IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Dated this the 5th day of November, 2014

PRESENT

THE HON'BLE MR. JUSTICE N KUMAR

AND

THE HON'BLE MR. JUSTICE B MANOHAR

STRP Nos.130, 136-168 & 169 -170 OF 2014

BETWEEN:

FOSROC CHEMICALS (INDIA) PVT.LTD
NO.38, 12TH CROSS, 3RD FLOOR
PSR ID CBI ROAD, GANGANAGAR NORTH
BANGALORE-560032
REPRESENTED HEREIN BY ITS
DIRECTOR,
MR.K.S.RAMAKRISHANA RAO ...PETITIONER

(BY SRI T. SURYANARAYANA, ADVOCATE)

AND:

THE STATE OF KARNATAKA
REPRESENTED BY THE
COMMISSIONER OF COMMERCIAL TAXES
VANIJYA THERIGE KARYALAYA
KALIDASA ROAD
GANDHINAGAR
BANGALORE-560009
BANGALORE CITY ...RESPONDENT

(BY SMT. S. SUJATHA, AGA)

These STRPs filed under Section 65(1) of KVAT Act, against the order dated 30-07-2013 passed in STA No.2266 to 2301 of 2011 on the file of the Karnataka Appellate Tribunal, Bengaluru, partly allowing the appeals.

These STRPs coming on for hearing this day, ***N. KUMAR J*** delivered the following:

O R D E R

These Revision Petitions are preferred by the assessee against the order passed by the Karnataka Appellate Tribunal dismissing his appeal and confirming the orders passed by the lower authorities.

2. The assessee is a Company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of manufacture and supply of construction chemicals. The assessee is registered under the provisions of the Central Sales Tax Act, 1956 (for short hereinafter referred to as 'the CST Act') and the Karnataka Value Added Tax Act, 2003 (for short hereinafter referred to as 'the KVAT Act').

3. For the years 2006-07, 2007-08 and 2008-09, the assessee filed its monthly returns as per the provisions of the KVAT Act. In the said return he declared both total and taxable turnovers under both the above enactments. In so far as CST is concerned, the assessee claimed the benefit of the concessional rate of tax in respect of interstate sales against 'C' Forms and claimed exemption from tax on the turnovers covered by 'F' Forms and 'I' Forms. He also claimed certain other exemptions. Under Section 38(1) of the KVAT Act when once a dealer has filed his return under Section 35 of the KVAT Act, he shall be deemed to have assessed to tax. The Deputy Commissioner of Commercial Taxes issued notice under Section 39 (1) of the KVAT Act for re-assessment. After over-ruling the objections of the assessee, the assessing authority denied the benefit of concessional rate of tax in respect of interstate sales against 'C' Forms on the ground that the 'C' Forms are either defective or not filed. He also disallowed the exemption claimed on the basis of 'F' and 'I' Forms.

4. Aggrieved by the said order, the assessee preferred an appeal to the Joint Commissioner of Commercial Taxes, Bangalore. The first Appellate Authority partly allowed the appeals granting the benefit of concessional rate of tax in those cases where 'C' Forms were produced before him and to deny the benefit of concessional rate of tax in respect of sales against which 'C' Forms were not furnished.

5. Aggrieved by the said order, the assessee preferred an appeal to the Karnataka Appellate Tribunal. The Tribunal has dismissed the appeal. Both the Appellate Authorities have not interfered with the order of the assessing authority imposing penalty in respect of tax which became due on account of non-furnishing of 'C' Forms. Therefore, the assessee is before this Court.

6. These Revisions Petitions were admitted to consider the following questions of law:-

1. Whether the prescribed authority can initiate a re-assessment under Section 39(1) of the

KVAT Act without first recording his satisfaction/belief that there is an understatement of tax liability and communicating the same to the dealer?

2. Whether the provision contained in Rule 6(b)(i) of the Central Sales Tax (Karnataka) Rules, 1957 providing for filing of 'C' Forms marked as 'original' to claim the benefit of concessional rate of tax is to be treated as directory of mandatory?

