

CASE NO.:
Appeal (civil) 3009 of 1999

PETITIONER:
MARUTI WIRE INDS. PVT. LTD.

Vs.

RESPONDENT:
S.T.O., IST CIRCLE, MATTANCHERRY & ORS.

DATE OF JUDGMENT: 27/03/2001

BENCH:
S.P. Bharucha, R.C. Lahoti & Y.K. Sabharwal.

JUDGMENT:

R.C. Lahoti, J.
L...I...T.....T.....T.....T.....T.....T.....T...J

Whether the appellant, an assessee, is liable to pay any penal interest on the assessed tax under Section 23(3) of the Kerala General Sales Tax Act, 1963 (hereinafter the Act, for short), from the date when return was due though neither a return was furnished nor any tax paid on self-assessment basis, is the question arising for decision in this appeal.

Briefly stated the relevant facts are as follows. In April, 1983 the appellant, stationed in Patna, entered into an agreement with M/s. Tata Oil Mills Co. Ltd. to supply imported inedible tallow to their factory at Ernakulam. Accordingly, the tallow was imported at the Cochin Port and delivered to the buyer. The appellant did not file a return of the turnover relating to the above-said transaction. The Sales Tax Officer finalised the assessment on 10.10.1984 and served the appellant on 4.3.1985 with notice raising a demand of sales tax whereafter the tax was paid. The appellant was then served with two notices raising demand for payment of Rs.1,85,882.58p. as penal interest under sub-section (3) of Section 23 of the Act for the period 20.5.1983 (the date by which the return of turn-over was due to be filed accompanied by proof of payment of the tax due as per return) to 25.2.1985. This demand was impugned by filing a writ petition before the High Court of Kerala at Ernakulam. A learned single Judge allowed the petition and quashed the said demand. The State of Kerala preferred a writ appeal which has been allowed and the judgment of the learned single Judge has been set aside. The aggrieved appellant has filed this appeal by special leave.

Sub-section (3) of Section 23 of the Act reads as under:-

(3) If the tax or any other amount assessed or due under this Act is not paid by any dealer or other person within the time prescribed therefor in this Act or in any rule made thereunder and in other cases within the time

specified therefor in the notice of demand, or within the time allowed for its payment by the appellate or revisional authority, as the case may be, or if payment is permitted in instalments by any of the authorities empowered in this behalf, any such instalment is not paid within the time specified, therefor, the dealer or other person shall pay, by way of penal interest, in the manner prescribed, in addition to the amount due, a sum equal to-

(a) one per cent of such amount for each month or part thereof for the first three months after the date specified for its payment;

(b) two per cent of such amount for each month or part thereof subsequent to the first three months aforesaid.

The present one is not a case where any amount of tax was collected by the appellant and then not deposited. It is an admitted position that the validity of impugned demand depends on the meaning to be assigned to the expression "if the tax or any other amount assessed as occurring in Section 23(3) of the Act. According to the appellant there was no order of assessment nor a return of turnover filed by way of self assessment in which case it should have been accompanied by proof of payment of tax as per self assessment and, therefore, the appellant was not required to pay tax unless and until a demand based on an order of assessment was raised against it. According to the respondent, an assessee held liable to payment of sales tax and not filing a return of turn-over, cannot be placed on a higher pedestal than an assessee who files a return and, therefore, a reasonable construction to be placed on sub-section 3 of Section 23 would be that an assessee not filing a return of turnover should be held liable to pay penal interest with effect from a date on which he should have filed a return of turnover accompanied by payment of tax even if such return was not actually filed. The learned counsel for the appellant submitted in response that the scheme of the Act as it stood at the relevant time contemplates a different penal action against such default, i.e. penalty under Section 45A of the Act for failure to submit the return of turnover which penalty can be as high as an amount twice the amount of sales tax payable but liability to pay penal interest cannot be cast on the assessee for such failure when the Act does not specifically provide for levy of penal interest for failure to file return of turnover. We find merit in the appellants plea. A legislative casus omissus cannot be supplied by judicial interpretative process.

