

Court No. - 5

Case :- SALES/TRADE TAX REVISION No. - 40 of 2021

Revisionist :- Durga Steel Rolling Mills Thru.Partner Amit Arora

Opposite Party :- Commissioner Of Commercial Taxes U.P.Lucknow

Counsel for Revisionist :- Mudit Agarwal

Counsel for Opposite Party :- C.S.C.

alongwith

Case :- SALES/TRADE TAX REVISION No. - 39 of 2021

Revisionist :- Durga Steel Rolling Mills Thru.Partner Amit Arora

Opposite Party :- Commissioner Of Commercial Taxes U.P.Lucknow

Counsel for Revisionist :- Mudit Agarwal

Counsel for Opposite Party :- C.S.C.

Hon'ble Abdul Moin,J.

1. Heard Shri Mudit Agarwal, learned counsel for the revisionist and Shri Sanjay Sarin, learned Additional Chief Standing Counsel appearing for the respondent.

2. Learned counsels appearing for the parties contend that the issue involved in SALES/TRADE TAX REVISION No. - 40 of 2021 and SALES/TRADE TAX REVISION No. - 39 of 2021 are the same. As such, the Court proceeds to hear and decide both the revisions together. For convenience, facts of SALES/TRADE TAX REVISION No. - 40 of 2021 are being taken.

3. This Court vide the order dated 17.08.2021 had admitted the revision. However the questions of law were not framed.

4. Both the learned counsels state that the questions of law which would be relevant for deciding the controversy involved in the instant revision would be as follows:

"(I) Whether the men-rea on the part of the assessee is an essential pre-requisite condition for imposition of penalty under Section 54(1)(2) of the U.P. VAT Act, 2008?"

(II) Whether penalty under Section 54(1)(2) of the Act can be imposed where the assessment is made on the basis of Best Judgement Assessment?

(IV) Whether imposition of penalty of 7 times the total tax imposed towards alleged concealed turnover was justified when the express provision of Section 54(1)(2) of the Act provides for imposition of a maximum penalty of 3 times of concealed turnover?"

5. Shri Mudit Agarwal, learned counsel for the revisionist states that although a counter affidavit has been filed in the revision but he does not intend to file any reply thereto and wants to argue the matter finally.
6. As such the Court proceeds to hear and decide the matter finally.
7. The instant revision has been filed challenging the judgement and order dated 06.04.2021 passed by the learned Commercial Tax Tribunal, Bench-2, Lucknow (hereinafter referred to as learned Tribunal) in Second Appeal No. 50 of 2017.
8. The case set forth by learned counsel for the revisionist is that a survey took place on the premises of the revisionist on 23.12.2008. The stock is alleged to have been noted by the surveyors on the basis of presumption. The stock was found to be recorded more in the books of accounts of the revisionist vis a vis the physical stock. An assessment order dated 30.10.2010, a copy of which is annexure 1 to the revision, was passed against the revisionist under the provisions of Section 28(2) of the U.P. V.A.T. Act, 2008 (hereinafter referred to as the Act, 2008). By the said assessment order the disputed demand was indicated as Rs 12,44,653/-. Being aggrieved, the revisionist filed a first appeal. The learned appellate authority, vide the order dated 27.06.2012, a copy of which is annexure 2 to the revision, reduced the disputed demand by Rs 6,21,875/- and thus a demand of Rs 6,22,778/- remained. Still being aggrieved, the revisionist filed an appeal before the learned Tribunal and at the same time the Department also filed an appeal. Both the appeals were clubbed together and were decided vide common judgement and

order dated 22.06.2016, a copy of which is annexure 3 to the revision, whereby the appeal of the revisionist was partly allowed while the appeal of the department was dismissed. While allowing the appeal, learned Tribunal gave a relief to the revisionist of Rs 3,25,625/- thus assessing the tax liable to be paid by the revisionist at Rs 2,46,250/- as stated by Shri Mudit Agarwal, learned counsel for the revisionist.

9. Shri Agarwal states that the judgement and order dated 22.06.2016 passed by the learned Tribunal attained finality as it was not challenged by the revisionist rather the revisionist acquiesced to the said order and has paid the aforesaid amount of Rs 2,46,250/-.

