A brought into force from January 1, 1968 with retro activity and it should operate from December 22, 1971 the day when it was notified. What is argued as in Assam Sales Tax Act the Government has not been empowered to enforce rules with retrospective effect. The cases 1976 GLR 8 (New Assam Valley Tea Co. Ltd v. The Agricturai Income Tax Officer, Assam and (1988) 2 GLR 285 (Bhauarm Jodhraj & Co. v. State of Assam) are pressed into service to support the contention. In this batch of cases there is no case where interest is charged retrospectively between January 1968 to December 1971. Therefore the question does not arise in the instant cases. I keep the question open to be considered in future in an appropriate case as in none of the eight cases such a question arises.

25. Before we part with the Rules, one argument of the Assessee advanced may be adverted. Rule 42A is inconsistent with the scheme in Section 35A of the Act. No part of Rule 42A is severable therefore Rule 42A is entirely ultra vires of Section 35A of the Act. Earlier pattern of legislation in Section 35A and Rule 42A was referred and it was held the two provisions are alike. In face of such a conclusion no question of severability arises.

26. It is next argued Section 35A, Rule 42A and 42B enable the revenue to charge graduated tax or progressive rates of interest. Therefore Section 35A and Rule 42A are violative of Article 265 and 300A of the Constitution of India. In Khazan Chand and Others Vs. State of Jammu and Kashmir and Others, referred earlier the issue interest charged in progressive manner was approved by the Supreme Court, In view of that decision the contention now raised cannot be contended.

27. I hold interest is calculated u/s 35A or under Rule 42A which are alike in substance and content and enable interest to be charged, Interest in all the eight cases in law is ascertained and demanded under the two provisions. The orders of demand for payment of interest in all the eight cases do not suffer any vice whatsoever. The Assessee represented to have filed representations of rectification of mistakes against the impugned orders. I keep it open to the Assessee to approach the Superintendent of Taxes in an application (if not already made) for correction of all inadvertent mistakes. On filing of such application the revenue authorities to pass orders in accordance with law.

28. For all the aforesaid reasons the writ petitions merit dismissal and are accordingly dismissed. No costs.

S.K. Homechaudhuri, J. (dissenting)

29. In these batch of 8 (eight) writ petitions the order of assessment imposing interest on the assessed tax under the Central Sales Tax Act, on the sale transaction of declared goods (petroleum coke) have been assailed on the

following grounds:

(i) On a true and correct interpretation of Section 9(2) of the Central Sales Tax Act, 1956, the provision of Section 35A of the Assam Sales Tax, 1947 purporting to a charge interest is not applicable to arrear tax payable under the Central Sales Tax Act, 1956 in as much as in the amendment made in Section 9(2) of the Central Sales Tax Act, by Act 103 of 1976 by inclusion of the words charging of payment of interest without amendment in the first part of the said Section 9(2) did not confer any power to charge interest.

(ii) Interest chargeable being part and parcel of tax and accretion to tax the provision of Section 35A of the Assam Sales Tax Act, is ultravires of Section 15(a) of the Central Sales Tax Act read with Article 286 of the Constitution inasmuch as the Petroleum Coke has been declared as goods of special importance u/s 14 of the Central Sales Tax Act, restriction to levy tax u/s 15(a) of the said Act cannot be overridden by Section 35A of the Assam Sales Tax Act.

(iii) Section 35A of the Assam Sales Tax Act, provide for charging interest on arrear tax payable at the maximum rate of Rs. 24% while Section 37(3) of the said Act provides for payment of interest @ 6% by the Government for delayed refund of the excess payment of tax by the Assessee whatever may be the period of delay, and the interest chargeable being compensatory and not penal, there cannot be any rational and/or intelligible basis for charging interest at the maximum rate of 24% u/s 35A from the Assessee while providing maximum rate of 6% in respect of refund and as such the provision of Section 35A so far it provides charging of interest above 6% is arbitrary, unreasonable and discriminatory.

(iv) Rule 42A of Assam Sales Tax Rules, 1947 is inconsistent and contrary to the substantive provision 35A of the Act, and the same is ultravires of Section 35A and interest assessed under the provision of Rule 42A read with Section 35A before substitution of the said section by Act XX of 1977 with effect from 15.12.77, are without jurisdiction, and void ab-initio.

