

GUJARAT HIGH COURT

Baroda Board & Paper Mills Ltd.

Vs.

Income-Tax Officer

Company Application No. 26 of 1973 with OJ Appeal No. 2 of 1975

(Divan, C.J. and B.K. Mehta, J.)

15.10.1975

JUDGMENT

B.K. Divan, C.J.

1. The question of law which arises in both these matters is regarding the preferential claims under section 530(1)(a) of the Companies Act. Under that section, in a winding up, there shall be paid in priority to all other debts, inter alia, all revenues, taxes, cesses and rates due from the company to the Central or a State Government or to a local authority at the relevant date as defined in clause (c) of sub-section (8) of section 530 and having become due and payable within the twelve months next before that date. Company Application No. 26 of 1973 came up for hearing before B. K. Mehta J. on October 11, 1973. In this application priority is claimed by the income-tax department in respect of certain dues. At the same time priority is also claimed in respect of certain sales tax liability of the company in liquidation on behalf of the State Government and in the company application the main question is whether, and if so, to what extent, priority can be recognised for the liabilities for income-tax and sales tax dues. When the matter came up for hearing before B. K. Mehta J. his attention was drawn to the decision of D. A. Desai J. in Company Application No. 94 of 1973 in Company Petition No. 21 of 1966, being the matter of *sales Tax Officer, Petlad v. Rajratna Naranbhai Mills Co. Ltd^l*, B. K. Mehta J. was unable to agree with the conclusions reached by D. A. Desai J. in Rajratna Naranbhai Mills Co.'s case and hence he referred the matter to a larger Bench so that the entire question may be decided.

2. Before this Company Application No. 26 of 1973 could be taken up for final hearing, appeal filed by the Sales Tax Officer, Petlad, in Rajratna Naranbhai Mills Company's case, being O. J. Appeal No. 2 of 1975, became ripe for hearing and since the question in both the matters is the same, we have heard both these matters together and we are disposing of both these matters by this common judgment.

3. Before we proceed with the specific facts of each case, it will be necessary to set out some of the relevant provisions of the Companies Act. Under section 528 of the Companies Act, 1956, provision is made for admitting to proof claims against a company in winding up proceedings. It provides that in every winding up, all debts payable on a

¹(1974) 44 Comp Cas 65

contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency, or may sound only in damages, or for some other reason may not bear a certain value. Section 529 provides for application of insolvency rules in winding-up of insolvent companies. But the provision which requires consideration in this case is section 530, sub-section (1) (a), which provides for preferential payments. Section 530(1)(a) is in these terms :

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

(a) all revenues, taxes, cesses and rates due from the company to the Central or a State Government or to a local authority at the relevant date as defined in clause (c) of sub-section (8), and having become due and payable within the twelve months next before that date."

4. Under sub-section (8) of section 530, for the purposes of section 530

"(c) the expression 'the relevant date' means -

(i) in the case of a company ordered to be wound up compulsorily, the date of the appointment of a provisional liquidator, or if no such appointment was made, the date of the winding up order, unless in either case the company had commenced to be wound up voluntarily before that date; and

(ii) in any case where sub-clause (i) does not apply, the date of the passing of the resolution for the voluntary winding up of the company."

5. The company with which we are concerned in Company Application No. 26 of 1973 was taken into voluntary liquidation and the relevant resolution as contemplated by section 530(8)(c)(ii) was passed on August 30, 1968, and that date is the "relevant date" with reference to which the provisions of section 530(1)(a) will have to be considered. The main controversy in this case is as to what is the meaning of the words "due and payable" when section 530(1)(a) says that the taxes, cesses and rates which are to be given a preference under section 530(1)(a) must have become "due and payable" within the twelve months next before the relevant date. It also says that not only they must become due and payable within the twelve months immediately preceding the relevant date but they must be due from the company either to the Central Government or to the State Government or to a local authority at the relevant date. Thus, section 530(1)(a) lays down two conditions - firstly, that the taxes, cesses, etc., must be due from the

company at the relevant date and, secondly, the taxes, cesses, etc., must have become due and payable within the twelve months immediately preceding the relevant date.

6. The decision of D. A. Desai J. in *Sales Tax Officer v. Rajratna Naranbhai Mills. Co. is now reported in*² and the view that he took was that the word "due" implies or conveys different meanings in juxtaposition in which it is used in the two parts of the same clause. The word "due" in the first part of the clause must mean "outstanding at the relevant date". When it occurs in the expression "having become due" in the later part of the clause, it means that the event which brought the debt into existence occurred and also it became payable, meaning thereby that its payment could have been enforced against the

²[1974] 44 Comp Cas 65

company within the twelve months before the relevant date, that is, the date of the order of winding up. There specific conditions are prescribed in the clause and all the three must co-exist and be satisfied in respect of any particular debt for which priority is claimed. The three conditions are :

- (1) Debt of the Kind mentioned in the clause must be outstanding on the relevant date;
- (2) The debt must have become due, in the sense that it must have been incurred at any time within the twelve months next before the relevant date; and
- (3) The debt must have become payable at any time within the twelve months next before the relevant date.

