(2015) 3 RLW 2060

Rajasthan High Court

Case No: Civil Sales Tax Revision Pet. Nos. 49, 50, 51, 52 and 53 of 2007

BSL Limited		APPELLANT
	Vs	
Commissioner, Commercial Taxes and Others		RESPONDENT

Date of Decision: Feb. 27, 2015

Acts Referred:
Rajasthan Value Added Tax Act, 2003 - Section 84

Citation: (2015) 3 RLW 2060

Hon'ble Judges: Pratap Krishna Lohra, J

Bench: Single Bench

Advocate: M.S. Singhvi, Senior Advocate, Vineet Dave and Abhishek Mehta, for the Appellant; D.K. Godara and Falgun Buch for V.K. Mathur, Advocates for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Pratap Krishna Lohra, J.
Petitioner-assessee has preferred these five revision petitions under Section 84 of the Rajasthan Value Added

Tax Act 2003 (Section 85 of the Rajasthan Sales Tax Act, 1994) against the impugned judgment and order dated 31st of January 2007 passed by

the Rajasthan Tax Board, Ajmer, whereby five separate appeals of the petitioner-assessee, bearing No. 2923 of 2005 impugning the order of

Commissioner, Commercial Taxes under Section 87 of the RST Act, with Appeals No. 816 of 2006, 817 of 2006, 818 of 2006 and 819 of

2006, pertaining to Assessment Years 1997-98 to 2000-2001, assailing the order of first appellate authority are decided by a common judgment

and order.

2. The facts, relevant and germane to the matter, are that petitioner is a public limited company, incorporated under the Companies Act 1956,

having its registered office and works at Mandpam, Bhilwara. At the inception, the petitioner company was registered with the Government of

India as 100% Export Oriented New Unit and involved in the business of manufacture and exporting fabrics made from blended yarn. The State

Government, in exercise of powers under sub-section (2) of Section 4 of the Rajasthan Sales Tax Act 1954 (for short, ''RST Act''), issued

Notification No. F.4(28) FD/GR-IV/94-2 dated 13th of June 1994 granting exemption from tax on sale or purchase, by a 100% Export Oriented

New Unit registered with Government of India, on raw material required by such unit for use in manufacture of other goods to the extent and

subject to the conditions mentioned therein and the scheduled appended thereto. The said exemption was allowed for a period of five years from

the date of first transaction of raw material purchased during the period from 15th June 1994 to 31st March 1997. The Notification further

envisaged the unit to issue declaration in Form ST-17 to the selling dealer. As per Schedule, units having investment of Rupees fifteen crores or

more were declared entitled to 100% exemption of tax and the units having investment between Rupees five crores to less than Rupees fifteen

crores were declared eligible for 50% tax exemption.

3. As the petitioner unit was fulfilling the requisite conditions incorporated in the Notification, it became eligible for tax exemption on the purchase

of raw material, viz. yarn requisite for manufacturing fabrics. Petitioner has pleaded that it was under a bonafide belief that being a 100% Export

Oriented registered unit, it is entitled to 100% exemption of tax payable and as such it purchased raw material i.e. yarn without paying tax by

issuing Form ST-17 in terms of the Notification. The process continued in the interregnum period during which the Notification for 100%

exemption was invoked. In the year 2000, survey was conducted at the premises of petitioner on 31st March 2000 and 2nd August 2000 by the

Assistant Commissioner (Commercial Taxes Officer), Anti Evasion, Commercial Taxes, Bhilwara.

4. During survey, it was revealed that petitioner has erroneously claimed 100% exemption on purchase of raw-material which was taxable @2%,

whereas it was entitled to exemption only upto 50% of the tax, as such, was liable to pay 1% purchase tax in terms of Notification dated 13th June

1994. The said discrepancy was noticed by the department on the ground that capital investment of the petitioner unit was less than Rs. 15 crores

and as such it was not entitled for 100% exemption from tax. When all these facts were unearthed during survey, the second respondent issued a

show cause notice to the petitioner for making provisional assessment for the Assessment Years 1998-99, 1999-2000 and 2000-2001 under

Sections 28 and 58 of the RST Act 1994. Simultaneously, the second respondent also issued a notice for reassessment under Section 30 and 58

of RST Act for the Assessment Year 1997-98 on the said ground. It goes without saying that before issuing all these notices, the regular

assessment proceedings for the Assessment Year 1997-1998 were already completed by the Commercial Taxes Officer, "A" Circle, Bhilwara on

15.12.1999.