30. On the first point raised on behalf of the Assessee it is submitted that Section 9(2) of the Central Sales Tax empowers charging of tax and other penalties etc. under the provision of State Sales Tax Act, However, no power to charge interest has been conferred specifically by first part of Section 9(2) of the Act, as such there cannot be any authorisation for charging interest under the Central Sales Tax Act on the arrear tax payable under the Central Sales Tax Act. In support of the contention reliance has been placed into decision of the Apex Court in the case Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra, wherein it was held by Apex Court that in the absence of specific provision in Section 9(2) of Central Sales Tax Act empowering to levy penalty, imposition of penalty [under] the State Sales Tax Act was without jurisdiction. On behalf of the revenue it has been submitted that said decision related to imposition of penalty and that by a catena of decisions, the Apex Court hold that interest is not penalty

but compensatory and accretion to tax. It is submitted that in the case of Mahalaxmi Sugar Mills Co. Vs. Commissioner of Income Tax , Delhi, the Apex Court held that interest on cess was a part and parcel of tax. As such penalty and interest stand on different footing and the decision in the Khemka & Co. (Supra) does not at all assist. There is ample force in the submission made on behalf of the revenue. The settled position being that interest of tax, is part and parcel of tax, contention of the Assessee that because of the fact first point of Section 9(2) of the Central Sale Tax Act not having empowered charging of interest no interest can be charged on the arrear tax payable under the Central Sales Tax Act is not tenable.

31. On the second point it has been submitted that it being the settled law that interest chargeable on the arrear of sales tax payable by the Assessee, is the part and parcel of the tax itself, restriction u/s 15(a) of the Central Sales Tax, namely, tax chargeable shall not exceed 4% on the sale proceed of declared goods, squarely applies in respect of charging interest also. Provision of Section 35A cannot override the provision of Section 15(a) of the Central Sales Tax Act, read with Article 286 of the Constitution of India. It has been pointed out that Section 3A was inserted by way of temporary measure authorising the levy of surcharge @ (sic)%, it was however provided that said surcharge would not apply in respect of the declared goods under the Central Sale Tax Act in case the total liability exceeds 4%. It is submitted that interest charged u/s 35A of the Assam Sales Tax Act, being a part and parcel of the tax so far as it authorises levy of interest on the arrear tax payable in respect of sale declared goods over and above of the restriction of 4% as provided by Section 15 of the Central Sales Tax Act, is ultravires of the Section 15(a) of the Central Sales Tax Act read with Article 286 of the Constitution of India. The subject matter of the impugned order being declared goods, the provision of Section 35A of the Assam Sales Tax Act cannot apply to override the restrictions u/s 15(a) of the Central Sales Tax Act. Revenue cannot be allowed to blow hot and cold. After taking shelter under the decision of the Apex Court that interest is compensatory and is a part and parcel of tax to meet the first ground, cannot be allowed to make different submission that tax and interest are different to overcome that the restriction u/s 15(a) of the Central Sales Tax Act in respect of the declared goods.

32. Article 286 of the Constitution provides that the parliament may by law declare some goods to be of special importance in inter-State trade or commerce and subject to such restriction and conditions in regard to the system of levy, rates and other incidence of the tax, Section 14 of the Central Sales Tax Act enumerates goods/articles of special importance and u/s 14 of the Act "Coal and Coke" is included as goods of special importance. Section 6 of the Central Sales Tax is the charging section. Section 8 of the said Act provides rates of taxes to be charged. Section 8(2)(A) provides that rates should be the prescribed rate of goods in the State or rate prescribed in Section 8, which ever is lower. By See 15 restriction is imposed by the parliament in the exercise of the power under Article 286 of the Constitution, as to the rates of tax payable on the sale of

declared goods and the maximum rate of levy on declared goods have been restricted to 4%.