3. Whether a dealer who furnishes 'C' Forms marked as 'duplicate' instead of 'C' Forms marked as 'original' should be denied the benefit of concessional rate of tax on that account?

4. Whether a dealer is not entitled for the benefit of concessional rate of tax on account of the fact that the invoices mentioned in the 'C' Forms pertain to a different quarter?

5. Whether interest under Section 9(2-B) of the CST Act read with Section 36 of the KVAT Act is chargeable from the end of the quarter till the date of assessment where a dealer is

not able to furnish 'C' Forms in support of his claim for concessional rate of tax?

6. Whether the difference in tax on account of non-furnishing of statutory forms like 'C' Forms at the time of assessment could be treated as understatement of liability attracting penalty under Section 72(2) of the KVAT Act?

7. The learned counsel for the assessee assailing the impugned order contended firstly that, the proceedings initiated under Section 39(1) of the KVAT Act is *void ab initio* because the assessing authority has not recorded the reasons for reopening the assessment. The reasons for such re-opening has to be in writing. The said reasons are not furnished to the assessee and, therefore, he submits the impugned order requires to be set aside on that short ground. He further submits that, though the assessee was not able to produce the original 'C' Form, he has produced duplicate 'C' Form and the authorities were not justified in denying the benefit of concessional rate of tax on the ground

that the original 'C' Forms are not produced. He further contended that the assessee has been denied the concessional rate of tax also, on the ground that the invoices mentioned in 'C' Form pertain to a different quarter which is contrary to the circular issued by the Commissioner of Commercial Taxes. Lastly he contended that the levy of interest and penalty is not automatic nor is it mandatory but the authorities have proceeded on the assumption that once the liability to tax arises, the liability to pay interest and penalty is automatic and, therefore, he submits for the aforesaid reasons the impugned order requires to be set aside.

8. Per contra, the learned counsel for the revenue submitted that,

(a) in the instant case, before initiation of re-assessment proceedings under Section 39(1) of the KVAT Act, the assessing authority has recorded his reasons in writing for reopening

of the assessment and, therefore, there is no substance in the first contention.

(b) In so far as the contention that the assessee is entitled to the benefit of concessional rate of interest, even if he produces a duplicate 'C' Form, runs counter to the judgment of the Apex Court which has held production of the original 'C' Form is a *sine qua non* for claiming concessional rate of tax and, therefore, there is no substance in the said contention.

(c) In so far as claiming the benefit of concessional rate of tax on account of the fact that the invoices mentioned in the 'C' Form pertain to a different quarter, the circular issued by the Commissioner of Commercial Taxes, requires to be interpreted reasonably.

(d) In so far as imposition of penalty is concerned, she submits that, once admittedly 'C' Forms are not furnished and liability to pay tax under the KVAT Act arises, not only the assessee is liable to pay interest but he is liable to pay penalty automatically and, therefore, she submits no case for interference is made out.

QUESTION 1 - WHETHER REASONS TO BE RECORDED IN WRITING

9. Section 39 of the KVAT Act speaks about re-assessment of tax. It reads as under : -

39. Re-assessment of tax.-

(1) Where the prescribed authority has grounds to believe that any return furnished which is deemed as assessed or any assessment issued under Section 38 understates the correct tax liability of the dealer, it, -

(a) may, based on any information available, re-assess, to the best of its judgement, the additional tax

payable and also impose any penalty under sub-section (2) or sub section (5)] of section 72 and demand payment of any interest ; and

(b) shall issue a notice of re-assessment to the dealer demanding that the tax shall be paid within ten days of the date of service of the notice after giving the dealer the opportunity of showing cause against such re-assessment in writing.

(2) Where after making a re-assessment under this Section, any further evidence comes to the notice of the prescribed authority, it may make any further re-assessments in addition to such earlier re-assessment.