5. The notices aforesaid were responded by the petitioner wherein the petitioner-assessee has submitted that it never intended to evade its tax

liability and 100% exemption was claimed by it under the bonafide belief in construing the Notification dated 13th of June 1994. It is also averred

in the return that the books of accounts are regularly maintained by it indicating the entire transactions of purchase and sales which were candidly

disclosed in the returns submitted on its behalf. The petitioner-assessee has also asserted that it has not violated the declarations in any manner.

Adverting to the purchase of raw material, the petitioner-assessee has submitted that the same was purchased by furnishing requisite Form ST-17

in accordance with the provisions of the Act and Rajasthan Sales Tax Rules 1995 (for short, "Rules of 1995") and thereafter such purchased

materials have been used in consonance with the declaration made therein, i.e. the purchase for which the declaration was made, viz. manufacturing

fabrics. Further reiterating that the assessee has not misused declaration forms in any manner, the petitioner has prayed that it is not liable to be

exposed for penalty either under Section 64 or 65 of the Act.

6. The respondent subsequent thereto passed provisional assessment order for the Assessment Years 1998-1999 to 2000-2001 on 11th August

2000 determining tax liability @1% on purchase of raw material as well as surcharge thereon and the petitioner-assessee was asked to deposit tax

@1% on purchase of raw material with surcharge. The Assessing Authority, while resorting to Section 58 of the Act also fastened liability of

interest on the petitioner-assessee for delay in depositing the requisite tax. Tax, surcharge and interest, as determined by the Assessing Authority,

are detailed as under:

7. It appears that the explanation tendered by the assessee has persuaded the Assessing Authority not to impose penalty under Section 64 or 65 of

the Act and that being so in the provisional assessment order no penalty was imposed. The Assessing Authority has also observed that it is a case

of bonafide bidding/doubt by taking into account the requisite entries about the transactions in the books of accounts of the assessee which were

disclosed in the return. A finding is also recorded by the Assessing Authority that the assessee has not misused the declaration forms inasmuch as

the goods purchased are used for the declared purpose. Similarly, the Assessing Authority also passed reassessment order dated 11th August

2000 in relation to Assessment Year 1997-98, whereby 1% tax is imposed on the assessee and interest levied for delay in making the payment.

For the Assessment Year 1997-98, the Assessing Authority has also noticed that it is not a fit case for imposition of penalty either under Section

64 or 65 of the Act.

8. Subsequently, regular assessment order under Section 29 of the RST Act 1994 for the Assessment Year 1998-99 is also passed by respondent

No. 2 on 6th February 2001 by merging the provisional assessment order in final assessment order. The petitioner-assessee deposited the amount

of tax surcharge as well as interest. In the same terms, regular assessment order under Section 29 of the Act was also passed with respect to

Assessment Year 1999-2000 on 25th September 2001 merging provisional assessment order therein, and so also for the Assessment Year 2000-

2001 on 20th December 2001. For the Assessment Year 1999-2000, the Assessing Authority raised a demand for the difference of interest

liability and the same was also paid by the assessee.