33. The Apex Court in *Mahalaxmi Sugar Mills* (supra) in clear terms held that interest payable on the cess u/s 2(3) of the relevant Act is in reality a part and parcel of the liability to pay cess and interest is an accretion to the cess. Following the decision of the *Mahalaxmi Sugar Mill* (supra) that this Court by judgment dated 28-1-89 in the Income tax reference No. 2/80 held that interest charged u/s 35A of the Assam Sales Tax Act is a part and parcel of the Sale Tax. Settled position being that interest charged on the arrear tax is an accretion to tax and a part and parcel of the tax, there is force in the submission of the Petitioner. It is held that interest payable on the arrear of tax on sale of declared goods is subject to the restriction, u/s 15 of the Central Sales Tax Act read with Article 286 of the Constitution of India. Question may arise if Section 35A of the Assam Sales Tax Act is subjected to restriction, u/s 15 of the Central Sales Tax Act defaulting Assessee dealing in declared goods may take advantage and go on delaying payment of the arrear tax. But provision for imposition of penalty under the Assam Sales Tax may suitably be invoked to deter a dealer from making default in payment of tax payable under the provision of Central Sales Tax Act in respect of selling declared goods.

34. In regard to the 3rd question namely, the provision of 35A of the Assam Sales Tax Act is arbitrary, discriminatory and is violative of Article 14 of the Constitution, it is submitted on behalf of the Assessee that settled position being that interest is nothing but compensation, accretion to tax, the rate of compensation which revenue is entitled for delay in payment of the arrear tax, the Assessee is equally entitled to get at the same rate of compensation for delay in making refund of the excess amount of tax paid by the Assessee. It is submitted that in the Income Tax Act, there has all along been the same rate of interest in respect of the delayed payment of the tax by the Assessee as well as in respect of refund by the revenue. But in the Assam Sales Tax Act, while u/s 35A interest at the rate maximum of 24% is chargeable against the dealer for making delay in payment of the tax due to be paid by the dealer, however, in respect of the refund by the revenue under the provision of Section 37 of the Assam Sales Tax Act Assessee is entitled to maximum rate of interest @ 6% interest whatever be the period of delay. As such, the provisions of Section 35A is arbitrary, and discriminatory and is violative of Article 14 of the Constitution. The validity of graduated rate of charging interest on the arrears tax came to be considered by the Apex Court in the case of *Khazan Chand and Others Vs. State of Jammu and Kashmir and Others*, wherein the Apex Court held that graduated rate of interest provided under the Section 8(2) of the Jammu & Kashmir Sales Tax Act could not be characterised as arbitrary and unreasonable, because similar graduated rate of interest was provided u/s 19(8) of the said Act in respect of refund of taxes to the Assessee. This submission appears to have force but submission challenging validity of the provision of Section 35A of the Act as has been made at the stage of argument only. No submission questioning the

validity of the provision of Section 35A on that count has been made in the writ petition in specific term. Consequently, Respondents has not given opportunity Jo meet the contention by placing materials. The matter is left open to be decided in an appropriate case in future.

35. On the question of the validity of Rule 42A of the Assam Sales Tax Rules, 1947 it has been submitted on behalf of the Assessee-

(a) After insertion of Section 35A to the Assam Sales Tax Act, by Assam Act XIV of 1967, providing to charge interest for the 1st time, the State of Assam in the exercise of power under [Section] 52 of the Act, inserted Rule 42A and Rule 42B in Assam Sales Tax Rules 1947 with retrospective effect from 1.1.68 prescribing rate of interest to be charged as contemplated u/s 35A of the Act prior to substitution of the said section by Act XX of 1977. But Rule 42A ignored scheme of Section 35A in respect of the charging of interest and instead provided altogether new scheme for levy of interest which is inconsistent with and contrary to the provision of Section 35A.

(b) As per Rule 42A charge of interest is applicable to all dealers both registered as well as unregistered, whereas Section 35A confined its applicability to registered dealers only. The Assam Sales Tax Act defines registered dealers and unregistered dealers separately.

(c) Rule 42A has done away the different stages as well as basis of levy of interest as provided u/s 35A. On the other hand has provided a new base of all cases levy of interest on the assessed amount as against the provisions of Section 35A providing for levy of interest on the amount due as per return except in case of suppression sales tax covered by Sub-section 2 of Section 35A of the Act.

