

HIGH COURT OF GUJARAT (D.B.)**ESSAR OIL LIMITED & 1*****Versus*****STATE OF GUJARAT & 5****Date of Decision:** 25 June 2012**Citation:** 2012 LawSuit(Guj) 407**Hon'ble Judges:** [P B Majmudar](#), [Mohinder Pal](#)**Case Type:** Special Civil Application**Case No:** 7067 of 2012**Subject:** Constitution, Consumer Protection**Acts Referred:**[Constitution Of India Art 226](#), [Art 137](#)[Supreme Court Rules, 1966](#) R 40(2)[Gujarat Value Added Tax Act, 2003](#) [Sec 41](#), [Sec 42\(2\)](#), [Sec 41\(1\)](#), [Sec 42](#)**Advocates:** [Kamal Trivedi](#), [Keyur D Gandhi](#), [Mihir Joshi](#), [Nanavati Associates](#), [P K Jani](#), [Sangeeta Vishen](#)**Cases Referred in (+): 6****P. B. Majmudar, J.**

[1] Draft amendment is submitted by the petitioners. The said draft amendment is granted. The amendment be carried out forthwith.

[2] An absolutely misconceived petition has been filed by the petitioners challenging the steps taken by the State to recover sales tax amount due to it along with the interest. The petitioner No.1 company wanted to start its business activities in the State of Gujarat and the petitioner No.1 company was provisionally registered as a Premier Unit under the scheme known as "Capital Investment Incentive to Premier/Prestigious Unit Scheme 1995-2000 (hereinafter referred as "the scheme"). The petitioner No.1 company had opted for the sales tax incentives on deferment basis under the scheme framed by the State Government and as per the scheme, the petitioner No.1 company was eligible for a final eligibility certificate for the sales tax incentives limit calculated at the rate of 125 percent of the amount invested in the

eligible fixed assets for a period of 17 years starting from the date of its commencement of commercial production or till the date the incentive limit granted to it is exhausted whichever was earlier. As per one of the conditions of the said scheme, the petitioner No.1 company was required to commence commercial production by 15.8.2003. The petitioner No.1 company could not proceed to achieve its objects by way of commercial production in view of the Public Interest Litigation which was filed challenging the action of the State in allowing the petitioner No.1 company to continue its business activities in the area which according to the petitioner of the Public Interest Litigation being Special Civil Application No.2840 of 1999 was under the Wild Life (Protection) Act, 1972. Initially, the Court in the said petition granted restraining orders and because of the same, the petitioner No.1 company could not commence its business and commercial production. The said proceedings reached its finality in the year 2004, as ultimately, the Supreme Court rejected the said Public Interest Litigation. The petitioner No.1 company commenced its business, but the State Government declined to give the benefit of the said scheme on the ground that the petitioners had failed to carry on its commercial activities within stipulated time provided under the scheme. The petitioner company, therefore, approached this Court by way of writ petition being Special Civil Application No.24233 of 2007. The Division Bench of this Court allowed the said writ petition by its judgment and order dated 22.4.2008. The Division Bench was of the opinion that since the petitioner company could not commence the commercial production because of intervening events, i.e. filing of the Public Interest Litigation and the order was operating against the petitioner company, that relevant period could be excluded while considering the benefit of scheme period provided under the scheme. The Division Bench by giving certain directions ultimately allowed the said writ petition. The Division Bench observed that the petitioner company shall not be given benefit of deferment of sales tax / value added tax beyond 14.8.2020. The aforesaid order of the Division Bench was carried further by the State before the Supreme Court. The Supreme Court allowed the appeal of the State Government being Civil Appeal No.599 of 2012 by judgment and order dated 17.1.2012. While allowing the appeal of the State, the Supreme Court has observed in paragraph 89 as under.

"89. In this case, Essar was categorically told by letter dated 28.05.2002, which is much prior to the expiry of the period, that time for availing the exemption cannot be extended. Admittedly, Essar failed to meet the deadline. In that factual scenario, the exercise undertaken by the High Court in the impugned judgment by directing various adjustments which virtually re-wrote the State's exemption scheme, is an exercise which is, with great respect, neither warranted in law nor supported by precedents. There is no question of equity here, an exemption is a stand alone process. Either an industry claiming exemption comes within it or it does not."