10. Once a return is filed by a dealer/assessee under Section 35 of the KVAT Act, the assessee/dealer shall be deemed to have assessed to tax based on the return filed by him. No separate order of assessment is required. However,

if the Commissioner notifies the dealer of any requirement of production of accounts before the Prescribed Authority in support of a return filed for any period, then such authority shall proceed to assess such dealer on the basis of the return filed or to the best of his judgment when the return filed is incomplete or incorrect.

11. Section 39 provides that, where the prescribed authority has grounds to believe that any return furnished which is deemed as assessed or any assessment issued under Section 38 understates the correct tax liability of the dealer, then it may proceed to re-assess and also make any further re-assessment in addition to such earlier re-assessment. As is clear from the language employed in Section 39, before that provision could be invoked there should be grounds to believe that any return furnished earlier understates the correct tax liability. Unless such grounds exist, the assessing authority has no jurisdiction to initiate re-assessment proceedings. In fact, the question, what does the expression '***reason to believe'*** means, was

the subject matter of judgment of the Bombay High Court in the case of ***STATE OF MAHARASHTRA vs KETAN ENTERPRISES AND ANOTHER [2010 30 VST 356 (BOM)]*** where interpreting Section 35 of the Bombay Sales Tax Act, it was held as under : -

> *23. The aforesaid sub-section lays down that when the Commissioner has reason to believe that during the assessment of turnover of any sales or purchases some turnover has either by mistake or by mischief escaped assessment, or has been under assessed or some deductions have been wrongly made or any draw back, set-off or refund has been wrongly granted, he may in case of a dealer who has concealed some sales or purchases or material particulars relating thereto, or has knowingly furnished incorrect returns, within eight years, and in any other case within five years, after giving the dealer an opportunity of being heard, proceed to assess or re-assess him to the best of his judgment.*
>
> *24. Above sub section specifically makes out that there is a distinction of substance between the concept of assessment and reassessment, it is not a one and the same thing. Once the assessment is complete, that can not be re-*

opened merely for asking. The authority is manifestly circumscribed by certain conditions. The power to reassess can be exercised only if those conditions exist and not otherwise. On an analysis of the relevant provisions, the material conditions prescribed for the exercise of the power to commence proceedings for reassessment are to be found under Section 35(I) of the BST Act.

25. The existence of the reasons is a must for holding belief that any turnover of sales or turnover of purchases of any goods has in respect of that year or part thereof escaped assessment, or has been under assessed or assessed at a lower rate, or that any deduction or other benefit referred to under Section 35(1) has been wrongly granted. The first condition thus immediately raises the question about the true import of the expression as "reason to believe" appearing in Section 35(1) of the BST Act.

26. The expression "reason to believe" postulates belief and the existence of reasons for that belief. The expression does not mean a purely subjective satisfaction of the Sales Tax Officer : the forum of decision as to the existence of reasons and the belief is not in the mind of the Sales Tax Officer. The words 'reason to believe' suggest that the belief must be that of an honest and reasonable person based upon reasonable

grounds and that the Sales Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. It cannot be merely a pretence. 'Reason to believe' is a common feature in taxing statutes. It has been considered to be the most salutary safeguard on the exercise of power by the officer concerned. It is made of two words 'reason' and 'to believe'. The word 'reason' means cause or justification and the word 'believe' means to accept as true or to have faith in it. Before the officer has faith or accepts a fact to exist there must be a justification for it. The belief may not be open to scrutiny as it is the final conclusion arrived at by the officer concerned, as a result of mental exercise made by him on the information received. But, the reason due to which the decision is reached can always be examined. The existence of reason(s) to believe is supposed to be the check, a limitation upon the power to reopen the assessment [See the leading decision on this subject in Barium Chemicals V. Company Law Board, AIR 1967 SC 295 at 324.] The power conferred upon the Sales Tax Officer by Section 35(1) is thus not unbridled one. It is hedged with several safeguards conceived in the interest of eliminating room for abuse of this power by the assessing officers. The idea is to save the assessee from harassment resulting from mechanical reopening of assessment. When