(d) Rules 42A provides levy of interest in event of non payment of tax within 30 days of the end of expiry of quarter. The expression quarter is unknown under the scheme of Assam Sales Tax Act and quarter is a new introduction inasmuch as the return period of Assam Sales Tax arc half yearly period ending on 31st March, and 30th September, of each year.

(e) Section 35A of the Act provide levy of simple interest @ 6% and left only rate of interest to be prescribed by the State Government in framing of rules in case of delay in payment of taxes as per return continues beyond 30 days of due dates, whereas Rule 42A has prescribed progressive rate of interest applicable for default for different periods on the assessment tax.

36. To appreciate the aforesaid submission, it is apt to give a brief legislature history of the Section 35A of the Assam Sales Tax and framing of Rules 42A and 42B of the Assam Sales Tax Rules, 1947. (sic) the 1st time by Assam Sales Tax Amendment Act, 1967, (Act XIV to 1967) provision of charging interest on the arrear tax was first incorporated to the Assam Sales Tax Act by inserting Section 35A with effect from 10.10.67, which provide as follows:

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 per cent per annum shall be (sic) as may be prescribed.

(2) Where on making the assessment, the Commissioner finds that a dealer has not maintained the account books properly and thereby he has suppressed the sale of goods in any period, the Commissioner may direct him to pay interest as prescribed in Sub-section (1). If the amount of tax payable under the Act has been reduced in appeal or revision, the interest may be calculated on the reduced amount.

(3) If any registered dealer does not pay into the Government Treasury the amount of tax within the date as provided in Sub-section (4) of Section 34 of any instalment of the tax within the extended date as per proviso to Sub-section (1) of Section 36 of Act, interest as provided in Sub-section (1) shall be payable from the first day of the month following the said date by the dealer upon the amount by which the tax if any paid falls short of the amount of the tax payable under the Act.

By Assam Sales Tax (Amendment) Act, 1968, (Assam Act VI of 1968) a new Sub-section, namely, Sub-section (4) was inserted in Section 35A with effect from 29.5.68 Sub-section (4) reads as follows:

(4) If the amount of tax paid within the prescribed date is not less than ninety per centum of the tax as finally assessed, no interest as provided for in Sub-section 1 of this section shall be levied.

37. The State Government in the purported exercise of power u/s 52 of the Assam Sales Tax Act, by Assam Sales Tax Amendment Rules, 1971 inserted Rule 42A and Rule 42B by making amendment of the Assam Sales Tax Rules 1947 here in after referred to as the rules.

Rules 42A: If a dealer does not submit the return and pay the amount of tax due from him within the dates specified in Rule 21(1) or the proviso thereto, he shall be liable to pay simple interest at the rate of six percent per annum on the amount of the tax assessed from the first day from the second month of the end of the quarter or period, as the case may be, to which such return may relate; the rate of interest shall be 12 percent per annum from the first day of third month and 24 percent per annum from the first day of the fourth and the succeeding months of the period during which the tax payable for the quarter/period remains unpaid:

Provided that where a dealer has paid 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 while of the assessed amount of tax up to the date of payment and thereafter on the balance tax payable.

Rule 42B: The amount of tax determined to be due u/s 34(4)(b) is the amount due at the close of each quarter or period and the interest above mentioned shall be levied in the manner as provided for in Rule 42A and the proviso thereto.

By Clause 1 of the said amendment which was published on 22-12-71 were given retrospective effect from 1-1-68.

Section 35A was substituted by the present Section 35A. by the Assam Act (XX) 1977 with effect from 15-12-77 by which the rate of interest to be charged at different stages on the arrear tax has been prescribed.

38. Out of these 8 writ petitions assessment imposing interest on the arrear-tax impugned in Civil Rule No. 305/77,306/77,307/77,505/80,506/80,508/80 and 509/80 pertain to the return period ending on 31.3.74, 31.3.75, 30.9.75, 30.9.76 30.9.77, 31.3.76 and 31.3.77 respectively. All these period of assessment pertain to period prior to substitution of Section 35A of the Assam Sales Tax by Act XX of 1977 came into force. As such assessment of interest in respect of these 7 periods were obviously made under the provisions of Section 35A of the Act before substitution thereof by Act XX of 1977, and Rule 42A of the Rules. The assessment order imposing of interest impugned in Civil Rule No. 507/80, however pertains to return period ending on 31-3-78 as such the assessment of interest impugned in the Civil Rule No. 507/80, was made only under the provisions of Section 35A, after it was substituted by Act XX of 1977, by which the rate of interest at different stages has been prescribed in the section itself.

