

CASE NO.:
Appeal (civil) 6448-6455 of 2002

PETITIONER:
E.I.D. Parry (India) Ltd.

RESPONDENT:
Asst. Commissioner of Commercial Taxes, Chennai

DATE OF JUDGMENT: 03/05/2005

BENCH:
S. N. Variava, Dr. AR. Lakshmanan & S. H. Kapadia

JUDGMENT:
J U D G M E N T

[with Civil Appeal No. 4230 of 2003]

S. N. VARIAVA, J.

These Appeals are against the Judgment of the Madras High Court dated 8th October, 2001.

Briefly stated the facts are as follows:

The Appellants are the manufacturer of sugar. They purchase sugarcane from farmers. By virtue of the Sugarcane (Control) Order, 1966 made under the Essential Commodities Act, 1955 the price for such purchase is statutorily fixed. Clause 3 of the Sugarcane (Control) Order lays down the minimum price of sugarcane payable by a producer of sugar. This is the price which is payable immediately at the time that the sugar is purchased. Over and above this, by virtue of Clause 5-A, an additional price is also payable. This additional price is to be fixed on the basis of a formula laid down in the first Schedule of the Sugarcane (Control) Order. The Formula given therein is as follows:

$$X = \frac{R \times 0.26 L + 2A + B}{2C}$$

R is the amount in rupees of sugar produced during the sugar year excluding the excise duty paid or payable to the factory by the purchaser. It is evident from the formula itself that the additional price is the amount which is incapable of determination at the time the sugarcane is supplied to the factory by the grower. The additional price can only be determined at the end of the sugar year and not earlier. Even though the additional price could not be determined till the end of the sugar year, in practice it took a long time to determine this price. Therefore the State Government advised the sugar producers to pay a price which was higher than the minimum price fixed under Clause 3. The manufacturers of sugar, like the Appellants, also paid the additional price as fixed by the Government at the time of purchase. The additional price so paid was then adjusted against the price fixed under Clause 5-A of the Sugarcane (Control) Order, 1966.

Under the Tamil Nadu General Sales Tax Act, 1959 dealers were given an option, under Section 13(2), of paying tax in advance on the basis of monthly returns. Section 13 is relevant and it reads as follows:

"13. Advance payment of tax

(1) The tax for each year payable under any of the provisions of this Act may be collected in advance during the year in monthly or other prescribed instalments and for

this purpose a dealer may be required to furnish within the prescribed period such returns as may be prescribed. The assessing authority may provisionally determine the amount of tax payable in advance during any year or in respect of any period and on such determination and intimation to the dealer he shall pay such tax in such instalments and within such period as may be prescribed.

(2) In lieu of the tax provisionally determined under sub-section (1), a dealer may, at his option, pay tax in advance during the year on the basis of his actual turnover for each month or for such other periods as may be prescribed. For this purpose, he may be required to furnish returns showing his actual turnover for each month or other periods as may be prescribed and to pay tax on the basis of such returns. The tax under this sub-section shall become due without any notice of demand to the dealer on the date of receipt of the return or on the last due date as prescribed, whichever is later.

2A. Notwithstanding anything contained in sub-sections (1) or (2), every dealer other than those paying tax under sub-section (2) of section 3D, section 3E or 7E, whose total turnover in the preceding year was not less than ten lakhs of rupees or his taxable turnover was not less than three lakhs of rupees and all dealer newly registered in the year shall pay tax during the year on the basis of his actual turnover for each month or for such other period, as may be prescribed.

(3) If no return is submitted by the dealer under sub-section (1) or sub-section (2) within the prescribed period, or if the return submitted by him appears to the assessing authority to be incomplete or incorrect, the assessing authority may, after making such enquiry as it considers necessary, determine the tax payable by the dealer to the best of its judgment:

PROVIDED that, before taking action under this sub-section on the ground that the return submitted by the dealer is incomplete or incorrect, the dealer shall be given a reasonable opportunity of proving the correctness or completeness of the return submitted by him.