9. After the regular assessment order, the Assistant Commissioner (Commercial Taxes Officer), Anti Evasion, Bhilwara, second respondent, who

conducted survey, laid applications under Section 87 of the RST Act before the Commissioner, Commercial Taxes and thereupon notices dated

3rd August 2005 were issued to the petitioner. The petitioner-assessee contested the notices by filing its written representation on 9th August 2005

alongwith zerox copies of several judgments. The Commissioner, Commercial Taxes, heard the petitioner and by its common order dated 10th

August 2005 disposed of all the applications under Section 87 of the RST Act for the Assessment Years 1997-1998 to 2000-2001. In its order,

the Commissioner has found that the assessee has availed 100% exemption on purchase of raw material by giving declaration in Form ST-17

against its entitlement for 50% in gross violation of Section 64 of the RST Act. With this finding, the Commissioner has observed that the Assessing

Authority ought to have levied penalty under Section 64 on account of misuse of declaration by the assessee. Finally, the Commissioner concluded

that all the orders passed by the Assessing Authority dropping penalty proceedings against the assessee are erroneous and due to its omission, loss

has been caused to the State revenue. Thus, all the applications under Section 87 of the RST Act were accepted by the Commissioner.

10. Feeling disgruntled with the order of the Commissioner, the petitioner-assessee laid an appeal before the Tax Board, Ajmer, which was

registered as Appeal No. 2923/2005/Bhilwara. When the proceedings in Appeal No. 2923 of 2005 were in vogue, the petitioner-assessee was

served with assessment order dated 16th December 2005 alongwith demand notices pertaining to Assessment Years 1997-1998 to 2000-2001

purportedly passed under Rule 34 of the Rules of 1995 read with Section 64 of the RST Act allegedly passed pursuant to the common order of

Commissioner, Commercial Taxes dated 10th August 2005, imposing penalty equal to double the amount of tax for violation of declaration form

ST-17. The details of penalty, for every assessment year, are as infra:

11. The petitioner-assessee has categorically averred that before issuing these orders whereby penalty was imposed for the Assessment Years

1997-98 to 2000-2001, no show cause notice or opportunity of being heard was afforded to it. Thus, precisely, the petitioner-assessee has shown

its discontentment and alleged vulnerability of these orders on the anvil of violation of principles of natural justice. In this behalf, the petitioner-

assessee has also taken shelter of Section 69 of the RST Act and Rule 47 of the Rules of 1995 and castigated these orders as void and nonest. Be

that as it may, being dismayed by the said orders, the petitioner-assessee preferred appeals before the Deputy Commissioner (Appeals),

Commercial Taxes under Section 84 of the RST Act. The appellate authority, Deputy Commissioner (Appeals), Bhilwara rejected all the appeals

by a common order dated 27th of March 2006 pertaining to Assessment Years 1997-1998 to 1999-2000. The appeal for Assessment Year

2000-2001 was also rejected on 27th of March 2006 by the appellate authority by a separate order. As such, the appellate authority has upheld

the order imposing penalty equal to double the amount of tax under Section 64 of the RST Act finding the same in consonance and in conformity

with the order of the Commissioner passed under Section 87 of the RST Act.

12. The petitioner has also averred in the revision petitions that penalty @5% is deposited by it in terms of exparte penalty orders dated

16.12.2005 and the receipts were also enclosed with the appeals which were filed before the Deputy Commissioner (Appeals), Commercial

Taxes, Bhilwara. It is also averred that when the appeals were pending, on being threatened by the Assessing Authority for coercive proceedings

for recovery, further 5% of the demand in question was deposited by the assessee on 20th March 2006. Therefore, in totality, the petitioner has

deposited 10% of the demand of penalty.

13. After dismissal of the appeals by the appellate authority, the petitioner-assessee laid four separate appeals before the Rajasthan Tax Board,

Ajmer alongwith stay petitions for the Assessment Years 1997-1998 to 2000-2001 respectively. When these four appeals were laid, the appeal

which was earlier filed by the assessee against the order of the Commissioner was pending, and therefore, all the five appeals were clubbed

together and decided by a common judgment and order by the learned Tax Board on 31st January 2007 by rejecting all the appeals. It is in that

background, the petitioner-assessee has laid these five revision petitions.

14. At the threshold on 23rd of October 2007, the Court was pleased to club all these revision petitions. Subsequently, on 21st of May 2008, the

revision petitions were admitted on following questions of law:

1. Whether the learned Commissioner has erred in interfering with the assessment orders passed by the Assessing Authority with the finding that

the cases did not warrant imposition of penalty; and in issuing directions for imposition of penalty by the impugned order dated 10.08.2005?