it is said the reason to believe is not open to scrutiny what is meant is that the satisfaction arrived at by the officer concerned is immune from challenge but where the satisfaction is not based on any material or it cannot withstand the test of reason, which is an integral part of it, then it falls through and the Court is empowered to strike it down. Belief may be subjective but reason has to be objective. In other words, the expression 'reason to believe' postulates belief and the existence of reasons for that belief. The existence of reasons for the belief is certainly justiciable but not the sufficiency of the reasons. It is, therefore, necessary for the Assessing Officer to record reasons so that the same can be supplied to the assessee in the event of demand by him. In the event of challenge, the higher forum is entitled to examine, it being justiciable. In a nut shell, the expression 'reason to believe' mandates that before jurisdiction under Section 35(1) is invoked by the Assessing Officer, he has to record his reasons for doing so or before issuing notice under Section 35(1) of the BST Act. The formation of belief and recording of reasons are imperative before the Assessing Officer can reopen a completed assessment. A mere change of opinion would not confer jurisdiction upon the Assessing Officer to initiate proceeding under Section 35(1) of the BST Act.

12. A Constitution Bench of the Apex Court also had an occasion to consider the expression '***reason to believe'*** in the case of ***BARIUM CHEMICALS LIMITED AND ANOTHER vs COMPANY LAW BOARD AND OTHERS [AIR 1967 SC 295]*** wherein it was held that, *the words, "reasonable grounds to believe" were to be a restraint on administrative power just as compliance of the rules of natural justice in a quasi judicial power which otherwise would render the power arbitrary. The words "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining "reason to believe or "the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the Court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits. It is an alternative safeguard to rules of natural justice where the function is administrative.*

13. From the aforesaid judgment it is clear that, when an assessment is made either under Section 38 (1) which is called a deemed assessment or an assessment after hearing

the assessee or after the best judgment assessment is made, if such an assessment is to be reopened, it has to be for good and sufficient reasons. Section 39(1) clearly sets out under what circumstances such a re-assessment could be done. It is only when the return furnished understates the correct tax liability. Therefore, unless such a ground exists or at least the assessing authority has reasons to believe that such a ground exists, he cannot initiate proceedings under Section 39(1). To see that such a power conferred under the Act is not unbridled one and it is not exercised with mala fide intention, in order to operate as a check or a limitation or the power to reopen the assessment, it is required that such reasons should be stated in writing. Once such reasons are stated in writing, it is not open to scrutiny unless it is demonstrated that it was not found on relevant facts. The said provision was not to be used as an instrument of oppression. However, if there are material which in the opinion of the assessing authority is sufficient to believe that it is a case of understatement to the correct

tax liability, he is vested with the power to initiate proceedings under Section 39(1) and pass a re-assessment order. If such an opinion is not found in writing, then the entire proceedings would be without jurisdiction.

14. In the instant case, the learned Government Advocate made available the records. It clearly sets out the reasons for initiating the re-assessment proceedings and, therefore, it cannot be said in the instant case the assessing authority has not stated in writing the reasons for initiating proceedings under Section 39(1) of the Act. It is also clear such an objection is not taken at the earliest point of time when a notice under Section 39(1) of the Act was issued on the assessee. The assessee has a right on service of such notice to call upon the assessing authority to furnish a copy of the reasons in writing so that he could suitably defend himself. But, without insisting on that information he files a detailed objection, participate in the re-assessment proceedings and suffers an order, then it is not open to him to contend that the requirements under Section 39(1) is not

complied with. In the instant case, such a contention is raised before the High Court for the first time and it is not permissible in law. For the aforesaid reasons, we do not see any substance in the first contention of the learned counsel for the assessee. Therefore, on the first question of law, we hold that the prescribed authority cannot initiate re-assessment proceedings under Section 39 (1) of the KVAT Act without first recording his suggestion/belief nor there is an understatement of tax liability. In the instant case, as the said requirement is complied with, we do not find substance in the contention of the assessee.