10. It is contended that during pendency of the aforesaid proceedings, a notice dated 30.01.2013 under Section 54(1)(2) of the Act, 2008, a copy of which is annexure 4 to the revision, had been issued to the revisionist. The revisionist filed his reply. Vide order dated 08.05.2013, a copy of which is annexure 5 to the revision, an order of penalty was passed whereby the revisionist has been required to pay an amount of Rs 18,65,625/- against the assessed tax of Rs 6,21,875/-. Being aggrieved the revisionist filed an appeal which was rejected vide the order dated 30.09.2016, a copy of which is annexure 7 to the petition. Still being aggrieved the revisionist filed a second appeal before the learned Tribunal which has also been dismissed vide the judgement and order dated 06.04.2021 as annexed to the revision. Being aggrieved the instant revision has been filed.

11. The argument of learned counsel for the revisionist is that a perusal of serial no. 2 of the table, as provided in Section 54(1) of the Act, 2008, would indicate that in order to attract the penalty, a finding has to be specifically recorded that the dealer has concealed the particulars of his turnover or has deliberately furnished inaccurate particulars of such turnover or has submitted a false tax return or has evaded payment of tax which he is liable to pay under the Act and only after such a finding has been recorded by the competent authority can the penalty be imposed.

12. The contention is that a perusal of the order impugned would indicate that no finding of the revisionist having deliberately concealed the particulars of his turnover or having deliberately furnished inaccurate particulars or having deliberately evaded payment of tax has been indicated and consequently the competent authority patently erred in imposing the penalty which aspect has not been considered by the appellate authority as well as by the learned Tribunal while dismissing the second appeal filed by the revisionist vide the judgement and order dated 06.04.2021.

13. Learned counsel for the revisionist also states that the provisions of section 54(1) of the Act, 2008 are akin to the provisions of Section 15A of the UP Sales Tax Act, 1948 renamed as U.P. Trade Tax Act, 1948 with retrospective effect (now repealed).

14. In this regard reliance has been placed on the judgements of this Court in the case of **M/s Moti Lal Jawahar Lal vs The Commissioner of Sales Tax, U.P., Lucknow, 2003 NTN (Vol.23) 590, The Commissioner, Sales Tax, U.P., Lucknow vs S/s Shanti Swarup Raj Kumar Katra Naj, Moradabad, STI 1998 ALLAHABAD HIGH COURT 394, The Commissioner of Sales Tax, Uttar Pradesh vs Sanjiv Fabrics, 2010 (9) SCC 630.**

15. Placing reliance on the division bench judgement of this Court in the case of **S.S. Flabours vs State of U.P. and another, 2016 (61) NTN DX 100** the argument of learned counsel for the revisionist is that this Court, after considering the provisions of Section 15A of the Trade Tax Act, 1948 (hereinafter referred to as the Act, 1948) has held the said provisions to be akin to Section 54 of the Act, 2008 and has thereafter held that in order to impose penalty, specific finding of concealment or furnishing of wrong particulars of return has to be made and in absence thereto, the order of imposition of penalty cannot be said to be legally sustainable in the eyes of law meaning thereby that mens-rea is a necessary ingredient for imposition of penalty.

16. Reliance has also been placed on the definition of "Tax Evasion" as per Blacks' Law Dictionary, 8th Edition.

17. No other argument has been raised.

18. On the other hand, Shri Sanjay Sarin, learned Additional Chief Standing Counsel appearing for the respondent argues that none of the aforesaid judgements have considered the full purport of column no. 2 of the table of Section 54 (1) of the Act 2008 in as much as one of the wrong on which the penalty can be imposed, as provided in the table, is the evasion on the part of the dealer for payment of tax which he is liable to pay under the Act.

19. The argument of Shri Sarin is that when the judgement and order dated 22.06.2016 passed by learned Tribunal whereby the revisionist has been assessed for payment of tax of Rs 2,45,250/- has attained finality and the revisionist has also deposited the tax as such the said payment of tax by revisionist would fall within the ambit of being an evasion of payment of tax which the revisionist has been held liable to pay under the provisions of the Act, 2008 and consequently the penalty can validly be imposed on the revisionist which in fact has been done by means of the order impugned dated 06.04.2021.