(4) If the assessing authority has reason to believe that the tax determined by it for any period was based on too low a turnover or was made at too low a rate or was based on too high a turnover or was made at too high a rate, it may enhance or reduce, as the case may be, such determination tax:

PROVIDED that before making an enhancement of the tax payable as aforesaid, the assessing authority shall, except where such enhancement is based on the turnover finally determined for the preceding year, give a reasonable opportunity to the dealer to show cause against such enhancement and make such enquiry as it may consider necessary.

(5) The determination and collection of tax under this section shall be subject to such adjustment as may be prescribed on the completion of final assessment in the manner prescribed."

The Appellants were thus filing returns. In these monthly returns they

showed their turnover on the basis of minimum price paid by them and paid tax thereon. They indicated the additional price which they had paid as per the advice of the Government but did not include it as part of the turnover and did not pay tax on such additional price. As and when the price, under Clause 5-A, was fixed the Appellants filed a revised return and paid tax on that.

After the revised returns were filed an Assessment Order was passed. In the Assessment Order interest was sought to be charged, under Section 24(3), on the price fixed under Clause 5-A from the date that the sugar was purchased till payment of tax was made by the Appellants. The Appellants challenged the demand for interest before the Tamil Nadu Taxation Special Tribunal. The Tribunal dismissed the Petition on 19th April, 2000. The Appellants then filed Writ Petition before the High Court which has been dismissed by the impugned Judgment.

Two questions arise for our consideration: (a) whether the advance paid, pursuant to the advice of the Government, can be considered to be price and thus includible in the monthly turnover of the Appellants and (b) whether interest under Section 24(3) can be charged on the price fixed under Clause 5-A and/or on the advance paid and if so, from what date.

On these questions, Mr. Vellapally has submitted that the price fixed under Clause 5-A would only be known after it was determined and that till the Clause 5-A price was announced it would not be includible in the returns for the reason that the price would not be known. He submitted that the advances given as per the advice of the Government are mere ad-hoc payments and that these advances do not constitute price. In support of his submission, he relied upon the Judgment of this Court in the case of State of Tamil Nadu vs. Kothari Sugars & Chemicals Ltd. reported in 1996 (7) SCC 751. He further submitted that, in any case, on a plain reading of Sections 13 and 24 of the Tamil Nadu General Sales Tax Act no interest can be levied unless and until an assessment has taken place and a notice of demand has been issued and tax had not been paid within the time specified in the notice of demand. In support of this submission, he relied upon the cases of J.K. Synthetics Ltd. vs. Commercial Taxes Officer reported in 1994 (4) SCC 276 and Frick India Ltd. vs. State of Haryana reported in 1994 (5) SCC 559.

On the other hand, Mr. Iyer submitted that the Appellants had chosen to follow the procedure under Section 13(2). He submitted that tax had to be paid on the actual turnover. He submitted that the decision of this Court in Kothari Sugars and Chemicals Ltd.'s case (supra) was only concerned with the question as to whether the amounts paid in advance, over and above the price fixed under Clause 5-A, can be considered to be price. He submitted that the observations made in that case are in the context of this question. He points out that this Court has in the case of U.P. Cooperative Cane Unions Federations vs. West U.P. Sugar Mills Association reported in 2004 (5) SCC 430 so noted. He submitted that therefore the observations in Kothari Sugars and Chemicals Ltd.'s case cannot be construed to mean that the advance price, paid towards the price fixed under Clause 5-A, does not constitute price. He further submitted that J.K. Synthetics Ltd.'s case would have no application as, in the present case, the tax is to be paid on actual turnover which would mean the actual amounts paid by way of price.

We have heard the parties and considered the submissions.

Let us first consider whether the advance paid, towards the Clause 5-A price, constitutes price and is includible in the monthly returns as turnover. As stated above, reliance has been placed, by Mr. Vellapally, on the Judgment of this Court in Kothari Sugars and Chemicals Ltd.'s case (supra). This Judgment does indicate that the advance paid pursuant to the advice of the Government cannot be considered to be the price. But we find that the observations made in this Judgment are in the context of the question whether additional amounts paid over and above the price fixed under Clause 5-A can be