2. Whether the Assessing Authority in respective cases has erred in proceeding to pass the orders imposing penalty without even issuing notice to

the dealer?

3. Whether any penalty could have been imposed against the dealer in the absence of a notice under Section 64 of the Rajasthan Sales Tax Act,

1994?

4. Whether in the facts and circumstances of these cases, the Department has been justified in imposing penalty against the dealer?

15. After admission on the aforementioned questions of law, an endeavour was made by the petitioner assessee for seeking amendment to urge

additional grounds in the revision petitions. The Court was pleased to allow the amendment on 26th November 2008 and framed under mentioned

additional questions of law for determination:

5. Whether non-imposition of penalty by the Assessing Authority being a discretionary order could have been interfered with by invoking revisional

powers under Sec.97 of RST Act by the Commissioner?

6. Whether the impugned penalty order dated 16.12.2005 has been passed without issuing any notice to the petitioner and without affording any

opportunity of hearing to the petitioner, contrary to the mandatory provisions as well as fundamental principles of natural justice was void and non-

est and hence liable to be quashed and set aside?

7. Whether in the facts and circumstances of the present case, the penalty could have been imposed under Section 64 of the RST Act when the

application for imposition of penalty in respect of Section 65 was submitted?

8. Whether the revisional authority could have clubbed 5 assessments when atleast 2 out of 5 assessments were barred by time?

16. Learned Senior Counsel for the petitioner, Mr. M.S. Singhvi, while assessing the impugned order, submits that the learned Tax Board has

failed to examine the ambit and scope of revision under Section 87 of the RST Act inasmuch as order dropping the penalty is beyond the scope of

revision. Elucidating with vehemence the scope of revision, learned counsel submits that the scope of revision cannot be equated with an appeal

and its ambit and scope is much narrower vis-a-vis an appeal. Learned counsel for the petitioner, thus, submits that a very vital issue relating to

scope of revision, under Section 87 of the RST Act, by the Commissioner against dropping penalty, has not been appreciated by the learned Tax

Board in the impugned order, which is essentially the edifice for the consequential assessment order to petitioner''s detriment for the Assessment

Years 1997-98 to 2000-01, and therefore, the impugned order is vitiated in law.

17. Learned counsel for the petitioner, Mr. Singhvi, would contend that the very assumption of revisional jurisdiction by the Commissioner under

Section 87 is dehors the statute inasmuch as exercise of such powers pre-supposes loss or pilferage of revenue, and from any stretch of

imagination penalty cannot be categorized as a source of revenue. Assailing imposition of penalty under Section 64 of the RST Act, learned

counsel submits that when the Assessing Authority has invoked the revisional jurisdiction of the Commissioner by taking shelter of Section 64 of

the RST Act, resorting to Section 64 for imposition of penalty by Commissioner is a patent error of law, which is completely eschewed by the

learned Tax Board in the impugned order. While resorting to the provisions of penalty under Section 64 and 65 of the RST Act, learned counsel

would contend that the language employed therein makes it crystal clear that imposition of penalty is discretionary and not mandatory and once the

Assessing Authority has exercised its discretion, it ought not to have interfered with by the revisional authority under Section 87 of the RST Act,

was a very vital issue, which has not been addressed by the learned Tax Board in the impugned order, and as such the same cannot be sustained.

Learned counsel for the petitioner has questioned the quantum of penalty, which is twice the amount of tax, by urging that it is optimum limit

prescribed under the statute which is to be resorted sparingly and not in a routine manner. Emphasizing credentials of the assessee, learned counsel

submits that a bonafide mistake by the assessee in claiming exemption cannot be overstretched to saddle it with optimum penalty.