20. Shri Sarin however fairly submits that as the amount of tax has been reduced from one stage to another and finally stood at Rs 2,46,250/- consequently three times the aforesaid amount can validly be imposed on the revisionist but in the instant case a still higher amount has been imposed.

21. So far as the judgements of this Court in the case of **M/s Moti Lal Jawahar Lal (supra)**, **S/s Shanti Swarup Raj Kumar Katra Naj (supra)**, **Sanjiv Fabrics (supra)** and **S.S. Flabours (supra)** are concerned more particularly the division bench judgement of this Court in the case of **S.S. Flabours (supra)** the argument of Shri Sarin is that the division bench, although has held that the provisions of Section 15A

of the Act, 1948 are pari-materia to provisions of Section 54(1) of the Act 2008, yet the division bench has not considered that there was no provision under the Act 1948 which provided for imposition of penalty where the dealer has evaded payment of tax which he is liable to pay under the said Act and thus it is argued that the said judgement would not be applicable in the facts of the instant case.

22. Heard the counsels for the parties and perused the records.

23. From perusal of the record it emerges that a survey took place at the premises of the revisionist on 23.12.2008. An assessment order dated 30.10.2010 was passed against the revisionist under the provisions of section 28(2) of the Act, 2008 whereby disputed demand was indicated as Rs 12,44,653/-. The revisionist filed the first appeal and the appellate authority vide order dated 27.06.2012 reduced the disputed demand by Rs 6,21,875/- and thus a demand of Rs 6,22,778/- remained. The revisionist as well as the Revenue filed second appeals against the said order dated 27.06.2012. Both the appeals were clubbed together and decided vide judgement and order dated 22.06.2016 by the learned Tribunal whereby the appeal of the revisionist was partly allowed while the appeal of the Revenue was dismissed. While allowing the appeal of the revisionist learned Tribunal has given a relief of Rs 3,25,625/- thus assessing the tax liability to be paid by the revisionist at Rs 2,46,250/-. The said order has attained finality. The amount of tax has also been deposited by the revisionist.

24. During pendency of the aforesaid proceedings, a notice under Section 54(1)(2) of the Act, 2008 was issued to the revisionist. The revisionist filed his reply. Vide the order dated 08.05.2013 an order of penalty has been passed whereby the revisionists has been required to pay an amount of Rs 18,65,625/- against the assessed tax of Rs 6,21,875/-. Being aggrieved the revisionist filed an appeal which has been rejected vide the order dated 30.09.2016. Still being aggrieved, a second appeal was filed before the learned Tribunal which has been

dismissed vide judgement and order dated 06.04.2021. Being aggrieved the instant revision has been filed.

25. The argument of learned counsel for the revisionist is that a perusal of serial no. 2 of table as provided in Section 54 (1) of the Act, 2008 would indicate that in order to levy a penalty, a finding has to be specifically recorded that the dealer, in this case the revisionist, has concealed particulars of turnover or has deliberately furnished inaccurate particulars of such turnover or has submitted a false tax return or has avoided payment of tax which he is liable to pay under the Act and only when a specific finding to the said effect has been recorded by the competent authority can the penalty be imposed.

26. The argument of learned counsel for the revisionist is that there has to be a specific finding of mens-rea by the authorities concerned of a deliberate attempt to evade tax and only after such a finding has been recorded can a penalty be imposed and in the absence of such finding the penalty as imposed on the revisionist vide the order impugned dated 08.05.2013 cannot be said to be legal and valid in the eyes of law.

27. In order to consider the arguments of learned counsel for the revisionist as to whether mens-rea would be an essential ingredient in the levy of penalty under Section 54(1)(2) of the Act, 2008 the Court may refer to the provisions of Section 54 of the Act, 2008.

28. For the sake of convenience, the relevant extract of Section 54 of the Act 2008 is reproduced as under:

54. Penalties in certain cases

(1) The assessing authority, if he is satisfied that any dealer or other person, as the case may, has committed the wrong described in column (2) of the table below, it may, after such inquiry, if any, as it may deem necessary and after giving dealer or person reasonable opportunity of being heard, direct that such dealer or person shall, in addition to the tax, if any, payable by him, pay by way of penalty, a sum as provided in column (3) against the same serial no. of the said table:

Sl. No.	Wrong	Amount of Penalty
1.
2.	<i>The dealer has concealed particular of his turnover or has deliberately furnished inaccurate particulars of such turnover; or submits a false tax return under this Act or evades payment of tax which he is liable to pay under this Act</i>	<i>three times of amount of tax concealed or avoided</i>
3.