[3] It is required to be noted that as per the scheme framed by the State Government which is known as "Sales Tax Deferment Scheme", a particular undertaking is entitled to recover tax from its customers and such collected tax is to be invested in a separate project within the State. It is not in dispute that for the relevant period between 2008 and 2012 i.e. from 8.6.2008 to 17.1.2012, the petitioner No.1 company already recovered the amount of sales tax from its customers and it had invested the said amount in its own company. Subsequently, in view of the judgment of the Supreme Court, the State Government started recovering the amount of sales tax for the relevant period as in view of the judgment of the Supreme Court, the benefit of deferment of the sales tax under the scheme is now not made available to the present petitioner company as the appeal of the State was already allowed by the Supreme Court. At that stage, on behalf of the State, demand notice was sent to the petitioner company immediately after the judgment of the Supreme Court asking the petitioner company to pay such amount which the petitioner No.1 company has collected from its customers and to repay the same to the State with interest. In connection to the said demand, the petitioner company wrote letters from time to time to the department. One of such letters is at page 304 in the compilation dated 23.1.2012. In the said letter, the petitioner No.1 company has stated as under:

"1. We refer to the above judgment of the Hon'ble Supreme Court of India dated 17.01.2012 rendered in the Civil Appeal No.599 of 2012. Being a party aggrieved by the said judgment, we intend to file a petition in the Hon'ble Supreme Court for review of the same. As per Rule 40(2) of the Supreme Court Rules, 1966, the period of limitation for filing a petition for review of judgment by the Supreme Court is 30 days from the date of its judgment, which in the our case expires on 16.02.2012.

2. In view of the above, we request you to kindly not to insist upon us to pay the Value Added Tax & Central Sales Tax collected by us from June 2008 onwards till the Hon'ble Supreme Court passes an order on our petition to be made for review of its said judgment dated 17.01.2012. We are also writing a separate letter to the Government of Gujarat for its indulgence in the matter."

[4] There is subsequent letter of the petitioner No.1 company which is on record dated 1.2.2012 which is at page 305. In paragraph 2 of the said letter, the petitioner No.1 company has stated as under:

"It is true that the Hon'ble Supreme Court has not stayed the implementation of its said judgment. You will appreciate that it is equally true that the Hon'ble Supreme Court is totally silent in its judgment on refund of tax collected by us. Seeking a review of a judgment passed by the Hon'ble Supreme Court is a remedy expressly

provided by Article 137 of the Constitution of India. For exercising this constitutional remedy, Rule 40(2) of the Supreme Court Rules, 1966, prescribes a period of 30 days from the date of the judgment, which period in our case expires on 16.02.2012. In our opinion, the said judgment of the Hon'ble Supreme Court is clearly erroneous. In our further opinion, circumstances of a substantial and compelling character exist in the present case justifying seeking review of its previous judgment by the Hon'ble Supreme Court. Without prejudice to our right to seek review of the judgment by the Hon'ble Supreme Court, we wish to inform you that during the hearing of your Appeal, the Hon'ble Supreme Court had asked the Counsel appearing for you whether the State Government would insist for payment of the deferred amount of tax forthwith and in lump sum, if the Appeal is allowed, your Counsel fairly submitted to the Hon'ble Supreme Court that the State desires our company to carry on its business as a going concern in the State; and that the State Government has no objection if we are permitted to pay the deferred amount of tax when due in easy installments. You may please verify on this aspect of the matter from your Counsel, Mr.Parag Tripathi. Lastly, it would not be fair, proper and reasonable for you to demand from us immediate payment of such a huge sum of money involved in lump sum before we have even exhausted the remedy available to us in law. Payment of deferred amount of tax in lump sum would adversely affect our operations. No interest is payable on the deferred amount of tax for the judgment of Hon'ble Supreme Court as well as the undertaking given by the State Government to the Hon'ble High Court and the interim order dated 11.08.2008 passed by the Hon'ble Supreme Court pursuant to which we collected the VAT / CST from June 2008 onwards and retained are silent on it. Believing bonafide that the deferred amount of tax would become repayable by us to the State Government in six equal installments after the expiry of the period of deferment stipulated under the Scheme, we have invested the same in the expansion of our refinery and other business in the State of Gujarat, which has benefited the State immensely."

[5] It is pointed out to the Court that subsequently, the Supreme Court rejected the said Review Petition.

[6] At the time of hearing of this petition, the petitioners have also submitted the draft amendment by which they have placed on record the copy of the application dated 5.4.2012 which is addressed to the Additional Chief Secretary (Finance), Ministry of Finance, Gandhinagar. In the said application, the petitioners have high-lighted their certain difficulties in the subject matter mentioned in the said application. The petitioners have made reference to section 41(1) and section 42(2) of the Gujarat Value Added Tax Act, 2003 (hereinafter referred as "the Act"). By the said application,

it is prayed by the petitioners that the State may give remission of the whole amount and the interest payable and allow the petitioner No.1 company to pay the tax amount without interest during the period of payment by 8 (eight) equal year installments commencing from 1.4.2013. Since the State Government was proceeding to recover the amount, the petitioners subsequently approached this Court by way of the present writ petition.