18. Highlighting the parameters and yardsticks, which are to be adhered to by a quasi-judicial authority, learned counsel submits that when such

authority is endowed with power to adjudicate, it is required to act in a judicious manner while adhering to the principles of natural justice. Learned

counsel has urged that when no motive can be imputed against the assessee, a quasi judicial authority is not expected to resort to the provision of

penalty as the penalty provision is not automatic. Learned counsel has strenuously urged that in the backdrop of fact situation, when there was no

material to make out a case of misuse of Form ST-17 by the assessee, invocation of powers under Section 64 of the RST Act for imposition of

penalty is wholly unwarranted. Mr. Singhvi submits that petitioner was a regular assessee and claim of 100% exemption from tax in furnishing Form

ST-17 was a bonafide mistake in construing Notification dated 13th June 1994 and therefore, this sort of omission ought not to have been

construed as deliberate to fasten the liability of penalty under Section 64 of the RST Act.

19. Mr. Singhvi further submits that the learned Tax Board has miserably failed to appreciate the afflictions of the petitioner-assessee in right

perspective while interpreting Section 64 of the RST Act. Mr. Singhvi has also urged that the findings of Commissioner are based on mere ipse-

dixit and conjectures, more particularly, in evaluation of the alleged culpability of the assessee in construing Notification dated 13th June 1994, and

the learned Tax Board, in upholding the said laconic order, has failed to exercise the jurisdiction so vested in it.

20. Taking shelter of the principles of natural justice, learned Senior Counsel submits that after order of remand by the learned Commissioner, the

Assessing Authority has straightway passed the order imposing penalty against the assessee without giving any notice or opportunity of being

heard. With this submission, learned counsel has urged that the Assessing Authority has violated the principles of natural justice and the first

appellate authority as well as learned Tax Board has also not at all cared to examine the matter in right perspective. Mr. Singhvi submits that the

order of the Assessing Authority, after remand for imposition of penalty, is clearly vitiated in law being violative of principles of natural justice, was

a very vital issue on which there is no whisper in the impugned order, which is sufficient to annul the impugned order. Learned counsel for the

petitioner has also urged that the revisional authority under Section 87 of the RST Act has seriously erred in clubbing all the assessments, more

particularly when two of them were barred by limitation, inasmuch as qua these two assessment orders clause (b) of sub-section (1) of Section 70

of the RST Act cannot be pressed into service as the assessment orders were not assailed by way of appeal or revision at the behest of Revenue.

Learned counsel, therefore, submits that vis-a-vis these two assessment orders, the order of the revisional authority is clearly vitiated in law, was

not taken note of by the learned Tax Board, is sufficient to conclude that the learned Tax Board has not examined the matter in its entirety. Mr.

Singhvi has also argued that there was no mens-rea of the assessee in furnishing declaration form and as such imposition of penalty is not

warranted. Mr. Singhvi has, therefore, argued that in absence of mens-rea imposition of penalty is uncalled for, is an issue not properly addressed

by the learned Tax Board.

21. Lastly, Mr. Singhvi submits that the provision of penalty under Section 64 and 65 of the RST Act is not akin to that of Section 78(5), as the

language employed clearly suggests that under Section 64 and 65 imposition of penalty is discretionary whereas under Section 78(5) it is

mandatory, but this vital issue has not been dealt with by the learned Tax Board in the impugned order. Mr. Singhvi has also strenuously urged that

the learned Tax Board has not examined the order passed by learned Commissioner under Section 87 of the RST Act, while upholding the same,

inasmuch as, the Commissioner has not at all recorded any finding that the Assessing Authority has exercised its discretion contrary to law. He

therefore submits that this omission on the part of the Commissioner has vitiated the order, which was lost sight completely by the learned Tax

Board, and as such the order impugned cannot be sustained.

22. In support of his various contentions, learned counsel, Mr. Singhvi, has placed reliance on following legal precedents:

Ã¯Â¿Â½ Commissioner, Commercial Taxes, Rajasthan, Jaipur and Anr. Vs. M/s. Asian Paints India Ltd., Jaipur [Tax Up-Date Vol.15 Part 1, page 3]

Ã¯Â¿Â½ Hindustan Petroleum Corporation Ltd. Vs. Dilbahar Singh, (2014) AIRSCW 5018 : (2014) 9 SCALE 657 : (2014) 9 SCC 78

Ã¯Â¿Â½ Assistant Commercial Taxes Officer Vs. Gaurav Steels Ltd. [(2006) 147 STC 36(Raj)].