considered to be the price. This has been so noticed by a Constitution Bench of this Court in U.P. Cooperative Cane Unions Federations's case (supra). In Kothari Sugars & Chemicals Ltd.'s case, tax had admittedly been paid in time on the advance paid towards Clause 5-A price. Tax was also sought to be levied on monies advanced over and above the Clause 5-A price. The observations made are merely setting out that advances made, over and above the Clause 5-A price, cannot be considered to be price. However it is clear that if amounts are paid towards the Clause 5-A price, they would be payment towards price and therefore part of turnover even though they may be paid in advance. In our view, Kothari Sugar & Chemicals Ltd.'s case does not lay down to the contrary. It does not even deal with this aspect. Of course Clause 5-A price will not be known till much later. However the Government advice makes it clear that the advance payment is to be towards the Clause 5-A price. Thus so long as the advance made is less than or equal to the Clause 5-A price it is advance payment of price. However if anything more has been paid then that would not be price in the absence of a contract or any statutory provision. It will thus have to be held that in the monthly returns the advance should have been included as part of turnover. If tax has been paid on advance and it is found that excess payment has been made, refund of tax on the excess payment can be claimed.

The question then arises whether interest, under Section 24(3) can be charged on the Clause 5-A price or on the advance and if so from what date. As has been noted hereinabove, the price fixed under Clause 5-A can only be decided on the basis of a formula set out hereinabove. It therefore cannot be decided at least till the end of the sugar year. In practice it is however decided much later. As the price would be an unknown, neither the assessee could predict what the price would be nor could the Assessing Officer, even on the basis of his best judgment, predict what that price would be. Therefore till the price under Clause 5-A is fixed there would be no question of an assessee including it in the monthly returns filed by him. A monthly return filed not showing the price fixed under Clause 5-A would neither be incorrect nor incomplete. It is only after the price under Clause 5-A is fixed that the assessee would be required to file a revised return showing the price fixed under Clause 5-A as part of his turnover. Mr. Iyer fairly admitted that interest on the price fixed under Clause 5-A could not be levied from the date the sugarcane was purchased as it would be impossible to know in advance what the price under Clause 5-A would be. His submission however was that the advance paid was towards the price fixed under Clause 5-A and therefore the amount paid as advance should have been included in the monthly returns as turnover and tax paid on that. He submitted that such returns had to show the actual turnover and if the returns did not show the actual turnover then the returns were incorrect and/or incomplete and therefore interest would be leviable from the date that these amounts were actually paid to the sugarcane growers till the tax on these amounts was paid.

Thus the Assessment Order levying interest on the entire price fixed under Clause 5-A and the Judgments of the Tribunal and the High Court upholding that are clearly erroneous. As stated above, the price fixed under Clause 5-A would not be known till much later. Thus, it would be impossible to show it in the monthly returns filed earlier. Of course as indicated earlier, Mr. Iyer is right the monthly returns should have included the amounts paid as advance in the turnover. The question still remains whether by not including them interest becomes payable on them under Section 24(3).

To consider this aspect, one needs to look at Section 13, which has been set out hereinabove. It is to be seen that under Section 13(2) tax could be paid in advance on the basis of monthly returns. A plain reading of Section 13(2) shows that the tax which has to be paid on the basis of such returns. If, as now contended by Mr. Iyer, the returns are incomplete or incorrect then, under Section 13(3), the

Assessing Authority must, after giving a reasonable opportunity to the assessee, determine what was the tax payable and issue a notice to pay the tax within a particular period. The determination and collection under Section 13 would then be subject to such adjustments as may be prescribed on completion of the final assessment.

Section 24 reads as follows:

"24. Payment and recovery of tax

(1) Save as otherwise provided for in sub-section (2) of section 13, the tax assessed or has become payable under this Act from a dealer or person and any other amount due from him under this Act shall be paid in such manner and in such instalments, if any and within such time as may be specified in the notice of assessment, not being less than twenty-one days from the date of service of the notice. The tax under sub-section (2) of section 13 shall be paid without any notice of demand. In default of such payments the whole of the amount outstanding on the date of default shall become immediately due and shall be a charge on the properties of the person or persons liable to pay the tax or interest under this Act.