Explanation – For the purposes of this section -

(i) the assessing authority includes an officer not below the rank of an officer appointed and posted by the Commissioner at a check-post or an officer empowered to exercise powers under sections 45, 46, 47, 48, 50, 51 and 52 of this Act;

(ii) if the value of goods described or mentioned in tax invoice, sale invoice or any such other document is under valued to the extent of more than fifty percent of the value of goods prevalent at the relevant time in the local market area where the transaction has taken place, the estimated value prevalent at the relevant time in such local market area shall be deemed to be the value of such goods,

(iii) if the value of goods is not described or mentioned in tax invoice, sale invoice or any such other document the estimated value prevalent at the relevant time in the local market area where the transaction has taken place, shall be deemed to be the value of such goods."

29. From perusal of Section 54 of the Act, 2008, so far as it is relevant to the facts of the instant case, it emerges that in case the assessing authority is satisfied that any dealer or other person has committed the wrong described in Column (2) of the table then it may direct such dealer or person to pay by way of penalty a sum as provided in column 3 against the same serial number.

30. Serial no. 2, with which the present controversy pertains to, describes the wrong committed by the dealer whereby where the dealer has

concealed particulars of his turnover or has deliberately furnished inaccurate particulars of such turnover or submits a false tax return under the Act 2008 or evades the payment of tax which he is liable to pay under the Act, 2008 then three times of amount of tax concealed or avoided can be imposed as penalty.

31. So far as the present controversy is concerned, the wrong as has been attributed to the revisionist, is evasion of payment of tax which he is liable to pay under the Act, 2008. The evasion of payment of tax has been indicated to be on the basis of assessment order dated 30.10.2010 as passed under the provisions of Section 28(2) of the Act, 2008 further reduced by order dated 27.06.2012 and still reduced vide the judgement and order dated 22.06.2016 whereby learned Tribunal has assessed the tax liable to be paid at 2,46,250/-.

32. Here it would also be pertinent to refer to the provisions of Section 28 of the Act 2008 per which the initial assessment order dated 30.10.2010 had been passed.

33. For the sake of convenience, the provision of Section 28 of the Act, 2008 is reproduced below:

"28. Assessment of tax after examination of Records.-

(1) In following types of cases or dealers, the assessing authority, after detailed examination of books, accounts and documents kept by the dealer in relation to his business and other relevant records, if any, and after making such inquiry as it may deem fit, subject to provision of sub-section (9), shall pass an assessment order for an assessment year in the manner provided in this section:

(a) in cases of such dealers as are specified or selected for tax audit by the Commissioner or any other officer, not below the rank of a Joint Commissioner, authorized by the Commissioner in this behalf; in such manner and within such time as may be prescribed;

(b) in case of a dealer falling in any of the categories below,

(i) dealer who has not submitted annual return of turnover and tax within the time prescribed or extended; or

(ii) dealer by whom tax return for one or more tax periods of the assessment year have not been submitted; or

(iii) dealer in whose case assessing authority has passed provisional assessment order under section 25 in respect of one or more tax periods to the best of its judgment; or

(iv) dealer in whose case, on the basis of material available on records, if the assessing authority is satisfied that the turnover of sales or purchases or both, as the case may be, and amount of tax shown payable as disclosed by the dealer in annual return of turnover and tax are not worthy of credence or tax shown payable in the return has not been deposited by the dealer, or the amount of input tax credit claimed is wrong or the amount of tax payable shown is incorrect; or

(v) dealer who has prevented or obstructed an officer empowered to make audit, survey, inspection, search or seizure under the provisions of this Act; or

(vi) [Omitted]

(2) Where after examination of books, accounts, documents and other records referred to in sub-section (1), -

(i) the assessing authority is satisfied about correctness of turnover of sale or purchase or both, as the case may be, disclosed by the dealer, it may assess the amount of tax payable by the dealer on such turnover and determine the amount of input tax credit admissible to the dealer or amount of reverse input tax credit payable by the dealer; and

(ii) where assessing authority is of the opinion that turnover of sale or purchase or both, as the case may be, disclosed by the dealer is not worthy of credence, it may determine to the best of its judgment the turnover of sale

or purchase or both, as the case may be, and assess the tax payable on such turnover and determine admissible amount of input tax credit and reverse input tax credit payable by the dealer.