Ã¯Â¿Â½ Commercial Taxes Officer Vs. Sojat Lime Co. [1989 (74) STC 288 (Raj)].

Ã¯Â¿Â½ Lord Venketshwara Caterers Vs. Commercial Taxes Officer, Anti Evasion, Zone-I [(2007) 10 VST 535 (Raj.)].

Ã¯Â¿Â½ Hindustan Steel Ltd. Vs. State of Orissa, AIR 1970 SC 253 : (1978) 2 ELT 159 : (1972) 83 ITR 26 : (1969) 2 SCC 627 : (1970) 1 SCR

753 : (1970) 25 STC 211

Ã¯Â¿Â½ Commissioner of Income Tax Vs. Jain Construction Co. [(2013) 257 CTR (Raj) 336]

23. E converso, learned counsel for the Revenue, Mr. D.K. Godara for Mr. V.K. Mathur, submits that Notification dated 13th June 1994 is clear

and unequivocal, prescribing the criteria of unit and extent of exemption of tax, and therefore, the very act of the petitioner-assessee in furnishing

declaration in Form ST-17 is a deliberate attempt by it to use the Declaration Form dehors the provisions of the RST Act and the rules made

thereunder, and as such the learned Commissioner and the learned Tax Board have rightly fastened the liability to pay penalty against assessee

under Section 64 of the RST Act. Mr. Godara would contend that legal position is no more res-integra that taxing statutes require strict

interpretation and any act of felony by an assessee cannot be excused. Learned counsel for the Revenue next contended that revisional jurisdiction

of the Commissioner under Section 87 of the RST Act is very wide to protect the interest of the State Revenue in case any order, passed by the

Assistant Commissioner, Commercial Taxes Officer, or in-charge of a check-post, is erroneous or prejudicial to the interest of Revenue.

Elaborating his contention, Mr. Godara submits that such a jurisdiction can be exercised suo-moto for imposition of penalty under Section 64 and

65 of the RST Act. Learned counsel for the Revenue has strenuously urged that the Commissioner and learned Tax Board have not committed any

error much less jurisdictional error in construing the declaration furnished by the assessee in Form ST-17 dehors the RST Act and the rules made

thereunder.

24. Countering the submissions of the learned counsel for the petitioner that submission of Declaration Form ST-17 was a bonafide mistake,

learned counsel for the Revenue would urge that facts unearthed and revealed during survey of the assessee establishment has completely erased

all misconceptions about bonafide mistake. According to Mr. Godara, interpretation of Section 64, as canvassed by the learned counsel for the

assessee, is alien to the basic principles of construction of taxing and fiscal statutes and such a benevolent interpretation may render the statute

otiose. Dilating on mens-rea of the assessee, Mr. Godara has urged that claim of 100% exemption from tax during regular assessment is a

deliberate and voluntary act or omission on the part of the assessee, which pre-supposes the essence of mens-rea.

25. Joining issue on limitation for exercise of revisional jurisdiction by Commissioner under Section 87 of the RST Act, learned counsel for the

Revenue submits that when the power of revision can be exercised suo-moto by the Commissioner, the question of limitation does not arise. He

further submits that on conjoint reading of Section 87 and Section 70(1)(b) of the RST Act, it is crystal clear that in certain eventualities suo-moto

power of revision can be exercised by the Commissioner within five years under sub-sec.(2) of Section 87 of the RST Act and as such the

contention of the assessee about limitation is not tenable. For strengthening his arguments, learned counsel for the Revenue has placed reliance on

following legal precedents:

Ã¯Â¿Â½ Guljag Industries Vs. Commercial Taxes Officer, (2007) 293 ITR 584 : (2007) 10 JT 1 : (2007) 9 SCALE 564 : (2007) 7 SCC 269 : (2007)

8 SCR 793 : (2007) 9 VST 1

Ã¯Â¿Â½ Commissioner of Sales Tax, U.P. Vs. Sanjiv Fabrics, (2010) 258 ELT 465 : (2010) 10 JT 192 : (2010) 9 SCC 630 : (2010) 35 VST 1

26. I have heard learned counsel for the parties, perused the impugned judgment and order of the learned Tax Board, and thoroughly scanned the

entire record.