7. The main challenge on behalf of the taxation authorities, both sales tax and income-tax authorities, is to this interpretation placed by Mr. Justice D. A. Desai on the words "due" and "due and payable". The question that we have to ask ourselves is whether the splitting up of the words "due" and "payable" occurring in the phrase "due and payable" towards the end of section 530(1)(a) is in accordance with the legal principles laid down by several decisions of the different courts.

8. Before we go on to the discussion of the different authorities on this point, we must mention that, as far back as 1946, in *Governor-General in Council v. Shiromani Sugar Mills Ltd*³, the Federal Court had held that in the winding-up of a company, the Crown is not entitled to any priority, prerogative or preferential treatment except to the extent provided for in the Indian Companies Act, in particular by sections 230 and 232 of the Indian Companies Act, 1913. We are at present concerned with the provisions of section 530(1)(a) of the 1956 Act which is equivalent to section 230(1) (a) of the 1913 Act and so far as the question before us is concerned, the provisions of section 230(1) (a) of the Act of 1913 were in identical terms with the provisions of section 230(1) (a) of the Act of 1913 were in identical terms with the provisions of section 530(1)(a) of the 1956 Act.

9. In *Builders Supply Corporation v. Union of India*,⁴ Gajendragadkar C.J., delivering the

judgment of the Supreme Court, has referred to the common law doctrine and he has observed :

"In construing the relevant provisions of section 46, the High Courts in India have had frequent occasions to consider whether the Government of India is entitled to claim priority for arrears of income-tax due to it from assesses over the private debts due from them to their creditors, and this claim has been consistently upheld."

10. At the same time it has been pointed out with reference to the decision of the Federal Court in *Governor-General in Council v. Shiromani Sugar Mills Ltd*⁵.

"It would be noticed that this conclusion postulates the applicability of the doctrine of priority of the debts due to the Crown and holds that as a result of the specific provisions contained in section 230(1)(a), the said doctrine must be

³(1946) 16 Comp Cas 71 (PC)

⁵(1946) 16 Comp Cas 71 (PC)

⁴(1965) 56 ITR 91 (SC)

worked in the manner prescribed by the said section and not outside it."

11. Coming now to the meaning of the words "due" and "due and payable", we find that these words have been interpreted by the courts in India and abroad in the context, both of the Companies Act and Similar provisions of the Insolvency Acts and Bankruptcy Acts. The provisions of the Companies Act, 1929, in England relating to priority of some debts in winding-up proceedings of a company were in identical terms with the provisions of section 530(1)(a) of the Companies Act, 1956. In *In re Airedale Garage Company Ltd. : Anglo-South American Bank v. The Company*⁶, Lord Hanworth M.R. observed :

"I think the words 'due and payable' in section 264 of the Companies Act are meant to refer to a liability in respect of which there had to be a payment, and the particular debt for additional rates must be deemed to have become due and payable within the period of the twelve months next before the relevant date."

12. In *Kesoram Industries & Cotton Mills Ltd. v. Commissioner of Wealth-tax, (1966)1 Comp*⁷ the question before the Supreme Court was the meaning to be attached to the words "debt owed" and "debt" occurring in the Wealth-tax Act. While considering this question, at page 779 of the report, Subba Rao J., delivering the majority judgment, has observed :

"The decision of a Full Bench of the Calcutta High Court in *Banchharam Majumdar v. Adyanath Bhattacharjee*⁸, throws considerable light on the connotation of the word 'debt'. Jenkins C.J. defined that word thus :

'I take it to be well established that a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation.' majority judgment, has observed :

Mookerjee J. quoted the following passage with approval from the judgment of the Supreme Court of California in *People v. Arguello*⁹

'Standing alone, the word "debt" is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds : Solvendum in present and solvendum in futuro A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, or does not become a debt, until the contingency has happened'."

13. It must be noticed that this passage from the decision of the Supreme Court of California in *People v. Arguello*¹⁰, distinguishes between a debt which is payable in future in the sense of a sum of money which has been promised at a future day and between (sic) "debt" in the sense of a sum of money which is presently due and payable. This passage also emphasizes that the word "debt" in the sense of a sum of money which is presently due and payable is described as a "debt due" whereas the sum of money which has been promised to be paid at future date is a "debt owing". This passage also makes it clear that it is only when a sum of money is presently due and payable that it can be said to be a "debt due", otherwise it will not be described as a "debt

⁶(1933) Ch 64 : (1932)2 Comp Cas 570 (CA) ⁸(1909)36 ILR Cal 936 (FB) ¹⁰(1869) 37 Calif 521

⁷LJ 154 (SC): (1966)59 ITR 767 (SC) ⁹(1869) 37 Calif 521

due". Thus, according to this passage which was approved by the Supreme Court in *Kesoram Industries* case the word "due" in the context of a "debt" or financial liability is equal to "due and payable" which in its turn is equivalent to presently payable.