[7] This Court passed an ex parte order on 11.5.2012. The said order reads as under.

"1. Let the matter appear on June 22, 2012. The respondents are at liberty to file affidavit-in-reply within a week after reopening. Rejoinder, if any, be given within a week thereafter.

2. After hearing the learned advocate for the petitioners and after going through the materials on record, we find that the petitioners have made out a strong prima facie case to have an interim order in terms of paragraph 34(e) of the application till next date as it appears that the State-respondent failed to exercise jurisdiction vested in it by Section 41 of the Gujarat Value Added Tax Act, 2003 on the wrong assumption that this question has already been concluded upto the Supreme Court whereas in the proceedings before the Supreme Court the question related to grant of exemption under the scheme framed by the State Government.

3. We, thus, pass such interim order. We, however, make it clear that pendency of this application will not stand in the way of the State-respondent in exercising jurisdiction under Section 41 of the Act or to pass any interim or final order in terms of the said provision of Section 41 of the Act. If any such interim or final order is passed, the petitioner shall comply with such order.

A copy of the application for exemption produced before us be kept with the record.

Direct Service is permitted."

[8] The said matter was, thereafter, placed before another bench as per the roster, but since the said Court declined to take up the matter by endorsement that not before the said bench, this matter is placed before this bench as per the order of the Honourable Acting Chief Justice.

[9] Learned Senior Counsel Mr.Mihir Joshi for the petitioners vehemently argued that the State Government has not adjudicated the application submitted by the petitioners, copy of which is given along with the amendment dated 5.4.2012. It is submitted by Mr.Joshi that the State Government has not taken any decision and on the other-hand is trying to recover the amount from the petitioner company regarding the amount of

sales tax for the relevant period as well as the amount of interest by adopting coercive method and according to him, till the application under section 41 of the Act submitted by the petitioners is adjudicated, it is not open for the State to take any action for recovering the amount in question. It is argued by Mr.Joshi that even while deciding such application, the State is required to give personal hearing to the petitioners and is required to decide the same by passing speaking order. It is submitted by Mr.Joshi that while deciding the application under sections 41 and 42 of the Act, the State Government is required to consider the relevant documents on record and is required to pass the reasoned order as the State is required to exercise its quasi judicial powers while deciding such application. In order to substantiate his say, Mr.Joshi has relied upon the judgments of the Division Bench of this Court to which reference will be made later on.

9.1 It is argued by Mr.Joshi that it is true that the amount of sales tax is already recovered by the petitioner company for the relevant period, but as per the scheme, the payment of sales tax is to be deferred and it is equally true that the Supreme Court has held that the petitioner company is not entitled to the benefit of the said scheme. However, according to him, it would not be possible for the petitioner company to meet with such huge liability if the amount is to be paid forthwith to the State.

9.2 It is submitted by Mr.Joshi that considering the factual scenario of the matter, this is a fit case in which remission is required to be given by the State in connection with the payment of interest in view of the fact that the petitioner company could not immediately commence the commercial activities in view of the injunction order operating in the filed at the relevant time. Mr.Joshi also submitted that even on the basis of the equitable consideration and hardships which the petitioner company is likely to face, it is a fit case in which the State should exercise its jurisdiction under section 41 of the Act by giving remission of payment of interest and also by giving suitable installments regarding payment of sales tax under Section 42 of the Act.

9.3 It is submitted by Mr.Joshi that so far as the powers which are exercised by the State under sections 41 and 42 of the Act are concerned, it is independent and it has no bearing with the decision of the Supreme Court in any manner. It is further submitted by Mr.Joshi that sections 41 and 42 of the Act itself contemplate the situation where after the tax liability is adjudicated, then the said provisions will come into picture and according to him, therefore, the said application is maintainable only after the final adjudication of the dispute which according to him is now decided by the Supreme Court.

9.4 It is vehemently submitted by Mr.Joshi that when the petitioner company is an on going concern, no prejudice will be caused to the State Government if the application submitted by the petitioner company is decided by the State and till the application is decided, the State be restrained from taking any coercive steps for recovering the amount in question.

