SUPREME COURT OF INDIA

M/S CONSOLIDATED COFFEE LTD.

Vs.

THE AGRICULTURAL INCOME-TAX OFFICER, MADIKERI & ORS.

14/11/2000

(D.P.Mohapatro,)

JUDGMENT

Bharucha, J.

C.A. Nos. 98-102 of 2000

The judgment and order under appeal was passed by a Division Bench of the High Court of Karnataka on writ appeals.

Briefly stated, these are the facts: These appeals relate to the Assessment Years 1981-82 to 1985-86. After the Agricultural Income-Tax Officer had completed its assessments for these years under the provisions of the Karnataka Agricultural Income-Tax Act, 1957, the assessee filed appeals before the Assistant Commissioner, Agricultural Income-Tax. On the assessees applications for stay, the Assistant Commissioner passed orders on 24th June, 1989 staying the recovery of the tax assessed subject to the payment of a stated amount and the furnishing of a bank guarantee. The conditions of the stay orders were complied with. The appeals were thereafter dismissed by the Assistant Commissioner, on 19th March, 1990. Thereupon, the bank guarantee was invoked and the balance of the amount of tax realized by the taxation authorities.

On 7th June, 1996, the Agricultural Income Tax Officer issued to the assessee a notice under Section 42(1) of the said Act proposing to levy penalty in the aggregate sum of Rs. 7,65,578 for not complying with the demands to pay tax between March, 1989 and 26th March, 1990. The demand of penalty was thereafter confirmed. The assessee filed a writ petition in the High Court at Karnataka for quashing the notice proposing to levy penalty and the order dated 6th March, 1997 passed thereon. The principal contention that was raised on behalf of the assessee was that no penalty could be levied for the period during which the orders of stay were in operation because for that period the assessee could not be said to be in default. Relying upon earlier judgments of the High Court, the learned Single Judge answered against the assessee the question that he posed thus: Whether the stay of the recovery as ordered by the Appellate Authority could grant an immunity to the petitioner against the levy of penalty for the said intervening period after the orders were vacated and the appeals dismissed. The assessee carried the order of the learned Single Judge before a Division Bench of the High Court. The order that is impugned before us was passed on those writ appeals. The Division Bench held: The provision of section 42 of the Act only quantifies the default for which the provisions have been made under section 41 and as such for the period the amount remained unpaid because of stay granted by the Appellate Authority, the appellants are liable for payment of penalty.

Sections 41 and 42 of the said Act read thus:

41. Tax when payable(1) Any amount specified as payable in a notice of demand under section 31 or an order under section 32, section 32A, section 34 or section 35, shall be paid within the time, at the place and to the person mentioned in a notice or order or if a time is not so mentioned, then, on or before the first day of the second month following the date of the service of the notice or order and any assessee failing so to pay shall be deemed to be in default.

(2) If an assessee makes an application within the time mentioned in the notice of demand in section 31, for being allowed to pay the tax due, the Agricultural Income-Tax Officer may in his discretion, by order in writing, allow the assessee to pay the tax due, in instalments not exceeding four in number at such intervals as the said Officer may fix in his discretion or extend the time for the payment of the entire tax due for such reasonable period as he may fix, if the assessee undertakes in writing to pay interest at the rate charged by the Scheduled Banks for unsecured loans.

Provided that if, on being allowed to pay the tax due by instalments, the assessee defaults in the payment of any one instalment, he shall be deemed to be a defaulter in respect of the total remaining amount of tax due.

42. Mode and time of recovery. (1) Where any assessee is in default in making payment of the tax or any other amount due under This Act,--- (i) 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 any other amount due under this Act, and

(ii) the person or persons liable to pay the tax or any other amount due under this Act shall pay a penalty equal to --

(a) one and one half per cent of the tax remaining unpaid for each month for the first three months after the expiry of the time specified under sub-section (1) or allowed under sub-section (2), of section 41; and

(b) two and one half per cent of such tax for each month subsequent to the first three months as aforesaid.@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ

Explanation.-- For the purposes of clause (ii) the penalty payable, for a part of a month shall be proportionately determined.