Shri G.C. Sharma, learned senior counsel for the appellant has relied on the Constitution Bench decision of this court in J.K. Synthetics Ltd. Vs. Commercial Taxes Officer, (1994) 94 STC 422 in support of his submission. In J.K. Synthetics case, majority opinion in Associated Cement Co. Ltd. Vs. Commercial Tax Officer, (1981) 48 STC 466 (SC) has been over-ruled and the minority opinion of P.N. Bhagwati, J. (as His Lordship then was) has been approved. In Associated Cement Co.s case, the demand for payment of interest was raised under Section 11B of Rajasthan Sales Tax Act, 1954. The assessee had submitted returns accompanied by receipts evidencing the payment of tax on the basis of the returns. The freight charges realised by the assessee were not included in the quantum of taxable turnover. Later

on, law was settled by this court holding that the freight charges were liable to be included in the figure of turnover whereafter the assessee filed a revised return including freight charges in the quantum of turnover and also paid the additional tax. Question arose, whether interest could be levied for the delay in depositing the tax amount relatable to the freight charges? Venkataramiah, J., speaking for himself and on behalf of A.P. Sen, J, held that the expression on the basis of return should be construed as on the basis of a true and proper return and an assessee, who did not file a return or made a wrong plea as to part of the turnover being not taxable but subsequently found to have made a wrong claim, would be liable to pay interest on the amount of tax which the assessee was held liable to pay but did not pay and such a construction would be in conformity with the legislative intention. Bhagwati, J. in his dissenting opinion construing the expression full amount of tax due on the basis of the return held:

. We must look at the return actually filed by the assessee in order to see what is the full amount of tax due on the basis of such return. It is not the assessed tax nor is it the tax due on the basis of a return which ought to have been filed by the assessee but it is the tax due according to the return actually filed that is payable under sub-section (2) of section 7. This provision is really in the nature of self-assessment and what it requires is that whatever be the amount of tax due on the basis of self-assessment must be paid up along with the filing of the return which constitutes self-assessment. I fail to see how the plain words of sub-section (2) of section 7 can be tortured to mean full amount of tax due on the basis of return which ought to have been filed but which has not been filed.

[emphasis supplied]

Repelling a similar plea raised on behalf of the Revenue as has been raised before us, Bhagwati, J. observed that if the assessee fails to file a return, he exposes himself to penalty for such default; the Legislature could never have intended that the assessee should be liable, on pain of imposition of penalty, to deposit an amount which is yet to be ascertained through assessment.

The same issue which was dealt with by a three-Judges Bench of this court in the case of Associated Cement Co. Ltd. came up for the consideration of Constitution Bench in the case of J.K. Synthetics Ltd. (supra). This court overruled the majority opinion and approving the minority opinion in Associated Cement Co.s case held that the provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is a substantive law, not adjectival law, and interest cannot be recovered by way of damages for wrongful detention of the amount. This court further held that the tax payable or tax due is that amount which becomes due ex-hypothesi on the turnover and taxable turnover shown in or based on the return or as to which an order of assessment has been made.

In view of the law laid down by the Constitution Bench, we are clearly of the opinion that the liability of the assessee appellant to pay sales tax could have arisen either

on return of turnover being filed by way of self-assessment or else on an order of assessment being made. No doubt Rule 27 (7A) of the Kerala General Sales Tax Rules, 1963 casts an obligation on assessees to file a return of total turnover and taxable turnover accompanied by proof of payment of the amount of tax due within 20 days of the previous quarter but such a return was not filed by the appellant. A failure to file return of taxable turnover may render the assessee liable for any other consequences or penal action as provided by law but cannot attract the liability for payment of penal interest under sub-section (3) of Section 23 of the Act on the parity of reasoning that if a return of turnover would have been filed on the due date then the tax as per return would have become due and payable on that date.

For the foregoing reasons, the appeal is allowed. The judgment of the Division Bench is set aside and that of the learned single Judge is restored. There will be no order as to the costs.