QUESTIONS 2 and 3 -

15. The Apex Court in the case of ***INDIA AGENCIES (REGD.) vs ADDITIONAL COMMISSIONER OF COMMERCIAL TAXES, BANGALORE [(2005) 139 STC 329]*** has held that, *in order to claim concessional rate of tax, the original 'C' Form has to be attached to the return. This requirement is not a mere formality or technicality but it is intended to achieve the object of preventing the forms being misused for the*

commission of fraud and collusion with a view to evade payment of taxes. The statutory provisions in this regard have to be construed strictly. Without producing the original 'C' Form as prescribed under the relevant Section, a dealer is not entitled for concessional rate of tax under Section 8(4) of the CST Act. In that view of the matter, the said question of law is answered in favour of the revenue and against the assessee.

QUESTION 4

16. The Commissioner of Commercial Taxes has issued Circular No. 1/2014-15. Para 2 , 4(a) and 4(b) of the same reads as under : -

> *2. The date of invoice or consignment note indicates the date on which the seller or consignor has effected the sale or stock transfer from the State of Karnataka and the buyer or consignee in the other State would account for such transactions after the goods are delivered to him. Thus, there is a gap of time between the raising of sale invoice or consignment note by a*

dealer of this State and the actual receipt of the goods by the dealer in another State. This time gap may result in change of quarter or month mainly in the cases of sale or stock transfers of goods effected in the last week of the end of a quarter or a month. By the time such goods are received by the purchaser or an agent next quarter or month would have started. The delay in recording the receipt of such goods in the purchase register or stock register by the receiving dealer in the other State may also be due to reasons like quality checking and inspection of such goods by the technical staff and further accounting by the purchase section. In the cases where there is a gap of time for the reasons mentioned above, the date of invoice or stock transfer note may not fit into the same quarter or month of the year or years for which a declaration in 'C' or 'F' form is issued.

4. In the light of the above observations, in the case of receipt and acceptance of 'C' form or 'F' from declarations, the following instructions are issued:

(a) the LVO/VSO or Audit Officers should not straightaway reject the same for the reasons that the date mentioned in the sale invoice or consignment note does not match as the declaration form issued by the dealer of other State pertains to next quarter or month. The primary objective of a 'C' Form or 'F' Form declaration is to ensure that goods are dispatched to other State as a result of sale or otherwise and the same are accounted for by the dealer of other State. As long as this primary objective is met the said declaration forms can be accepted as valid. Therefore, such declarations can be accepted as valid declarations relating to goods delivered in a quarter or month based on the date of dispatch of such goods or date of receipt of such goods in other States or date of invoice or combination of all the three.

(b) In the time gap between the dates mentioned in the documents and the declarations filed by the seller is too large and if the accepting authority is having any doubt regarding the genuineness of such

> *declarations, it is instructed to get the declarations cross verified through the Additional Commissioner (I & C).*

17. In view of the above Circular, the authorities were not justified in not granting relief to the assessee and, therefore, that portion of the impugned order is hereby set aside. The said question of law is answered in favour of the assessee and against the revenue.

QUESTION 5

18. This Court had an occasion to consider the very question in the case of ***STATE OF KARNATAKA vs M/S MAINTEC TECHNOLOGIES PRIVATE LIMITED [STRP Nos. 120/2013 & CONNECTED MATTERS] DECIDED ON 12.6.2014,*** where at para 16 it has been held as under : -