(3) Before making an assessment under sub-section (2), dealer shall -

(i) be required to furnish annual return of turnover and tax referred to in sub-section (7) of section 24, if he has not already submitted such return;

(ii) be given reasonable opportunity of being heard; and

(iii) be served with a notice to show cause, where determination of turnover, input tax credit or reverse input tax credit, or assessment of tax, all or any one of them, as the case may be, are to be made to the best of the judgment of the assessing authority.

(4) The show cause notice referred to in sub-section (3) shall contain all such reasons on which the assessing authority has formed its opinion about incorrectness of the turnover of sale or purchase or both, as the case may be, amount of tax, amount of input tax credit or amount of reverse input tax credit:

(5) Order of assessment shall be in writing and copy of assessment order along with prescribed notice of demand of the balance amount of tax, if any, to be deposited by the dealer, shall be served on the dealer.

(6) Dealer shall deposit amount of tax assessed in excess of amount of tax deposited by him for the assessment year, within a period of thirty days after the date of service of the assessment order and notice of demand.

(7) Where the amount of tax deposited by the dealer is found in excess of tax assessed, the same shall be refunded to the dealer according to the provisions of this Act.

(8) Assessing authority shall not be precluded from making assessment order under this section on the ground of passing of any provisional assessment order in respect of any tax period under section 25 and such provisional assessment order, if any, shall stand merged in the assessment order passed under this section.

[(9) Notwithstanding anything to the contrary in any other provision of this Act, where an unregistered dealer brings any taxable goods from outside the State more than once during an assessment year, separate assessment relating to goods brought on each occasion may be made for the same assessment year.]

(10) The provisions of this Act shall apply to each assessment order passed under sub-section (9) as they apply to an order passed under sub-section (2).

(11) Dealers under sub-section (9) shall not be required to furnish annual return of turnover and tax and in cases of such dealers assessment under sub-section (9) may be made even before the expiry of the assessment year.

(12) Provisions of sub-sections (5), (6) and (7) shall, mutatis mutandis, apply to every assessment order passed under any provisions of this Act."

34. A perusal of Section 28(2) of the Act 2008 would indicate that where after examination of books, accounts and other records referred to in Section 28(1) of the Act, 2008 the assessing authority is satisfied about correctness of sale or purchase or both, it may assess the amount of tax payable by the dealer. Where the assessing authority is of the opinion that turnover of sale or purchase or both, disclosed by the dealer is not worthy of credence, it may determine to the best of its judgement the turnover of sale or purchase or both and assess the tax payable on such turnover and determine the taxable amount of input tax credit and reverse input tax credit payable by the dealer.

35. A further perusal of Section 28(2) of the Act 2008 indicates that the power of assessment of the amount of tax payable by the dealer on such turnover and for determining the amount of input tax credit admissible to the dealer has been given to the assessing authority and further where the assessing authority is of the opinion that turnover of sale or purchase or both disclosed by the dealer is not worthy of credence it may determine to the **best of its judgement** the turnover of sale or purchase or both and assess the tax payable on such turnover. Exercising the power, as vested

in the assessing authority, the order dated 30.10.2010 had been passed which upon further scrutiny after challenge at various levels, has resulted in judgement and order dated 22.06.2016 whereby the second appeal of the revisionist has been partly allowed and on the basis of the tax liable to be paid by the revisionist, the penalty as provided under Section 54 (1) (2) of the Act, 2008 has been imposed.

36. The assessment order dated 30.10.2010 would indicate that the same has been passed considering the provisions of Section 28(2) of the Act, 2008 on the basis of best of its judgement meaning thereby that it is an assessment which has been made by the assessing authority.