39. It is apparent from the provision of Section 35A of the Assam Sales Tax Act, prior to its substitution by Act XX of 1977 that in case a registered dealer fails to pay the amount of tax or part there of due as per his return his books of account, within the date prescribed by the Act, he will be liable to pay simple interest at the rate of 6% per annum on the unpaid amount of tax for initial period of thirty days of default and thereafter simple interest upto the maximum rate of 24% per annum as may be prescribed by the Government.

Sub-section 2 of the said Section 35A however provided that if the dealer does not maintain the account books and there by suppressed the sale of goods during any return period interest would be charged on the assessed tax. As such the scheme and base of charging interest as per Section 35A before its substitution by Act XX of 1977, was that interest was to be charged on the unpaid amount of tax due as per the return of the registered dealer or as per his books of account and only in case when the dealer did not maintain account which resulted in suppression of sale of goods, simple interest would be charged on the assessed amount of tax if the same is not paid within the time prescribed

by the provision of the Act.

40. Rule 42A framed by the Government in the exercise of power u/s 52 and Section 35A of the Act before its substitution by Act XX of 1977, however provides that all dealers whether the registered or not are liable to pay interest in cases of future to pay the tax with the time prescribed by the provision of the Act on the assessed amount of tax, although as per provision of Section 35A, a registered dealer is liable to pay interest on the amount of unpaid tax as per his return or books of accounts.

41. From what is stated above, it is apparent that Rule 42A as framed in exercise of power u/s 52 and Section 35A of the Assam Sales Tax has provided scheme and base of charging interest altogether different from those provided u/s 35A of the Act, before substitution thereof by the Act XX of 1977.

42. The Petitioners in support of its contention has placed reliance on the decision of this Court in *New Assam Valley Tea Co. Ltd v. Agricultural Income Tax Officer, Assam* reported in 1976 ALR 46. This Court in the said decision held Rule 11(2)(b) of the Assam Agricultural Income Tax Rules 1939 framed u/s 19 and 53 of the Assam Agricultural Income Tax Act, 1939, was illegal and void on the ground that while Section 19 of the Act as it was at the material time laid down that interest might be charged as may be prescribed by Rule upto the date of furnishing return, Rule 11(2)(b) framed there under, however prescribed charge of interest upto the date of payment of the tax due, and as such the provision of Rule 11(2)(b) held to be *ultravires* of Section 19 of the Act.

43. The ratio of the aforesaid decision of this Court in *New Assam Valley Tea Co. Supra* clearly applies on the fact of the case in hand. Here while Section 35A before its substitution by Act XX of 1977 provided charging of interest on the unpaid tax by registered dealer due as per his return or books of account Rule 42A prescribed altogether a different scheme and base of charging interest namely interest to be charged on the unpaid amount of tax as assessed. The settled law being that rule making authority must exercise powers within the limit as provided by the provisions of the Act, in the instant case, however the provisions of Rule 42A is apparently inconsistent with and beyond the limits of power of the rule making authority as provided by the Section 35A and that being so Rule 42A is *ultravires* of provision of Section 35A as It was before its substitution by Act XX of 1977 and as such is illegal void and inoperative.

44. Rule 42A of the Assam Sales Tax being illegal and void the assessment made under provisions of the said rules are equally illegal and void and consequently the assessment order impugned in Civil Rules 305 of 1977, 306 of 1977, 307 of 1977, 505 of 1980, 506 of 1980, 508 of 1980 and 503 of 1980 passed under Rule 42A of the Rules, are illegal and void.

45. For the reasons given above, the petitions are allowed and the assessment orders impugned in the writ petitions are set aside and quashed. No order as to costs.