> *"16. From the aforesaid judgment of the Apex Court it is clear, provision for charging interest is introduced in order to compensate for the loss occasioned to the revenue due to delay in payment of tax. The provision for charging of*

interest can only be on the basis of a statutory provision. It is a substantive law. The object is to compensate the revenue for delay in payment of tax. Therefore, effect has to be given to the said provision strictly in accordance with law. So long as the assessee pays the tax which according to him is due on the basis of information supplied in the return filed by him, there would be no default on his part to meet his statutory obligation under the Act. Therefore, it cannot be said that the assessee has not paid the tax which is payable. It is only after the determination of the questions of fact the assessing officer passes the order holding that the assessee is liable to pay tax which he has not paid. Then an opportunity has to be given to the assessee to pay such tax determined after adjudication within the time by raising a demand. If the assessee commits a default in payment of tax within that time, then he would become a defaulter. It is thereafter his liability to pay interest would arise. The reason being the assessee cannot project the final assessment and he cannot be expected to pay the tax on that basis to avoid the liability to pay interest. It would be asking him to do it near

impossible. Therefore, the Apex Court held in those circumstances the liability to pay tax arises only after such adjudication and not earlier to it. There cannot be any quarrel with the said proposition."

19. Therefore, in the instant case, when there is a liability to pay tax under the KVAT Act, when the assessee is not entitled to the concessional rate under the CST Act for not furnishing the 'C' Form, consequently he is liable to pay tax under the KVAT Act. Tax having not been paid on the due date he is liable to pay interest on the said tax, as the interest is compensatory in nature. Therefore, the finding of the authorities levying interest on tax cannot be found fault with. The said question of law is answered in favour of the revenue and against the assessee.

QUESTION 6 - REGARDING PENALTY

20. Section 72 of the KVAT Act deals with penalties relating to assessment. Sub-section (2) of Section 72 reads as under:-

> ***"72. Penalties relating to returns and assessment****:*
>
> *xxx xxx xxx*
>
> *(2) A dealer who for any prescribed tax period furnishes particulars for preparation of a return or furnishes a return which understates his liability to tax or overstates his entitlement to a tax credit by more than five per cent of his actual liability to tax, or his actual tax credit, as the case may be. shall after being given the opportunity of showing cause in writing against the imposition of a penalty, be liable to a penalty equal to ten per cent of the amount of such tax under or overstated.*

21. A reading of the aforesaid provision makes it clear that, when a dealer has filed his return in the prescribed form and he understates his liability to pay tax or overstates his entitlement to a tax credit by more than 5% of his actual liability to tax, he is liable to pay penalty equal to 10% of the amount of such tax under or overstated. However, before levying penalty he shall be given an opportunity of showing cause in writing against the imposition of penalty. It is only

after considering the said cause, the penalty could be imposed. Therefore, it is clear that imposition of penalty under Section 72 (2) is not automatic. A discretion is conferred on the assessing authority to impose penalty or not and the rate of such penalty is statutorily provided. The Apex Court in the case of ***HINDUSTAN STEEL LIMITED vs THE STATE OF ORISSA*** [(1970) VOL. 25 STC 211] has categorically held that, *liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasicriminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances.*

22. This Court also had an occasion to consider Section 12 B (4) of the Karnataka Sales Tax Act in the case of ***M/S XEROX INDIA LIMITED vs THE STATE OF KARNATAKA [STRP No. 298/2013] decided on 21.11.2013.*** In that regard it was held that, *the nonpayment of tax along with the returns or at the end of the financial year cannot be said to be willful, deliberate or contumacious and that the assessee was acting deliberately in defiance of law or was guilt of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty cannot be imposed merely because it is lawful to do so.*

23. The Apex Court in the case of ***GULJAG INDUSTRIES vs COMMERCIAL TAXES OFFICER [(2007) 9 VST 1]*** dealing with the penalty provision under the Rajasthan Sales Tax Act, 1994 held as under:-

> *"22. There is dichotomy between contravention of Section 78(2) of the said Act which invites strict civil liability on the assessee*

and the evasion of tax. When a statement of import/export is not filed before the A.O. it results in evasion of tax, however, when the goods in movement are carried without the declaration Form No.18A/18C then strict liability comes in, in the form of Section 78(5) of the said Act. Breach of Section 78(2) imposes strict liability under Section 78(5) because as stated above goods in movement cannot be carried without Form No.18A/18C. We are not concerned with non-filing of statements before the A.O. We are concerned with the goods in movement being carried without supporting declaration forms. The object behind enactment of Section 78(5) which gives no discretion to the competent authority in the matter of quantum of penalty fixed at 30 per cent of the estimated value is to provide to the State a remedy for the loss of revenue. The object behind enactment of Section 78(5) is to emphasise loss of revenue and to provide a remedy for such loss. It is not the object of the said Section to punish the offender for having committed an economic offence and to deter him from committing such offences. The penalty imposed under the said Section 78(5) is a civil liability.