9.5 It is submitted by Mr.Joshi that the Additional Commissioner by his letter dated 19.4.2012 informed the petitioner company that their representation dated 5.4.2012 is rejected in view of the order of the Supreme Court in the Review Petition dated 3.4.2012 and representation is not being accepted and the petitioner company was asked to immediately deposit the amount in question of the tax including interest failing which strict steps will be undertaken and the petitioner company was asked to take note of the same. It is argued by Mr.Joshi that on the wrong premises, the application of the petitioner company is rejected. It is further submitted by Mr.Joshi that the decision of the Supreme Court in the aforesaid matter as well as rejection of the Review Petition have no bearing so far as the question of deciding the application under sections 41 and 42 of the Act is concerned. It is argued by Mr.Joshi that the said order, therefore, is without application of mind and contrary to law. It is argued by Mr.Joshi that in view of the same, the aforesaid order of the Additional Commissioner is required to be set aside and the matter is required to be remitted to the State Government to decide the application of the petitioner company denovo. It is also submitted that this Court cannot go behind the order passed by the State in this behalf by resorting to any additional grounds as the Court is required to see legality of the impugned order only.

[10] Learned Advocate General Mr.Kamal Trivedi, on the other-hand, vehemently opposed the petition. It is pointed out that this is a case in which the petitioner company has already recovered the amount of tax from its customers for the relevant period and has invested the said amount in its own company and accordingly, the petitioner company has got unjust benefit and enrichment by collecting the tax and not remitted the same in spite of the fact that their main prayer about the benefit of the scheme is already negated by the Supreme Court. It is submitted by Mr.Trivedi that after the order of the Supreme Court, the State proceeded to recover the amount in accordance with law keeping in mind the observations and directions given by the Supreme Court in its order.

10.1 Mr.Trivedi has further argued that the petitioner company having taken the benefit of sales take amount from its customers and having not even invested the same in other project, but invested the same in its same unit and looking to the said conduct, this Court may not exercise its extra-ordinary jurisdiction under

Article 226 of the Constitution of India by giving any relief. It is submitted by Mr.Trivedi that, in any case, since January 2012, the petitioner company is not paying any amount even though the petitioner company lost upto the Supreme Court. However, this statement is opposed by Mr.Joshi by saying that the said statement is factually not correct. Mr.Trivedi has relied upon various judgments of the Supreme Court in order to substantiate his say in the matter of tax liability, interim relief normally cannot be granted. It is submitted by Mr.Trivedi that ad-interim relief granted by this Court is ex parte order and if the say of the State was considered, it is clear that the petitioner company has absolutely no case to get any equitable relief from this Court.

10.2 Mr.Trivedi has vehemently argued that this is a case in which the petitioner company has collected the amount from its customers and invested the said amount in its own company and according to him, therefore, in view of the said conduct, the petitioner company was even otherwise not entitled to the benefit of the scheme as it was required to invest the amount in other project which has not been done in this case. It is argued by Mr.Trivedi that even if the benefit of deferment of sales tax is available to the petitioner company, the said benefit could have come to an end by March 2012 and, thereafter, the petitioner company was required to pay regular sales tax etc. which according to him today comes to Rs.6414.19 crores and even that amount has not been paid by the petitioner company and the petitioner company cannot enrich itself at the cost of the State exchequer and the State revenue.

10.3 Even after collecting the amount of sales tax and even though the petitioner company now cannot retain the said amount in view of the judgment of the Supreme Court, in the instant case is not parting pai towards the tax. Mr.Trivedi has also placed on record a copy of the Review Petition filed by the petitioner company before the Supreme Court and has relied upon certain averments made in the said application. Mr.Joshi, however, has disputed the statement of Mr.Trivedi that even if the benefit of the scheme is available, the said benefit would come to an end by March 2012 and that the petitioner company has not paid the amount of sales tax thereafter.

[11] We have heard learned counsel for both the sides at great length. We have also gone through the relevant documents forming the part of the petition and various case law cited by learned counsel for both the sides.

[12] It is no-doubt true that at the time when the petitioner company was to commence its commercial activities and production, Public Interest Litigation was filed before this Court which remained pending for long time and ultimately, the said Public

Interest Litigation was dismissed by ultimate order of the Supreme Court in the year 2004. The State Government, however, took the stand that the petitioner company was not entitled to the benefit of the scheme as it has failed to commence the commercial production within stipulated time. The writ petition filed by the petitioner company was allowed by the Division Bench. However, subsequently, the Supreme Court set aside the said judgment by its judgment and order dated 17.1.2012 in Civil Appeal No.599 of 2012. In view of the said judgment of the Supreme Court, now it cannot be disputed that for the relevant period, the petitioner company was liable to pay the sales tax amount and the interest accrued thereon from time to time to the Government. As pointed out earlier, the petitioner company has already collected the tax amount from 8.6.2008 to 17.1.2012 and had invested the said amount in its own company and not in any other new project or any other company. In view of the judgment of the Supreme Court, liability of the said tax payment, therefore, clearly arose and the petitioner company was bound to pay the said amount to the State. Initially, when the demand was made, the petitioner company asked the State Government to wait till the Review Petition is decided. The State Government has shown generosity by not proceeding further and awaiting the decision in the Review Petition. Subsequently, the Review Petition was dismissed by the Supreme Court. Learned Advocate General has pointed out that the averments made in the Review Petition. In paragraph 8 of the Review Petition, it is averred as under :