37. The jurisdiction of the assessing authority while taking recourse to the "best judgement assessment" is well settled. Hon'ble Supreme Court in the cases of **State of Kerala vs C. Velukutty 1966 (60) ITR 239 (SC)**, **The Commissioner of Income Tax, Calcutta v. Padamchand Ramgopal, 1970 (3) SCC 866**, **M/s Joharmal Murlidhar and co. v. Agricultural Income Tax Officer, Assam and others, 1970 (3) SCC 331** and **Shri S. M. Hasan, S.T.O. Jhansi and another v. M/s New Gramophone House, Jhansi, (1976) 4 SCC 854**, has categorically held that while assessing on the basis of "best judgement" the assessing authority has to make the assessment honestly and on the basis of intelligent well grounded **estimate** rather than pure surmises i.e. the assessment so made while taking recourse to the "best judgement assessment" should be on **reasonable guess** based upon the material available before the assessing authority.

38. Being armed with the aforesaid interpretation of "best judgement assessment" it can safely be presumed that the assessment order dated 30.10.2010 passed under Section 28(2) of the Act, 2008 was passed by the assessing authority on a reasonable guess or well grounded estimate.

39. At the same time, the penalty which has been imposed on the revisionist in terms of Section 54(1)(2) of the Act, 2008 indicates that the

same has been passed on the basis of the assessment order under Section 28(2) of the Act, 2008 on the ground of evasion of payment of tax which the revisionist was liable to pay under the Act.

40. "Tax evasion" has been defined in the Black Law Dictionary, 9th Edition as follows:

"tax evasion. The willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability."

41. From perusal of the aforesaid definition of 'tax evasion' it emerges that tax evasion has been defined as a **willful** attempt to defeat or circumvent the tax law in order to illegally reduce ones tax liability. The word "willful" would mean a deliberate attempt to circumvent the tax law.

42. As already indicated above, the order of penalty passed under Section 54(1)(2) of the Act, 2008 is based on the order of the assessing authority as passed under Section 28(2) of the Act, 2008. The assessment order under Section 28(2) of the Act, 2008 is on the basis of well grounded estimate or reasonable guess as held by Hon'ble Supreme Court meaning thereby that the said order does not indicate the willful attempt to defeat or circumvent the tax law to reduce the tax liability. Once the sine qua non to imposition of penalty is evasion of payment of tax and for evasion there has to be a willful act consequently the Court will have to examine as to whether there has been willful act on the part of the revisionist in evasion of tax.

43. For this, the Court will also have to consider as to whether mens-rea would be an essential ingredient or element in order to attract the offences under Section 54(1)(2) of the Act, 2008.

44. In this regard, Hon'ble Supreme Court in the case of **Sanjiv Fabrics (supra)** has held as under:

"24. Whether an offence can be said to have been committed without the necessary mens rea is a vexed question. However,

the broad principle applied by the courts to answer the said question is that there is a presumption that mens rea is an essential ingredient in every offence but the presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals and both must be considered. (See: Sherras Vs. De Rutzen and State of Maharashtra vs Mayon Han George).

25. Although in relation to the taxing statutes, this Court has, on various occasions, examined the requirement of mens rea but it has not been possible to evolve an abstract principle of law which could be applied to determine the question. As already stated, answer to the question depends on the object of the statute and the language employed in the provision of the statute creating the offence. There is no gain saying that a penal provision has to be strictly construed on its own language.

26. In Nathulal vs State of Madhya Pradesh 11, while dealing with the question whether to constitute an offence under Section 7 of the Essential Commodities Act, 1955 which provides for levy of penalty for contravention of any order made under Section 3 of the State Act mens rea is an essential ingredient, a three-Judge Bench of this Court observed as follows:

"Mens rea is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of mens rea, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The nature of the mens rea that would be implied in a

statute creating an offence depends on the object of the Act and the provisions thereof."

27. *In Union of India & Ors Vs Dharamendra Textile Processors & ors 12 while examining the scope of Section 11-AC of the of the Central Excise Act, 1944, a three judge Bench of this Court, observed that:*

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

30. To put it succinctly, in examining whether mens rea is an essential element of an offence created under a taxing statute, regard must be had to the following factors:

(i) the object and scheme of the statute;

(ii) the language of the section and;

(iii) the nature of penalty.