14. That this is the only way to interpret the words "due" and "due and payable" is borne out by the decision of the Supreme Court in *Union of India v. Raman Iron Foundry*¹¹ In that case Bhagwati J., delivering the judgment of the Supreme Court, observed in the context of the phrase "recover of sum due" and said :

"Now a sum would be due to the purchaser when there is an existing obligation to pay it in praesenti. It would be profitable in this connection to refer to the concept of a 'debt', for a sum due is the same thing as a debt due. The classical definition of 'debt' is to be found in *Webb v. Stenton*¹², where Lindley L.J. said : '... a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation.' There must be debitum in praesenti; solvendum may be in praesenti or in future - that is immaterial. There must be an existing obligation to pay a sum of money now or in future."

15. Then the passage from the decision of the Supreme Court of California in *People v. Arguello*¹³, which we have set out hereinabove as approved by the Supreme Court in *Kesoram Industries and Cotton Mills Ltd. v. Commissioner of Wealth-tax*¹⁴, was cited and, after citing that passage, Bhagwati J. has observed :

"This passage indicates that when there is an obligation to pay a sum of money at a future date, it is a debt owing but when the obligation is to pay a sum of money in praesenti it is a debt due. A sum due would, therefore, mean a sum for which there is an existing obligation to pay in praesenti or, in other words, which is presently payable."

16. It is in this context that we have to consider the schemes of the Income-tax Act and the Sales Tax Act to ascertain when income-tax under the Indian Income-tax Act or sales tax under the scheme of the Central Sales Tax Act or the State Sales Tax Acts can be said to be "due" in the sense we have now explained, that is, in the sense of a sum of money payable in praesenti or, to put it in the words of the Supreme Court, a sum for which there is an existing obligation to pay a sum of money presently which, in other words, is presently payable.

17. Under the scheme of the Indian Income-tax Act, there are provisions now in section 140A for self-assessment, that is, the liability to pay the tax on the amount shown in the income-tax return and the amount is to be paid within a particular period after the filing of the return. There is also provision for provisional assessment to be made by the Income-tax Officer (section 141). There is provision for summary assessment under section 132 when, as a result of some search, any money, bullion, jewellery or other valuable article or thing is seized under sub-section (1) of section 132. There is also provision for advance payment of tax and also provision for deduction of tax at source but it is only when the final order in regular assessment proceedings is passed and after giving credit to the

¹¹ AIR 1974 SC 1265, 1271

¹³(1869) 37 Calif 521

¹²(1883)11 QBD 518 (CA)

¹⁴(1966)1 Comp LJ 154 (SC)

assessee for any payments made by him towards the dues for a particular year are adjusted and the demand notice is issued that it can be said that income-tax for that particular assessment year has become due in the sense of "become presently payable".

18. In *Doorga Prosad v. Secretary of State*¹⁵, Sir John Beaumont, delivering the opinion of the Privy Council, has observed at page 289 of the report :

"In their Lordships' opinion, although income-tax may be popularly described as due for a certain year, it is not in law so due. It is calculated and assessed by reference to the income of the assessee for a given year, but it is due when demand is made under section 29 and section 45. It then becomes a debt due to the Crown, but not for any particular period."

19. The scheme of the Income-tax Act, 1961, does not differ in this connection from the scheme of the Indian Income-tax Act, 1922, with reference to which the Privy Council made this observation and, hence, so far as income-tax is concerned, the tax for a particular assessment year becomes a debt due to the Crown only when the income-tax is calculated and assessed by reference to the income of the assessee for that particular year under consideration and thereafter the demand is made under the relevant provisions of the Income-tax Act. It is only then

that it becomes a debt due to the Crown and a debt due means, as pointed out above, a debt which is presently payable, which can be enforced and which is the same thing, as pointed out by *People v. Arguello*¹⁶ as due and payable.