"The judgment in review is bound to have a severe adverse impact on the cash-flow and the operations, in as much as, under the Sales Tax deferment Scheme, Essar could have paid the deferred amount of tax including the amount of Rs.6,300 crores, collected so far, in 6 equal annual installments, after it exhausted the incentive limit. Payment forthwith of the whole amount of Rs.6,300 crores is bound to cause economic duress to Essar, which is not in the interest of the State and Essar."

On the basis of the said averments, it is argued by Mr.Trivedi that the petitioner company is required to make the payment forthwith of the whole amount and the averment is also made that it is bound to cause economic duress to the petitioner company.

[13] It is required to be noted that the petitioner company had not approached the State Government immediately at the time when the demand was made by the State Government by way of preferring an application under sections 41 and 42 of the Act. On the contrary, an attempt was made to defer the payment of recovery on the ground that the Review Petition was pending before the Supreme Court. Considering the said conduct of the petitioner company, we are of the view that filing of an application under sections 41 and 42 of the Act is nothing but an afterthought with a view to delay

repayment of the tax which the petitioner company has already collected. Even, the application under sections 41 and 42 of the Act was not placed on record at the time when the petition was moved before the Division Bench earlier. The said application was placed before us with amendment at this stage. In the present petition, subsequently, the State has filed the Misc. Civil Application for vacating the ad-interim relief in which it is clearly averred as to how the petitioner company tried to delay the proceedings even though an opportunity was given to the petitioner company to remain present and to put its case. It is argued by Mr.Trivedi that even if any tax amount is adjudicated for the first time and if the appeal is to be filed against such order, then also there is condition precedent to deposit the entire amount, while in the instant case, the petitioner company simply on the ground that it has preferred the application for remission and installments, is sitting tight over the issue of repayment and is not paying the single pai towards the sales tax which it has already collected and retained by it for long time. Considering the facts and circumstances of the case, in our view, this is not a case in which the State Government is required to be restrained from proceeding further to recover legitimate dues on the ground that the application under sections 41 and 42 of the Act is preferred by the petitioner company for remission of interest and installments. It is not possible for us to accept the request of Mr.Joshi that unless the said application is decided, the State Government should be restrained from recovering any amount.

[14] At this stage, reference is required to be made to the provisions of sections 41 and 42 of the Act. The said provisions read as under.

"Section 41 : Remission of tax, penalty or interest :-

(1) Subject to such conditions as it may impose, the State Government may, if it is necessary so to do in the public interest in case of double taxation or to redress an [inequitable situation, or for sufficient and reasonable cause] remit by an order either generally or specially, the whole or any part of the tax, penalty or interest payable in respect of any period by any dealer or a class of dealers or of any specified class of sales or purchase.

(2) The Commissioner may, in such circumstances and subject to such conditions and within such limit as may be prescribed remit the whole or any part of the tax, penalty or interest payable, in respect of any period, by any dealer.

Section 42 : Payment and recovery of tax and interest on delayed payment. :-

(1) The amount of tax assessed, reassessed or becoming payable for any period under section 32, 33, 34, 35, 75 or 79, less any amount already paid by the dealer in respect of such period, shall together with penalty and interest if any that may

become payable under any of the provisions of this Act, be paid by the dealer or the person liable therefore into a Government treasury or in such other manner as may be prescribed within thirty days from the date of service of notice of demand issued by the Commissioner for this purpose.

(2) On an application by the dealer, the Commissioner may in respect of any particular dealer or person and for reasons to be recorded in writing, extend the time for payment or allow payment by installments, subject to such conditions as he may think fit to impose in the circumstances of the case.

(3) In a case where payment by installment is allowed under sub-section (2) and the dealer or the person liable for such payment commits default in paying any one of the installments within the time fixed by the Commissioner under that sub-section, the dealer or the person shall be deemed to be in default in respect of the whole of the amount then outstanding and the other installments shall be deemed to have been due on the same date as the installment in default.

(4) Interest at the rate of eighteen per cent per annum shall be charged for the period as may be extended or the installments as may be granted under sub-section (2).