(2) Any tax assessed or any amount due under this Act from any assessee or any other person may, without prejudice to any other mode of collection, be recovered--

(a) as if it were an arrear of land revenue; or

(aa) by attachment and sale or by sale without attachment of any property of such assessee or any other person by such authority, in such manner, as may be prescribed;

(b) notwithstanding anything contained in the Code of Criminal Procedure, 1973, (Central Act 2 of 1974), on an application to any Magistrate, by such Magistrate, as if it were a fine imposed by him: Provided that where an assessee or other person who has appealed or applied for revision of any order made under this Act and has complied with an order made by the appellate or the revising authority in regard to the payment of tax or other amount, no proceedings for recovery under this

sub-section shall be taken or for revision. continued until the disposal of such appeal or application (3) The High Court may either suo-motu or on an application made by the Commissioner or any person aggrieved by the order revise an order made by a Magistrate under clause (b) of sub-section (2).

The argument on behalf of the taxing authorities is that the stay order only prevented them from effecting a recovery of the tax due from the assessee; it did not preclude the assessee from paying the tax. Therefore, the assessees obligation to pay the tax remained unaffected by the stay order and it continued to be in default. It was, therefore, liable to make payment of the penalty demanded under Section 42.

It may immediately be noted that Section 41 contemplates the payment of interest when an assessee seeks time for payment of the tax due. A provision in regard to interest is also to be found in Section 61 of the Act. There is, therefore, no good reason for assuming, as the High Court appears to have done, that what Section 42 contemplated was in reality the payment of interest and not penalty. Interest is compensatory; penalty is penal, that is, punishing in character. Section 42 requires the payment of penalty by an assessee who has not paid tax in time and the quantum of the penalty increases with the delay.

Section 42 speaks of an assessee in default. The question, therefore, is: can an assessee be said to be in default during the period for which an order of stay of recovery of the tax due from him is operating ? The answer is indicated in the proviso to sub-section (2) itself. Sub-section (2) empowers the collection of tax from an assessee in default as if it were an arrear of land revenue and as if it were a fine imposed by a Magistrate under the Code of Criminal Procedure. The proviso says that where an assessee or other person has appealed or applied for revision of any order made under the said Act and has complied with an order made by the appellate or the revising authority in regard to the payment of tax, no proceedings for recovery under sub-section (2) may be continued until the disposal of the appeal or revision. Thus, there is recognition that during the period the stay is in operation recovery of the tax cannot be effected. It cannot be effected because the order of stay has placed the demand for the tax in abeyance. During the period of the stay, therefore, the assessee is not in default.

As has been pointed out by this court in Kanoria Chemicals and Industries Ltd. vs. U.P. State Electricity Board (1997) 5 SCC 772, an order of stay may be made in different ways but the effect thereof is the same, namely, that for the period during which an order of stay operates, the order that is stayed does not exist in the eye of the law. Once the stay is vacated, the order is resuscitated and may then be executed. For the period of stay, therefore, the assessee cannot be said to be in default of the orders stayed and, therefore, no penalty in that behalf can be imposed.

Our attention was invited by learned counsel for the taxing authorities to the judgment in the case of Kanoria Chemicals and Industries Ltd., just referred to, as relevant to a case of penalty. That was a case that related to late payment surcharge/interest on an amount due. The question was whether such late payment surcharge/interest was penal in nature and, therefore, could not be recovered, having regard to the stay of recovery thereof granted by an appropriate authority. This Court did not accept the argument that it was penal but, having regard to the fact that the rate of late payment surcharge seemed penal and the facts and circumstances of the case, it reduced the assessees obligation in respect thereof. We cannot, based upon the aforesaid judgment or otherwise, accept the submission of learned counsel for the taxing authorities that the penalty contemplated by Section 42 is analogous to a late payment surcharge/interest. A late payment surcharge/interest is necessarily

compensatory in character. A penalty is a punishment.

In the premises, we hold that the assessee was not in default for the period 24th June, 1989 onwards and that it cannot be subjected to penalty under Section 42 in regard to that period. The demand in that behalf is set aside. The appeal is allowed to the aforesaid extent. No order as to costs.

C.A. No. 3051 of 2000

The facts are similar to those in C.A. Nos. 98-102/2000 just decided except that, in this case, the stay order was passed by the High Court. For the period during which that stay order was in operation the assessee was not, for the reasons set out above, in default and the demand of penalty under Section 42 for that period is set aside. The appeal is allowed to the aforesaid extent. No order as to costs.