20. Mr. A. L. Shah who appears for the liquidator in O. J. Appeal No. 2 of 1975 has urged before us that the legislature has used in the context of the priority of debts two distinct sets of words "debt due" and "due and payable" and proper meaning should be given to these sets of words, namely, "debt due" and "due and payable" and a distinction must be made when the legislature has used two different terminologies, namely, "due" in the beginning of the clause and "due and payable" at the end of the clause. He also wants us to dissect the phrase "due and payable" and he wants to emphasize that the debt must have become due in the narrower sense of the word of having come into existence and having been payable with reference to enforceability of payment and, in this sense, relying upon the decision of D. A. Desai J., he has urged before us that the debt must be existing at the relevant date and the event which brought the debts into existence must have occurred within the twelve months preceding the relevant date and it must also have become payable, meaning thereby that its payment could have been enforced against the company, within the twelve before the relevant date. In view of the decisions that we have already referred to, particularly the passage from *People v. Arguello*¹⁷, a approved by the Supreme Court in Kesoram Industries' case and in Raman Iron Foundry's case, it is not possible for us to accept this contention of Mr. Shah. In our opinion, the only meaning that could be attached to the word "due" occurring in section 530 is that it must be presently due and the words "due and payable" mean the same thing, namely, that it must be presently payable. Therefore, so far as section 530(1)(a) is concerned, the revenue, tax, cess or rate, due from the company to the Central or State Government or to a local authority must be presently payable, that is, that the liability could be enforced as at the relevant date and, secondly, it must have so become presently payable within the twelve

¹⁵(1945)13 ITR 285 (PC)

¹⁷(1869) 37 Calif 521

¹⁶(1869) 37 Calif 521

months immediately proceeding the relevant date.

21. In support of his argument, Mr. Shah very strongly relied upon certain observations of Sinha J. in *In re Recols (India) Ltd*¹⁸. We find from the report that the Bench which decided the matter consisted of three learned judges, Chakravartti C.J., Lahiri J. and Sinha J. Chakravartti C.J. and Lahiri J. agreed and Sinha J. delivered a separate but concurring judgment. The interpretation which Mr. Shah wants us to put on the words "due and payable" occurring in section 530(1)(a) is to be found in the judgment of Sinha J. only. Chakravartti C.J. in his judgment has referred to the decision of the Privy Council in *Doorga Prosad v. Secretary of State*¹⁹, and applied the principle of the decision to the Sales Tax Act. After referring to the decision in Doorga Prosad's case, Chakravartti C.J. proceeded to consider the question whether the principle enunciated as to income-tax could be applied to the Bengal Sales Tax Act and observed :

"There seems to be no reason why the principle should not apply to sales tax due under an assessment, because the position as to assessed tax under the two Acts is precisely the same. Under both the Acts, the liability to pay the relevant tax accrues before an assessment is made - under the Bengal Act and in the case of a registered dealer, as soon as a taxable sale is made and under the Indian Act, as soon as a person's income reaches the taxable limit. Returns are to be filed under both the Acts. Under the Income-tax Act, an assessment is made under section 23, then a notice of demand is to be served on the assessee under section 29, specifying the amount of tax payable under order of assessment and, under section 45, the amount is to be paid within the time mentioned in the notice or if a time is not so mentioned, within the other period mentioned in the section, failing which the assessee is to be deemed to be in default. Under the Bengal Act, an assessment is made under section 11(1), read with rule 54, then a notice of demand is to be served under rule 55, and, under section 11(3), the amount of the demand must be paid by such date as may be specified in the notice. It is true that under the Indian Act, an assessment is to be made in all cases, but under the Bengal Act only when no return is furnished or when the return furnished appears to be incorrect and incomplete, but those two cases are provided for in the Indian Act in section 23(4) and section 23(3) and the effect of an assessment and the steps to be taken subsequently are common to all types of assessment under the section. In the case before the Judicial Committee, the assessment was one under section 23(4). In view of the complete identity between the provisions of the two Acts regarding assessed taxes, I see no reason why the principle enunciated by the Judicial Committee should not apply to the sum of ₹ 759-8-9 involved in the present case which is due under as assessment (for sales tax). Mr. Chaudhuri contended that there was some difference between the two Acts in that an assessee, not paying the assessed income-tax within the time mentioned in section 45 of the Income-tax Act, was to be deemed a defaulter, whereas there was no such provision in the Bengal Act or the Rules framed thereunder. I do not think that it was the presence of the words 'in default' in section 45 which was the reason for the Judicial

¹⁸(1953) 23 Comp Cas 380 (Cal)(FB)

¹⁹(1945) 13 ITR 285 (PC)

Committee's view that the tax was due when a demand was made under sections 29 and 45, for, in the first place, if a person liable to pay a debt does not pay it by the date fixed for payment, he becomes a defaulter without any statute declaring him to be so and, in the second place, what their Lordships say is that the tax becomes due when a notice of demand is made and not that it becomes due when it is not paid by the date fixed for payment and thereby a default is committed Lastly, the principle that where a tax has to be assessed, it does not become either due or payable till at least an assessment is made, is one of general application I am accordingly of opinion that there is nothing

in the Bengal Finance (Sales Tax) Act to exclude the operation of the principle laid down by the Judicial Committee on tax assessed under it."

Sinha J.

22. 1 on the other hand, held :

"(1) Sales tax from a dealer chargeable under the Bengal Finance (Sales Tax) Act, 1941, is 'due' immediately upon his gross turnover exceeding the taxable quantum during the period prescribed by the Act. For determining the taxable turnover all due allowances must be made under sections 5 and 6 of the Act. But as soon as there is a taxable turnover the tax is due.