On difference of opinion between the two Hon''ble Judges the matter was referred to the third Judge, Hon''ble Mr. Justice B.L. Hansaria. The judgment of the third Judge is given below:

B.L. Hansaria, J.

46. 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".

47. 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, herinafter 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 in 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 in as much as Rule 42A is ultravires Section 35A; and (4) Section 35A of the State Act is violative of Article 14 of the Constitution.

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

49. To answer the first point agitated by the Petitioner we may note Section 9(2) of the Central Act as it stood at the relevent time.

9(2) Subject to the other provisions of this act and the rules made thereunder, the authorities for the time being empowered to assess, re-assess, 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 of 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, appeales, reviews,

revisions, references, refunds, penalties, compounding of offences and treatment of documents furnished by a dealer as confidential, shall apply accordingly.

50. 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 and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, in which the question of imposing (sic) 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 Assessee 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 penalty alone could be imposed which had been made payable by the provisions of 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 impossible under the general sales tax law of the State. It was pointed out by the majority that in the absence of any provision in 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 contingency cannot be regarded as legal. The decision in *Khemka & Co.* was followed in *Manganese Ore (India) Ltd. Vs. The Regional Assistant Commissioner of Sales Tax, Jabalpur*,

51. 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 and Others Vs. State of Jammu and Kashmir and Others*, 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.

52. Reference was also made to *Ganeshdass Sri Ram v. ITO* AIR 1988 SC 421. 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."

53. 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 later 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 v. CIT* 1989 1 GLJ 266 after referring to *State of Kerala and Others Vs. M.*

Padmanabhan Nair, and Adhai Singh v. Secretary, Ministry of Communication AIR 1981 SC 2177 in which reliance was placed on Inglewood Pulp and Paper Co. Ltd. v. 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.

54. On the question whether Section 35A of the State Act is hit by Section 15(a) of the Central Act, the submission of Sri 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 v. CIT (1980) 123 1TR 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 v. 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 sales-tax payable by the Assessee. The same view was taken in Assam Forest Products v. CIT (1989) 1 GLR 474.

55. Relying on these decisions Sri Bhattacharjee has submitted that charging of interest even at the (sic) 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 Sri Talukdar that though interest may be regarded as an (sic) to tax conceptually, tax, interest and penalty are different as pointed out in Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others, 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.

56. 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.

57. In so far as the third submission is concerned, the contention of Sri 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 21(1) or the proviso thereto, he shall be liable to pay simple interest at the rate of six percent per annum on the amount of 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 relate; 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 the 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 upto the date of payment and there after on the balance tax payable.

58. 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. v. 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 Sri 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 provision of Section 35A.

59. 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 read down in the sense that interest has to be determined on the basis of the return filled 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 Sri Talukdar is that 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 Sri 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 u/s 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.

60. 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 Hombachudhuri, J. did not express any opinion on this aspect of the case. It may however be mentioned that 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 yardsticks 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 practised. 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 Section 214 and 215 and other sections of the income tax Act.

61. 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 Hombachudhuri, J. has not expressed any opinion on this score.

62. I would summarise my views as below on the four questions agitated by the

Assessee:

(1) Even if Section 9(2) of the Central 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 Homchudhuri, J. has expressed no opinion on this aspect of the case.

After receipt of the opinion of the third judge, the matter came up before the Division Bench comprising of Hon"ble Chief Justice A. Raghuvir and Hon"ble Mr. Justice S.K. Homchaudhuri and the following order was passed.

A. Raghuvir, C.J.

After the opinion of the 3rd Judge is received, and after bearing the learned Counsel of both sides the following order is passed.

As per the judgment of the Chief Justice Rule 42A is valid.

As per the judgment of the Homchaudhuri, J. the Rule 42A is held ultravires of the Act XVII of 1947.

As per the judgment of the Hansaria, J. as indicated in sub-para (3) of para 14 which reads as under:

(3) Rule 42A of the Assam Sales Tax Rules, 1947 is altravires 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.

In our view, the majority view is the view indicated in sub-para (3) para 14 of Hansaria, J. The Respondents authorities are directed to reckon interest as above. The writ petitions are disposed of accordingly. All interlocutory orders passed are hereby vacated. No costs.