(5) If the amount of tax and penalty, if any, is not paid within the time specified in sub-section (1) or extended under sub-section (2), as the case may be, the dealer or the person liable therefore shall be deemed to be in default in respect of that amount.

(6) Where the amount of tax assessed or reassessed for any period, under section 34 or section 35, subject to revision, if any, under section 75, exceeds the amount of tax already paid by a dealer for that period, these shall be paid by such dealer, for the period commencing from the date of expiry of the time prescribed for payment of tax under sub-section (1), (2) or (3) of section 30 and ending on date of order of assessment, reassessment, or as the case may be, revision, simple interest at the rate of eighteen per cent per annum on the amount of tax not so paid or any less amount thereof remaining unpaid during such period.

(7) Where a dealer does not pay the amount of tax falling under sub-section (1) on or before the prescribed date, then there shall be paid by such dealer for the period commencing on the specified date and ending on the date of payment, simple interest at the rate of eighteen per cent per annum on the amount of tax not so paid or any less amount thereof remaining unpaid during such period :

Provided that where security, other than in the form of surety bond, has been furnished by a dealer under sub-sections (1) and (2) of section 28, the Commissioner may, for good and sufficient reasons to be recorded in writing, realise any amount of tax, penalty or interest remaining unpaid as aforesaid or part thereof by ordering forfeiture of the whole or any part of the security."

[15] Reading the said provisions, it is clear that in case if the State is satisfied that in the public interest when there is a question of double taxation or in case of equitable situation, the State may remit the amount of tax, penalty or interest. Learned Senior Counsel Mr. Joshi argued that this is a fit case in which remission is required to be given regarding the amount of interest and installments are required to be given as per section 41 of the Act so far as the payment of principal amount of tax is concerned. We fail to understand as to how in the instant case, the petitioner company which has already recovered the large amount of tax for the relevant period and has invested the said amount in its own undertaking can now legitimately ask for such benefit on the ground that in the public interest and equitable situation, such benefit is required to be given. We find substance in the argument of learned Advocate General that sections 41 and 42 of the Act cannot be interpreted in such a manner that in a given case even if there is no public interest involved or when there is no question of double taxation and moment the application is preferred, the State should be restrained from proceeding further to recover the amount. We also find force in the argument of learned Advocate General that equity lies in favour of the Government as the petitioner company having already recovered the amount of tax for the relevant period and invested the amount in the fixed deposit in its own undertaking and now is not paying back the amount of sales tax to the State even though benefit of deferment of sales tax incentive is not made available in favour of the petitioner company in view of the judgment of the Supreme Court in the present case itself. In fact, when the petitioner company collected the amount of tax from its customers and in case, if it is found that there is no scheme available like the deferment of tax, such collection of the petitioner company is for the benefit of the State and the petitioner company is a trustee for the said amount. We are not expressing any opinion as to whether the petitioner company has committed any breach of trust or criminal breach of trust. Suffice it to say that this is not a case wherein this court can exercise its extra ordinary jurisdiction by passing appropriate order to recover the amount simply because at a later stage the petitioner company has filed the application under sections 41 and 42 of the Act for giving installments of payment of sales tax and to give remission of payment of interest on such amount. In our view, the provisions of sections 41 and 42 of the Act can be made applicable in case of public interest or in case where it is a case of double taxation or any other equitable ground. Considering the facts of the case, there is no question of applicability of the said provisions as in fact, it is in the public interest that the

petitioner company should be directed to repay the amount which it has already collected from its customers. If any order is passed in favour of the petitioner company under sections 41 and 42 of the Act, such order itself would be against the public interest. The petitioner company cannot be allowed to sit tight over the issue of repayment by taking a plea that it has already applied to the State Government under sections 41 and 42 of the Act. In fact, sections 41 and 42 of the Act can never be said to be a matter of right of a person by which he can get such benefit as it is a purely equitable jurisdiction of the State which has to be exercised considering the facts and circumstances of each case. The powers under sections 41 and 42 of the Act, therefore, cannot be equated with the powers of appeal which are available to the assessee. Filing of such application is with a view to delay the payment to the State Government which amount the petitioner company has already collected as stated earlier and has retained with it. The petitioner company cannot withhold the amount illegally and while collecting the amount of sales tax, the petitioner company is a trustee for the State Government as the amount is collected only for the purpose of paying it to the State. The petitioner company cannot be allowed to enrich itself in such a manner nor the tax amount which the petitioner company has received can ever be said to be the income of the petitioner company in any manner.