(2) But the sales tax payable under the Act becomes 'payable' as follows :

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

(b) where the dealer has not filed a return or filed a return which is not correct or complete, then as to the amount assessed under section 11(1) and (2), or the amount so assessed less the amount already paid under section 10(3), together with penalties, if any, payable under the Act immediately upon the notice under section 11(3) being served upon him in the prescribed form."

22. In our opinion, Chakravarti C.J. has already emphasized in the majority judgment that the tax both under the Sales Tax Act and the Income-tax Act is precisely the same and nothing has been pointed out to us from the provisions of the Bombay Sales Tax Act which would distinguish the scheme of the Bombay Sales Tax Act from the similar scheme of the Bengal Sales Tax Act. The tax becomes due and payable when the tax has been assessed and a notice of demand for the payment of the tax is served upon the assessee or the dealer concerned. It is only in this sense that the word has to be interpreted.

23. Mr. Kaji who appeared on behalf of the income-tax authorities has relied upon the non-obstante clause in section 178(6) of the Income-tax Act, 1961. Under section 178, sub-section (1), every person who is the liquidator of any company which is being wound up, whether under the orders of a court or otherwise, or who has been appointed the receiver of any assets of a company shall, within thirty days after he has become such liquidator, give notice of his appointment as such to the Income-tax Officer who is entitled to assess the income of the company. Under sub-section (2) the Income-tax Officer shall, after making such enquiries or calling for such information as he may deem fit, notify to the liquidator within three months from the date on which he receives notice of the appointment of the liquidator the amount which in the opinion of the Income-tax Officer, would be sufficient to provide for any tax which is then, or is likely thereafter to become, payable by the company. Under sub-section (3) the liquidator shall

not, without the leave of the Commissioner, part with any of the assets of the company or the properties in his hands until he has been notified by the Income-tax Officer under sub-section (2) and, on being so notified, shall set aside an amount equal to the amount notified and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hands. Sub-section (6) provides that the provisions of section 178 shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force. Mr. Kaji in this connection has drawn our attention to the commentaries at page 942 of the sixth edition of Kanga and Palkhivala on Income-tax, where the relevant passage reads :

"The provisions of section 178 do not have any bearing on the question of priority for the company's tax dues. They do not confer on the Government any higher rights or wider priorities than those enjoyed by the Government under the company law. Section 178 is enacted for the very limited purpose of ensuring that the Government's existing rights and priorities under the law are not defeated by sale of the company's assets or distribution among the shareholders or creditors who under the Companies Act are not entitled to be paid before the Government. If the assets of the Company in liquidation are insufficient to pay the unsecured creditors in full, the administration must be in accordance with the aforesaid provisions of section 530 of the Companies Act, 1956, under which the Government's right to priority (a) is no higher than that of other specified preferential creditors, and (b) is limited to tax which had become due and payable within the twelve months next before the date of winding up Sub-section (6) of section 178, which provides that the provisions of that section 'shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force', does not militate against the view stated above. Since the provisions of that section do not affect or alter the existing law of priority, it is obvious that there is nothing in section 178 to override the provisions for preferential payments contained in section 530 of the Companies Act."

24. In Sampath Iyengar's book on the Law of Income Tax, sixth edition, at page 1732, with reference to section 178(6), it has been stated :

"This is an important provision in this connection. It states that the directions contained in section 178 shall supervene any other law for the time being in force. The reference is to the provisions of the Indian Companies Act, 1956. Section 530(1)(a) of that Act grants priority for the tax due to the Government, only in so far as it has 'become due and payable within the twelve months next before' the date of the appointment of a provisional liquidator or the date of the winding-up order (where there has been no appointment of a liquidator) in the case of a compulsory winding-up, and where the winding-up is voluntary, the date of the order of the resolution for the voluntary winding-up-designated as 'relevant date' by clause (c) of section 530(8). Under the provisions of the Income-tax Act, a tax becomes payable only after a notice of demand is served upon the assessee under section 156 So, the priority under the Companies Act is restricted to cases where the notice of demand for payment of tax has been served under section 156

within the period of one year immediately preceding the 'relevant date'. Consequence is that though an order of assessment might have been made before the commencement of the winding up, still, no priority would attach to such tax unless the notice of demand under section 156 therefore had been served upon the company within the period of the one year as mentioned above this section secures to the revenue priority of payment over all unsecured creditors, of taxes payable in respect of all periods up to the date of the commencement of the liquidation or the date of the appointment of a receiver. In respect of the taxes due, if any, for years subsequent to the commencement of the liquidation, or subsequent to the appointment of a receiver, there is no provision made in this Act or in the Companies Act."