Willful consignment is not an essential ingredient for attracting the civil liability as in the case of prosecution. Section 78(2) is a mandatory provision. If the declaration Form 18A/18C does not support the goods in movement because it is left blank then in that event Section 78(5) provides for imposition of monetary penalty for non-compliance. Default or failure to comply with Section 78(2) is the failure/default of statutory civil obligation and proceedings under Section 78(5) is neither criminal nor quasi-criminal in nature. The penalty is for statutory offence. Therefore, there is no question of proving of intention or of mens rea as the same is excluded from the category of essential element for imposing penalty. Penalty under Section 78(5) is attracted as soon as there is contravention of statutory obligations. Intention of parties committing such violation is wholly irrelevant. Moreover, in the present case, we find that goods in movement carried with Form No.18A/18C. The modus operandi adopted by the assessees itself indicates mens rea. This is not the case where goods in movement are carried without the declaration forms. In the present matter, as

stated above, goods in movement were carried with the declaration forms. These forms were duly signed, however, material particulars were not filled in. The explanation given by the assessees in most of the cases is that they are not responsible for the misdeeds of the consignors. The other explanation given by the assessees is regarding the language problem. There is no merit in these defences. They are excuses. The declaration forms were unfilled so that they could be used again and again. The forms were collected by the consignee from the said Department. The consignee undertakes to see that the value of the goods is supplied by the consignor. It is not open to the consignee to keep the column in respect of the description of goods as blank. Even the column dealing with nature of transaction is left blank. The consignee is the buyer of the goods. He knows the descriptions of the goods which he is supposed to buy. There is no reason for leaving that column blank. Therefore, there are no special circumstances in any case for waiver of penalty for contravention of Section 78(2). The assessees were fully aware that the goods in movement had to be supported

by Form ST 18A/18C. Therefore, they made the goods travelled with the forms. However, the said forms are left blank in all material respects. Therefore, A.O. was right in drawing inference of mens rea against the assessees. It has been repeatedly argued before us that apart from the declaration forms the assessees possessed documentary evidence like invoice, books of accounts etc to support the movement of goods and, therefore, it was open to the assessees to show to the competent authority that there was no intention to evade the tax. We find no merit in this argument. Firstly, we are concerned with contravention of Section 78(2) which requires the goods in movement to travel with the declaration in Form 18A/18C duly filled in. It is Section 78(2)(a) which has been contravened in the present case by the assessees by carrying the goods with blank forms though signed by the consignee. In fact, the assessees resorted to the above modus operandi to hoodwink the competent officer at the check-post. As stated above, if the form is left incomplete and if the description of the goods is not given then it is impossible for the assessing officer to assess the

taxable goods. Moreover, in the absence of value/price it is not possible for the A.O. to arrive at the taxable turnover as defined under Section 2(42) of the said Act. Therefore, we have emphasized the words "material particulars" in the present case. It is not open to the assessees to contend that in certain cases of interstate transactions they were not liable in any event for being taxed under the RST Act 1994 and, therefore, penalty for contravention of Section 78(2) cannot be imposed. As stated hereinabove, declaration has to be given in Form 18A/18C even in respect of goods in movement under interstate sales. It is for contravention of Section 78(2) that penalty is attracted under Section 78(5). Whether the goods are put in movement under local sales, imports, exports or interstate transactions, they are goods in movement, therefore, they have to be supported by the requisite declaration. It is not open to the assessee to contravene and say that the goods were exempt. Without disclosing the nature of transaction it cannot be said that the transaction was exempt. In the present case, we are only

concerned with the goods in movement not being supported by the requisite declaration."