[16] At this stage, learned Senior Counsel Mr. Joshi has relied upon the Division Bench's judgment in the case of State of Gujarat Vs. Avani Underwear Co., (91 Sales Tax Cases 148) while interpreting sections 41 of the Act. In the aforesaid case, the assessee company suffered the huge loss of the property in view of the accidental fire which affected the entire industrial state, furniture, books, stock etc. of the company were totally destroyed in the fire. The company applied for exemption from payment of sales tax under section 55 of the Sales Tax Act and also asked for remission from the payment of sales tax. After considering the scheme of the said provisions, the Court has held that the Tribunal was justified in upholding the contention of the company and the Court also gave answer to the reference which was made to the Court under the Sales Tax Act holding that reasons are required to be given while disposing of the application for remission of the tax.

[17] This Court is required to find out as to whether the said ratio will be applicable in the facts and circumstances of the present case. At the cost of repetition, we may say that the petitioner company who has already collected the amount of sales tax has retained the amount and is now not refunding the same to the State Government. It is true that, before the Supreme Court, the petitioner company has not taken the point of applicability of sections 41 and 42 of the Act. However, liability of payment of tax has arisen in view of the decision of the Supreme Court wherein it is found that the

petitioner company is not entitled to the benefit of deferment of sales tax in the scheme framed by the State Government.

[18] At once stage, we had asked Mr.Joshi whether the petitioner company would like to approach the Supreme Court by way of an application for clarification or by way of appropriate application in the matter which is decided by the Supreme Court. However, Mr.Joshi said that since this petition is filed entirely on different cause of action and only in connection with the benefit which the petitioner company is seeking under sections 41 and 42 of the Act, he would like to argue the matter on all available points before this Court. Under the circumstances, we have examined the arguments of learned counsel for both the sides in detail.

[19] Learned Advocate General has relied upon the aspect of granting the interim relief in taxation case and relied upon the following judgments.

- (i) [Siliguri Municipality and others Vs. Amalendu Das and others](#), 1984 2 SCC 436].
- (ii) [Empire Industries Limited and others Vs. Union of India and others](#), 1985 3 SCC 314].
- (iii) [State of Maharashtra and others Vs. Nagpur Distillers, Nagpur and another](#), 2006 AIR(SC) 1987].
- (iv) Modipon Ltd. Vs. Collector of C.Excise, Meerut,2002 144 ELT 267 (All.0].

[20] Mr.Trivedi has relied upon the decision of the Supreme Court in the case of [Union of India and another Vs. Jesus Sales Corporation](#), 1996 4 SCC 69 wherein it is held that under the different situations and conditions the requirement of compliance of the principle of natural justice vary. It is also held that the Court cannot insist that under all circumstances and under different statutory provisions, personal hearings have to be afforded to the persons concerned. It has also been held that if this principle of affording of personal hearing is extended whenever statutory authorities are vested with the power to exercise discretion in connection with the statutory appeals, it shall lead to chaotic conditions.

20.1 Regarding natural justice, Mr.Trivedi has relied upon the decision of the Delhi High Court in the case of [Saketh India Limited Vs. Union of India](#), 2002 143 ELT 274 (Del.) wherein the Division Bench of the Delhi High Court has held that when the appellant of that case was called for personal hearing and even the opportunity was given and when he had not appeared before the authority, the authority was justifying in proceeding ex parte and passing the impugned order.

[21] Learned Trivedi has also relied upon the decision of this Court in the case of Shree Vallabh Glass Works Ltd. Vs. State of Gujarat, 84 Sales Tax Cases 186. Relevant observations of the Division Bench are as under.