25. With respect to the learned author of Iyengar on Income Tax, it must be said that his interpretation of the provision of section 178(6) is not correct. There is nothing in section 178 about the priority of payments. Priority of payment is provided for in the Companies Act and not in the Income-tax Act. All that section 178 require is that the liquidator should inform the Income-tax Officer concerned that he has been appointed as such from a particular date. The Income-tax Officer has to intimate under sub-section (2) within three months from the date on which he receives notice of the appointment of the liquidator the amount which, in the opinion of the Income-tax Officer, would be sufficient to provide for any tax which is then, or is likely, thereafter, to become payable by the company. The liquidator has not to part with any of the assets of the company without the leave of the Commissioner, until he has been notified by the Income-tax Officer under sub-section (2) and, on being so notified, shall set aside an amount, equal to the amount notified, and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hands. If the liquidator fails to act in accordance with the section or fails to set aside the amount as required by sub-section (3) or parts with any or the assets of the company or the properties in his hands, in contravention of the provisions of that sub-section, he becomes personally liable for the payment of the tax which the company would be liable to pay. Throughout the section there is nothing which says that, apart from keeping asides these properties or assets sufficient to meet the possible tax liabilities of the company, the liquidator in liquidation proceedings has to give priority to the income-tax liability in an order of priority different from the order of priority mentioned in section 530(1)(a) of the Companies Act. Therefore, the non-obstante clause in section 178(6) does not interfere in any manner with the order of priorities laid down in section 530(1)(a) of the Companies Act and it must be pointed out that section 17 and Central Sales Tax Act, 1956, is in terms similar to section 178 of the Income-tax Act and there also it has been provided that the provisions of section 17 shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force. Word for word section 17 of the Central Sales Tax Act is equivalent to section 178 of the Income-tax Act, 1961, and for the reasons that we have stated above, the same principle has to be followed.

26. In *Kondaskar, Official Liquidator v. Deshpande, Income-tax Officer*²⁰, the Supreme Court has dealt with the powers of the court dealing with liquidation matters. At page 699 of the report Dua

, J., delivering the judgment of the Supreme Court, has observed :

"The argument that the proceedings for assessment for reassessment of a company which is being wound up can only be started or continued with the leave of the liquidation court is also, on the scheme both of the Act and of the Income-tax Act, unacceptable. We have not been shown any principle on which the liquidation court should be vested with the power to stop assessment proceedings for determining the amount of tax payable by the company which is being wound up. The liquidation court would have full power to scrutinize the claim of the revenue after income-tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation court then to decide how far under the law the amount of income-tax determined by the department should be accepted as a lawful liability on the funds of the company in liquidation. At that state the winding-up court can fully safeguard the interests of the company and its creditors under the Act. Incidentally, it may be pointed out that at the Bar no English decision was brought to our notice under which the assessment proceedings were held to be controlled by the winding-up court. On the view that we have taken, the decisions in the case of *Union of India v. Seth Spinning Mills Ltd. (In liquidation)*²¹, and the Mysore Spun Silk Mills Ltd. (In liquidation) do not seem to lay down the correct rule of law that the Income-tax Officers must obtain leave of the winding-up court for commencing or continuing assessment or reassessment proceedings."

27. Thus, according to this decision in Kondaskar's case, it is obvious that the powers of the liquidation court are very wide and according to this decision of the Supreme Court, after the assessment for income-tax has been completed and the demand notice has been issued and the payment of the tax has been demanded from the liquidator, it would be open to the liquidation court then to decide how far under the law the amount of income-tax determined by the department should be accepted as a lawful liability on the funds of the company in liquidation. The discussion so far clearly establishes that so far as dues for income-tax are concerned, it is only when the regular assessment as distinguished from provisional assessment or summary assessment or an assessment for the purpose of advance tax or a self assessment, has been made and a notice of demand for tax is issued that the income-tax can be said to be due and payable. According to the decision of Chakravarti C.J. in *Recols (India) Ltd.'s* case with which we are in entire agreement, the same principles would apply in the case of sales tax also.

28. In *Kedarnath Jute Mfg. Co. Ltd. v. Commissioner of Income-tax*²², Grover J., delivering the judgment of the Supreme Court, has observed :

"Now under all sales tax laws including the statute with which we are concerned, the moment a dealer makes either purchase or sales which are subject to taxation, the obligation to pay the tax arises and is attracted. Although that liability cannot be enforced till the quantification is effected by assessment proceedings, the

²⁰(1972) 1 Comp LJ 55 (SC) : (1972) 83 ITR 685 : (1972) 42 Comp Cas 168 (SC) ²²(1971) 82 ITR 363 (SC)
²¹(1962) 46 ITR 193 : (1962) 32 Comp Cas 801 (Punj)

liability for payment of tax is independent of the assessment."