(2) Any tax assessed on or has become payable by, or any other amount due under this Act from a dealer or person and any fee due from him under this Act, shall, subject to the claim of the Government in respect of land revenue and the claim of the Land Development Bank in regard to the property mortgaged to it under section 28(2) of the Tamil Nadu Co-operative Land Development Banks Act, 1934 (Tamil Nadu Act X of 1934), have priority over all other claims against the property of the said dealer or person and the same may without prejudice to any other mode of collection be recovered-

- (a) as land revenue; or
- (b) on application to any Magistrate by such Magistrate as if it were a fine imposed by him;

PROVIDED that no proceedings for such recovery shall be taken or continued as long as he has, in regard to the payment of such tax, other amount or fee, as the case may be, complied with an order by any of the authorities to whom the dealer or person has appealed or applied for revision, under sections 31, 31A, 33, 35, 36, 37 or 38.

(3) On any amount remaining unpaid after the date specified for its payment as referred to in sub-section (1) or in the order permitting payment in instalments, the dealer or person shall pay, in addition to the amount due, interest at one and half per cent per month of such amount for the first three months of default and at two per cent per month of such amount for the subsequent period of default.

PROVIDED that if the amount remaining unpaid is less than one hundred rupees and the period of default is not more than a month, no interest shall be paid:

PROVIDED FURTHER that where a dealer or person has preferred an appeal or revision against any order of assessment or revision of assessment under this Act, the interest payable under this sub-section, in respect of the amount in dispute in the appeal or revision, shall be postponed till the disposal of the appeal or revision, as the

case may be, and shall be calculated on the amount that becomes due in accordance with the final order passed on the appeal or revision as if such amount had been specified in the order of assessment or revision of assessment, as the case may be.

(3A) Where a dealer submits the prescribed return within ten days after the expiry of the prescribed period, he shall also pay, in addition to the amount of tax due as per his return, interest at two per cent of the tax payable for every month or part thereof.

(4) Where the tax paid under this Act is found to be in excess on final assessment or revision of assessment, or as a result of an order passed in appeal, revision or review, the excess amount shall be refunded to the dealer after adjustment of arrears of tax, if any, due from him. Where the excess amount is not refunded to the dealer within a period of ninety days from the date of the order of assessment or revision of assessment and in the case of order passed in appeal, revision or review, within a period of ninety days from the date of receipt of the order, the government shall pay by way of interest, where the amount refundable is not less than one hundred rupees, a sum equal to the sum calculated at the rate of one percent or part thereof of such amount for each month or part thereof after the expiry of the said period of ninety days.

Explanation: For the purpose of this section, the expression "order passed in appeal, revision or review" shall not include an order passed in such appeal, revision or review with direction to make fresh assessment order."

Under Section 24(1) if the tax has been assessed or has become payable under the Act, then the payment has to be made within the said time as may be specified in the notice of assessment and tax under Section 13(2) has to be paid without any notice of demand. However, as seen above, the tax under Section 13(2), in the absence of any determination by the Assessing Authority, is tax as per the returns. If default is made in payment of such tax then interest becomes payable under the Act. In the present case, it is an admitted position that tax as per the monthly return had been paid within time. It is also an admitted position that there was no assessment, even provisional, by the Assessing Authority prior to the final assessment made after the revised returns had been filed. Interest becomes payable under Section 24(3) on an amount remaining unpaid after the date specified for its payment under sub-section (1) of Section 24. As seen above sub-section (1) of Section 24 deals with an assessed tax or tax which has become payable under the Act. In cases covered by Section 13(2) tax must be paid without any notice of demand. But as stated above, under Section 13(2) tax is to be paid "on the basis of such returns". Tax as per the returns has admittedly been paid. If the returns were incomplete or incorrect as now claimed the assessing authority had to determine the tax payable and issue a notice of demand. In the absence of any assessment, even provisional, and a notice of demand no interest would be payable under Section 24(3). In this case, it is an admitted position that as soon as the revised return was filed the Appellants paid the tax as per the revised return. Therefore they paid the tax even before the final assessment took place. Thus the claim for interest, under Section 24(3) from the date that the advances were paid to the sugarcane growers is not sustainable. There is no provision under the Act which permits charging of interest unless and until there has been a provisional assessment and a notice of demand prescribing the period

within which the tax was to be paid.