" That takes us to the third question. All the lower authorities have concurrently found that financial stringency pleaded by the applicant was not reasonable cause so as to justify non-payment of tax by the applicant within the stipulated time. However, it is the case of the applicant that it has applied to the Sales Tax Officer for extension of time for making payment of tax due. According to the applicant such extensions were applied for from time to time and such applications were granted. Based on this factum of extensions of time granted by the Sales Tax Officer, Mr.Joshi, learned advocate appearing for the applicant, submits that the lower authorities should have held that there was reasonable cause for non-payment of tax within stipulated time inasmuch as the Sales Tax Officer has extended time for payment of sales tax from time to time. Mr.Joshi in this connection invites our attention to section 38(4) of the Bombay Act and section 47(4) of the Gujarat Act. The said provisions, in fact, refer to the powers of the Commissioner of Sales Tax or an appellate authority to extend the date for payment of tax. When in exercise of such powers time is extended for payment of tax it is expected of the party to pay such tax within the extended time. While in the case before us it is found that the authorities found that the applicant has defaulted to pay the tax within the extended time. Secondly, the authorities have also found that cause of financial stringency put forward by the applicant was not genuine and bona fide. In fact, it is found that the applicant has also collected sales tax from the customers before the delivery of goods was given since the railway receipts were required to be got released from the bank. The applicant having thus collected tax from its customers it cannot put forward the cause of financial stringency as reasonable cause which prevented it from making the payment of tax due within the stipulated time. In fact, the cause pleaded by the applicant is not only not bona fide or genuine but it is found to be jejune and unreal. The lower authorities have, in fact, found that the applicant had already collected tax from the customers, and therefore, it ought to have paid the tax within the stipulated time. It is also required to be noted that at the time of granting extension the Sales Tax Officer has specifically stipulated that the liability to pay penalty incurred because of late payment would continue. In that view of the matter, we do not think that extension of time for payment of tax granted by the Sales Tax Officer would have as such constituted reasonable cause justifying non-payment of tax by the applicant within the stipulated time. We are, therefore, of the opinion that the lower authorities were right in holding that extension of time simpliciter or grant of instalments for payment of sales tax by the Sales Tax Officer does not constitute

reasonable cause to claim protection from liability arising under section 36(3) of the Bombay Act and/or under section 45(5) of the Gujarat Act."

Relying upon the same, it is submitted by Mr.Trivedi that when the petitioner company has already collected the tax, there is no question on its part to ask for the installments or remission as having collected the amount for the State, it is duty bound to pay back to the State with interest.

[22] Considering the totality of the facts and circumstances of the case, this is not a case in which this Court would like to restrain the State Government under its extra-ordinary jurisdiction under Article 226 of the Constitution of India from recovering its legitimate dues from the petitioner company and by not recovering any amount on the ground that subsequently the petitioner company approached the State Government under sections 41 and 42 of the Act for which the State is entitled to recover from the petitioner company. The petitioner company, in fact, should have acted as a good company by refunding the amount which is recovered from its customers towards the sales tax and the petitioner company is duty bound to pay back the amount of tax collected by it from the customers to the State and cannot deprive the State to receive the said amount which is legitimate dues of the State. On one hand, the State has shown sympathetic approach by waiting from the beginning from time to time till the Review Petition is decided by the Supreme Court as the petitioner company has taken time only on the ground that the petitioner company has filed Review Petition which we have referred to above. Considering the same as well as the scheme of sections 41 and 42 of the Act which is stated above, we would not like to exercise our powers under extra-ordinary jurisdiction restraining the State from recovering its legitimate dues which dues are required to be paid by the petitioner company to the State.

[23] Considering the said aspect, in our view, the petitioner company cannot retain the said amount and it cannot retain the said amount for utilizing the same for its commercial benefit depriving the State to get its legitimate dues back. The State is collecting the tax amount for the benefit and welfare of the citizens and the State also cannot allow the petitioner company to retain the said amount for the financial benefit of the petitioner company and to allow the petitioner company to utilize the said money for its capital investment at the cost of the public exchequer. We accordingly do not find any substance in the petition and it is dismissed. Ad-interim relief granted earlier stands vacated.

[24] At this stage, Mr.Joshi requested that ad-interim relief may be extended for some time to enable the petitioner company to approach the Supreme Court. However, in view of what is stated above and in view of the fact that the petitioner company has already recovered the tax amount from its customers, it would not be proper to extend

such interim relief which was granted ex parte initially. The petitioner company has already retained the said amount for long unauthorizedly. Considering the same, the said prayer is rejected. The State Government may now proceed further expeditiously to recover the amount in question. Mr.Joshi, however, objected that the Court may not direct the State Government to proceed expeditiously against the petitioner company as according to him, no such order can be passed in the petition filed by the petitioners. Learned Advocate General, however, stated that in the Misc. Civil Application filed by the State, the State has already made averments in the application that the State may be allowed to proceed to recover the amount. In our view, in view of the ad-interim stay, the State was restrained to recover the amount. When the petition is rejected, naturally, the Court can certainly ask the State Government to proceed expeditiously for recovering the amount. In fact, even without such observations, the State is bound to proceed accordingly. It is unfortunate that even after collecting the aforesaid amount from its customers towards the tax, the petitioner company has invested the same in its own company by way of fixed deposits and is trying to enrich itself and also trying to put as many hurdles as possible in the matter of paying the amount back to the State Government. Retention of such amount by the petitioner company is nothing sort, but an unauthorized retention of public money.

[25] In view of the dismissal of the petition, the Misc. Civil Application stands disposed of.

Levons Technologies Pvt. Ltd.