29. It is true that in this passage the distinction between tax ability and the obligation to pay tax on the one hand and enforceability of that tax liability so far as sales tax liabilities are concerned, has been emphasized but what we are concerned with is not when the obligation to pay the tax arises but as to from what date the sales tax becomes presently payable. It becomes presently payable only when it can be enforced and it can only be enforced when the quantification is effected by the assessment proceedings and the demand notice under the Sales Tax Act is issued. Till that moment, though there may be an obligation to pay in future, it cannot be said to be a tax due in the sense of tax presently payable or the payment of which can be enforced as on a particular date. It is only with the words "due" and "due and payable" occurring in section 530(1)(a) that we have to deal in this particular case.

30. Mr. Shah has also relied upon the decision of the Mysore High Court in *Income-tax Officer v. Official Liquidator*²³, and he has relied upon the following passage of the decision of the single judge of the Mysore High Court at page 812 of the report :

"Reliance was sought to be placed on a ruling of the Patna High Court in In the matter of Bihar Bolts and Rivets and Engineering Works (In liquidation). The tax death with there was sales tax and the question was whether the tax claimed was within the ambit of section 530(1)(a) of the Companies Act. It appears to have been argued that the tax had not become due within the twelve months next before the winding-up, though it might be said to have become payable within that period. The argument was rejected with the following observations :

'Mr. Shreenath Singh has contended that the amount of ₹ 7,934-1-0 due to the sales tax department is not entitled to priority, because it did not become due during the period of 12 months next before the relevant date. I am of opinion that this contention is without substance. Section 530(1)(a) of the new Act does not require that a claim must become due as well as payable within the period of twelve months. In my judgment its requirements are satisfied if the co-existence of both occurs for the first time within the period. Even if the amounts of sales tax for the three years in question were due from before the period of twelve months, they were not payable previously. As they first became payable within that period, having already been due from before, I hold that the entire amount of ₹ 7,934-1-0 ought to be treated as a preferential claim and to be paid in priority to ordinary debts.'

The question whether the said interpretation of the sub-section is quite accurate or may require further scrutiny need not be gone into in this application because, upon facts, the

income-tax claimed in this application had become both due the payable long before the period of twelve months immediately preceding the winding-up order."

²³(1967) 63 ITR 810: (1967) 37 Comp Cas 114

31. The decision of the Patna High Court is also reported in AIR 1959 Patna 537 and there following the decision of Sinha J. in *Recols (India) Ltd.*'s case, K. Sahai J. has observed :

"..... that the words 'due' and 'payable' are not synonymous. As soon as one person owes a certain amount to another, the amount is due from the former to the latter. If a date is fixed for payment of the amount, it does not become payable and the debtor cannot be compelled to pay before that date. Sales tax becomes due for each transactions of sale immediately after the sale is effected. To the extent of the liability admitted in a return the amount of tax is payable before the dealer submits that return. No question of subsequent recovery of such a sum arises as it is paid even before the return is filed. Under sub-section (4) of section 14 of the Bihar Sales Tax Act, however, the amount of sales tax assessed under section 13 less the amount already paid by the dealer, is payable by a date specified in a notice issued by the Commissioner for payment. No amount which remains unascertained and no amount which is not legally recoverable by the claimant or creditor can be said to be payable. Until final assessment order has been passed declaring the amount that a dealer must pay as tax in excess of the liability admitted by him in his return no one can be certain of the figure. Hence, the amount becomes ascertained only when the final assessment authority quantifies it. That amount becomes legally recoverable only when a notice is issued by the Commissioner is provided for in sub-section (4) of section 14."

32. While dealing with the decision of the Calcutta High Court in *Recols (India) Ltd.*'s case we have already indicated that we prefer to accept the reasoning of Chakravartti C.J. in preference to the reasoning of Sinha J. for the reasons already stated, and, therefore, with great respect to the learned judges of the Patna and the Mysore High Courts, we are unable to follow their conclusions.

33. In *Sales Tax Officer v. Official Liquidator*²⁴, a single judge of the Allahabad High Court has held that under section 530(1)(a) the tax, etc., should have become due within the period of 12 months immediately preceding the date of the winding up, and that they should also have become payable within that period. Both these conditions must co-exist before the priority mentioned therein can be claimed. The section envisages revenue, sales tax, etc., currently due and payable at the time of the winding-up order and does not include within its ambit arrears of the same. The word "revenues" used in the provision means those which have become due and payable as revenues within the relevant period and not revenues which are recoverable as arrears of land revenue. Now, a reference to the dates mentioned in the decision of the learned single judge makes it clear that the relevant date in that particular case was August 7, 1963, and the different assessment orders were passed either before August 7, 1962, or after August 7, 1963. It

is, therefore, clear that in view of the facts of that particular case, the conclusion of the learned single judge that the sales tax dues could not be said to have become due and payable within twelve months from the winding up of the company was correct and the priority could not be granted to those debts.