Our view finds support from the Constitution Bench decision of this Court in J.K. Synthetics Ltd.'s case (supra). It must be mentioned that earlier to J.K. Synthetics Ltd.'s case the question whether interest would be payable from the date of return on the footing that the return is an incorrect return had come up for consideration before a three Judge Bench of this Court in the case of Associated Cement Company Ltd. vs. Commercial Tax Officer, Kota reported in 1981 (4) SCC 578. There was a difference of opinion. The majority Judgment held that the return must be a true return and if in a final assessment it is held that the return was incorrect or incomplete, then interest would be leviable from the date the incomplete or incorrect return was filed. The minority opinion held that tax was to be paid as per the return and so long as tax was paid as per the return, merely because in the final assessment it was held that the return was incorrect or incomplete interest could not be levied prior to the date of final assessment and the demand thereunder. The majority view was doubted and the question was referred to a Constitution Bench. The Constitution Bench in J.K. Synthetics Ltd.'s case accepted the minority view and overruled the majority view. The Constitution Bench held that tax was payable only as per the returns. It is held that if incomplete or incorrect return are filed it was open to the Assessing Officer to provisionally assess and make a demand. It is held that if that was not done then interest could not be levied on the footing that in a final assessment it is found that the returns had been incorrect.

The decision in J.K. Synthetics Ltd.'s case was thereafter followed by another Constitution Bench in the case of Frick India Ltd.'s case (supra). These Judgments fully cover the question under consideration. They are not only binding on us but we are in full agreement with the principle laid down therein.

Mr. Iyer made an attempt to distinguish the Judgments on the ground that the provisions under consideration, in J. K. Synthetics Ltd.'s case, are not in pari materia with the provisions of the Tamil Nadu General Sales Tax Act. He submitted that the words "actual turnover" had not been used in the Rajasthan Act. He submitted that under the Tamil Nadu General Sales Tax Act the return has to be as per the actual turnover. In our view, the words "actual turnover" can have no different meaning from the word "turnover". The word "turnover" has been defined under Section 2(r) to mean the aggregate amount for which the goods are bought and sold. Under Section 13(2) the monthly return has to indicate the actual turnover and tax is then payable as per the return. If the return shows the actual turnover and tax is not paid as per the return, then interest would be payable under Section 24(3) as that would be a case where amount has remained unpaid after the date specified for its payment. However, if the monthly return does not indicate the actual turnover then it was for the Assessing Authority to make a demand on the footing that the return was incomplete or incorrect. In the absence of any such demand interest would not become payable under Section 24(3) as there is no provision for charging of interest prior to the date of demand. In this respect the principles laid down in J.K. Synthetics Ltd.'s case fully apply even though the provisions of the Tamil Nadu General Sales Tax Act and the Rajasthan Act may not be identical. The principle to be kept in mind is, that, when the levy of interest emanates as a statutory consequence and such liability is a direct consequence of non-payment of tax, be it under Section 215 of the Income Tax Act or under Section 7(2) / 7(2A) read with Section 11B(a) of the Rajasthan Sales Tax Act, 1954 (as discussed in the decision of this Court in the case of J. K. Synthetics Ltd.'s case (supra) or under Sections 13(2) / 24(3) read with Rule 18(3) under the Tamil Nadu General Sales Tax Act, 1959, then such a levy is different from the levy of interest which is dependent on the discretion of the

Assessing Officer. The default arising on non-payment of tax on an admitted liability in the case of self-assessment falls under Section 24(3) read with Rule 18(3) which attracts automatic levy of interest whereas the default in filing incomplete and incorrect return falls under Rule 18(4) which attracts best judgment assessment in which the levy of interest is based on the adjudication by the Assessing Officer. Therefore, Rule 18(3) and Rule 18(4) operate in different spheres.

In this view of the matter, the impugned Judgment of the High Court and the Order of the Tribunal as well as the Assessing Authority cannot be sustained and are hereby set aside to the extent they levy interest under Section 24(3).

In this view of the matter, the Appeals stand allowed. There will be no order as to costs.