24. That was a case where there was an obligation cast under law on the transporter to carry along with goods the declaration in Form No. 18A/18C, if the said forms are not carried along with the goods, then penalty is liable to be imposed by virtue of Section 78(5) of the Act. Though before imposing penalty the person in charge of the goods vehicle should be given a reasonable opportunity of being heard, after so heard if it is proved that he was not carrying the documents along with the goods, then the authority has no discretion except to impose the penalty equal to 30% of the value of such goods. In that context the Apex Court held that, it is a case of strict civil liability, the object behind enacting Section 78(5) is to emphasize loss of revenue and to provide a remedy for such loss, it is not the object of the said Section to punish the offender for having committed an economic offence and to deter him from committing such offence.

25. That judgment has no application to the facts of this case. The language employed in the aforesaid provision is totally different from the language used in Section 72(2). To attract Section 72 (2) the condition precedent is the return filed by the dealer should understate the liability. It is only on that condition being fulfilled, an opportunity should be given to the dealer to show cause in writing against the imposition of penalty. If the cause shown is not satisfactory, then the penalty equal to 10% of the amount of such tax under or overstated could be levied. From the aforesaid language in the Section it is clear that imposition of penalty under Section 72 (2) is not automatic. Even though no *mens rea* is required to attract the said provision, unless it is established that the assessee/dealer has understated his liability to tax, the question of imposing any penalty under the said provision would not arise. Understating the liability is a *sine qua non* for attracting Section 72 (2) of the Act.

26. In the instant case, the assessee has filed the declaration claiming concessional rate of tax in respect of inter state sales to which he is entitled to in law. On the day he filed such declaration he has not made any understatement. Whatever statement he has made in such declaration is strictly in accordance with the provisions of the CST Act. The provisions of the CST Act also provides for 3 months time to the purchaser to furnish the 'C' Form. Even after the assessment order is passed and the dealer/assessee is denied the benefit of concessional rate of tax under the CST Act on the ground that 'C' Forms are not furnished, if he is able to secure the Forms either at the time of assessment before the assessing authority or he is able to produce the said 'C' Forms before the first Appellate Authority or the second Appellate Authority, the judicial opinion is that he is entitled to the benefit of the said concessional rate of tax. In fact, in the instant case, on production of 'C' Form at the appellate stage, the Appellate Authority has granted the benefit of concessional rate which

had been denied by the assessing authority on the ground that the 'C' Forms were not furnished. Therefore, it is not a case of assessee trying to understate his liability to tax. His conduct in claiming concessional rate of tax in his return cannot be construed as a deliberate act in defiance of law or contumacious or dishonest or acted in conscious disregard of its obligations. On the contrary his declaration is in accordance with the provisions of the CST Act. On a representation made by the purchaser he has sold the goods claiming concessional rate of tax. When the purchaser is unable to produce the 'C' Form for any reason whatsoever, then the liability is cast on the assessee to pay tax under the KVAT Act. The said tax ought to have been paid on the date of sale and if there is a delay in payment of the said tax, by virtue of Section 36 of the Act which makes payment of interest automatic and mandatory, he is liable to pay tax and interest, thus he is compensating the revenue for the delay in payment of tax which should have been legitimately paid on the day he filed the returns. But, by no stretch of

imagination it could be said that he had any intention of avoiding any payment of tax or his action is contrary to any law or that he is understating his liability to pay tax in the returns. Therefore, he cannot be saddled with the liability to pay penalty for no fault of his. Therefore, the order passed by the authorities levying penalty is unjustified and illegal. Accordingly, it is hereby set aside. For the aforesaid reasons, the question of law is answered in favour of the assessee and against the revenue and, therefore, the order imposing penalty is hereby set aside.

27. For the aforesaid reasons, the revision petitions are partly allowed.

Sd/-
JUDGE

Sd/-
JUDGE

ckl/-