34. We find in O.J. Appeal No. 2 of 1975 that the sales tax authorities were claiming

²⁴(1968) 38 Comp Cas 430 (All)

priority for certain sales tax dues under the Bombay Sales Tax Act and certain dues under the Central Sales Tax Act. The relevant date in this particular case is June 26, 1967, on which date the order for winding up the company was passed. In the light of what we have stated above, all sales tax dues in respect of which the assessment orders were passed within the period of twelve months immediately preceding June 26, 1967, would have priority. We find that the amounts of ₹ 3,829,75, ₹ 2,117,43, ₹ 1,029,89, ₹ 1,237,36, ₹ 367,92, ₹ 741,83, ₹ 1,258.83 and ₹ 481,45 will have priority. Similarly, all amounts for Central Sales tax will have priority because the relevant assessment orders were passed and the amounts had become due within the period of twelve months immediately preceding June 26, 1967, and the payments aggregating to ₹ 19,812,87 will rank as ordinary debts without any priority since both the relevant orders were passed after the date of the winding-up order.

35. We find that the sales tax authorities also seek to recover either as ordinary debts or as priority debts certain amounts of penalties from the official liquidator, who is the liquidator of Rajratna Naranbhai Mills Company. Now, under the Bombay Sales Tax Act, section 36, sub-section (3), if a dealer does not, without reasonable cause, pay tax within the time he is required by or under the provisions of the Act to pay it, he shall, subject to the provisions of sub-section (5) of section 55 pay by way of penalty, in addition to the amount of tax, a sum equal to one per cent. of the amount of tax for each month for the first three months, after the last date by which the dealer should have paid that tax, and one and one-half per cent. of the amount of tax for each month thereafter. These amounts of penalty are sought to be imposed upon the company for the reason that after the order of winding up was passed and when sales tax dues were demanded from the liquidator as representing the company, he did not pay any amount. Mr. Shah, for the sales tax authorities, has clearly stated that these are the types of penalties which are sought to be levied from the company in this particular case. It is obvious that under the scheme of the Indian Companies Act, 1956, it is not open to the liquidator to pay any liabilities, whether it is a priority claim or otherwise, unless the claims are scrutinized and ascertained and the dues are paid on the orders of the liquidation court. Just because the liquidator does not pay promptly within the time mentioned in the notice of demand issued by the sales tax authorities, it cannot be said that he has not paid the tax without reasonable cause. The priority claims have to be ascertained, the assets have to be collected and it is only in the course of winding up that even priority claims can be paid. Under these circumstances there was every reasonable cause for the official liquidator not to pay the sales tax dues within the date mentioned in the demand notice. We have already

referred to the decision of the Supreme Court in Kondaskar's case and pointed out that it is open to the liquidation court to scrutinise the claim of the revenue after the tax has been determined and its payment demanded from the liquidator. It is open to the liquidation court to decide how far under the how the amount of the tax determined by the department should be accepted as the lawful liability of the company in liquidation. So far as these penalty amounts are concerned, they have been sought to be imposed in total disregard of the consideration of the provisions of the company law and without apparently considering whether there was any reasonable cause on the part of the official liquidator not to pay the amount within the time prescribed by the sales tax authorities for the payment of the sales tax dues. Under these circumstances, in exercise of powers referred to by the Supreme Court in Kondaskar's case, we hold that the amounts of penalties sought to be recovered from the Rajratna Naranbhai Mills Company Ltd. for non-payment of the sales tax dues by the official liquidator are not admissible claims at all because they have been sought to be recovered without application of mind as to whether there was a reasonable cause for the official liquidator not to pay the amount. In view of the provisions of the Companies Act, he could not have paid that amount as demanded by the sales tax authorities, his hands being tied by the provisions of the company law and yet penalty was sought to be levied from him. Under these circumstances, this question of penalty for sales tax dues must be decided as above and it must be held that the Sales Tax Officer is not entitled to recover in liquidation proceedings any of these amounts of penalties.

36. As regards Company Application No. 26 of 1973, we have already pointed out that the relevant date in this case is August 30, 1968, and so far as the income-tax dues are concerned, some of them are on the basis of penalty and some are on the basis of regular demands made against the company. It is only those amounts which became due and payable in the sense that we have mentioned above, and penalty which the company became liable to pay on account of acts of omission and commission prior to the date of the winding-up order that the liability would arise. If the assessment order or the order of penalty was passed within the period of twelve months immediately preceding the relevant date, namely, August 20, 1968, it would be entitled to priority in the light of what we have stated above.

37. Under these circumstances, we allow O.J. Appeal No. 2 of 1975 to the extent to which priority can be granted as pointed out above and as regards Company Application No. 26 of 1973, the liquidator will give priority to the sales tax dues and income-tax dues in the light of this judgment. There will be no order as to costs in either of these two matters as the provision of law was not clear at the time when the rival contentions were taken up. Company Application No. 26 of 1973 will now go back to the learned single judge for being dealt with according to law in the light of what is stated herein.