31. *It is true that the object of Section 10(b) of the Act is to prevent any misuse of the registration certificate but the legislature has, in the said Section, used the expression "falsely represents" in contradistinction to "wrongly represents." Therefore, what we are required to construe is whether the words "falsely represents" would cover a mere incorrect representation or would embrace only such representations which are knowingly, wilfully and intentionally false.*

32. *According to the Black's Law Dictionary (6th Edition), the word "false" has two distinct and well-recognized meanings: (1) intentionally or knowingly or negligently untrue; (2) untrue by mistake or accident, or honestly after the exercise of reasonable care. A thing is called "false" when it is done, or made, with knowledge, actual or constructive, that it is untrue or illegal, or is said to be done falsely when the meaning is that the party is in fault for its error.*

33. *Likewise, P. Ramanatha Aiyar in Advance Law Lexicon (3rd Edition, 2005) explains the word "false" as:*

"In the more important uses in jurisprudence the word implies something more than a mere untruth; it is an untruth coupled with a lying intent.....or an intent to deceive or to perpetrate some treachery or fraud. The true meaning of the term must, as in other instances, often be determined by the context'."

36. In view of the above, we are of the considered opinion that the use of the expression "falsely represents" is indicative of the fact that the offence under Section 10(b) of the Act comes into existence only where a dealer acts deliberately in defiance of law or is guilty of contumacious or dishonest conduct. Therefore, in proceedings for levy of penalty under Section 10A of the Act, burden would be on the revenue to prove the existence of circumstances constituting the said offence."

(emphasis by the Court)

45. From perusal of the judgement of **Sanjiv Fabrics (supra)** it emerges that Hon'ble Apex Court has held that in examining whether the mens-rea is an essential element of an offence created under a taxing statute, regard must be had to the following factors namely:

- (i) the object and scheme of the statute;
- (ii) the language of the section; and
- (iii) the nature of penalty.

46. The object of Section 54 of the Act, 2008 is to impose penalty if any dealer or person has committed wrong described in column (2) of the table. So far as serial no. 2 of the table is concerned the same reads that where a dealer has concealed the particulars of his turnover or has deliberately furnished inaccurate particulars of such turnover or has submitted a false tax return under the Act or has evaded payment of tax which he is liable to pay under the Act then three times the amount of tax concealed or avoided is to be imposed as a penalty.

47. From the language of the Section it is thus clear that, so far as the present controversy is concerned, the dealer would be liable to pay penalty for evasion of tax. 'Evasion of tax' is a willful attempt to defeat

or circumvent tax law as defined in Blacks Law Dictionary. The penalty is based on the assessment order under Section 28(2) of the Act, 2008. In turn the assessment order is based on "best judgement assessment" which has been held by the Hon'ble Supreme Court to be on well grounded estimate or reasonable guess based.

48. The revisionist has already paid the tax as assessed after modification by the learned Tribunal vide the order dated 22.06.2016. At no stage is there any finding of any willful evasion of tax by the revisionist or a finding of there being any deliberate attempt on the part of the revisionist in avoiding the payment of tax. It is for the authorities to specifically prove the evasion of payment of tax on the part of the revisionist where the evasion has been defined as a willful attempt i.e. the authorities would have to prove a willful attempt on the part of the revisionist to evade tax. In absence thereto the order imposing penalty on the revisionist based on the assessment order passed under Section 28(2) of 2008 cannot be said to fall within the ambit of any of the eventualities as provided under Section 54(1)(2) of the Act 2008 more particularly it cannot be considered to be an evasion of payment of tax by the dealer / revisionist so as to attract the penalty as has been imposed on the revisionist.

49. Keeping in view the aforesaid discussion, the questions of law stand decided as below:

Question of law	Decision
"(I) Whether the men-rea on the part of the assessee is an essential pre-requisite condition for imposition of penalty under Section 54(1)(2) of the U.P. VAT Act, 2008?	Yes
(II) Whether penalty under Section 54(1)(2) of the Act can be imposed where the assessment is made on the basis of Best Judgement Assessment?	No

(IV) Whether imposition of penalty of 7 times the total tax imposed towards alleged concealed turnover was justified when the express provision of Section 54(1) (2) of the Act provides for imposition of a maximum penalty of 3 times of concealed turnover?	Left open to be decided in appropriate proceedings
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50. The revision is **allowed**. The judgement and order dated 06.04.2021 passed by learned Commercial Tax Tribunal, Lucknow in Second Appeal No. 50 of 2017 is set aside.

51. Consequences to follow.

Order Date :- 15.03.2024

J.K. Dinkar