27. Rival counsels have made sincere endeavour to bring home the issues they have canvassed to elicit favourable answers on the questions of law

formulated by the Court.

28. Now I propose to deal with the questions of law framed in the backdrop of facts and circumstances as well as the rival submissions. Question

No. 1 and Question No. 5 are almost interrelated, therefore, these questions are taken up together.

29. With a view to find a plausible answer to these two questions, it is worthwhile to examine the revisional powers and jurisdiction of the learned

Commissioner under Section 87 of the RST Act. Section 87 of the RST Act reads as under:

87. Revision by the commissioner-

(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by

Assistant Commissioner, Commercial Taxes Officer, Assistant Commercial Taxes Officer or in-charge of a checkpost is erroneous or is prejudicial

to the interests of the State revenue, he may, after having made or after having caused to be made, such enquiry as he considers necessary, and

after having given to the dealer a reasonable opportunity of being heard, pass such order or issue such direction as he deems proper under the

circumstances of the case.

(2) No order or direction under sub-section (1) shall be passed or issued by the Commissioner if a period of five years has already elapsed from

the date on which the order sought to be revised was passed.

30. The powers of the Commissioner to call for and examine the records of any proceedings under the RST Act, in the event of infirmity in any

order passed by a competent authority empowered to impose tax, is not an absolute power exercisable at the whims and fancy of the

Commissioner. The power to exercise revisional jurisdiction is circumscribed by the legislature by prescribing certain conditions, viz., if the order is

erroneous, or is prejudicial to the interest of the State revenue. The emphasis is on two terms; namely, erroneous order, or if it is prejudicial to the

interest of the State revenue. Even by applying the principles of interpretation of statutes vis-a-vis a taxing or a fiscal statute, it is difficult to

presume that revisional powers of the Commissioner is blanket, or such power is akin to panacea of all ills in any order passed under the RST Act.

Taking into account the factual background of the case, it is noticed that the Assessing Authority, while passing the assessment orders for various

assessment years, has properly construed the Notification dated 13th of June 1994 issued by the Commercial Taxes Department. The schedule

therein envisaged category of unit and extent of exemption of tax in following manner:

31. While examining the true purport of the Notification dated 13th June 1994, the Assessing Authority in all the assessment orders has concluded

that the petitioner unit is having an investment of Rs. 5 Crores or more but less than Rs. 15 crore in land, new factory building and new plant and

machinery, and accordingly, applying the ratio of extent of exemption of tax, has levied 50% tax to enrich the coffers of the revenue. As such, the

Assessing Authority has discharged its quasi judicial function to protect the interest of the revenue by imposing interest on the amount of tax under

Section 58 of the RST Act. While adverting to imposition of penalty under Section 65 of the RST Act, the Assessing Authority has observed that

prima facie it is not satisfied that the assessee has made an attempt to avoid or evade payment of tax, and as such in its discretion declined to

impose penalty on it. For exercising its discretion, the Assessing Authority has also taken note of the fact that the assessee has furnished the books

of accounts for each assessment year, showing sale and purchase without concealing any material, and non-payment of tax by the assessee is

bonafide in not properly construing the Notification dated 13th of June 1994.

32. This Court, in M/s. Asian Paints Pvt. Ltd. (supra), while examining the scope of revisional powers of the Commissioner under Section 87 of

the RST Act, has held that non-imposition of penalty under Section 65 of the RST Act is not revisable. The Court held:

There appears to be basic fallacy in the reasonings given by learned Commissioner that penalty under Sec.65 of the Act would also be

automatically attracted if the Assessing Authority comes to the conclusion that higher rate of tax of 16% would be applicable on the sale of

distemper as against 12% as claimed by the assessee. The imposition of penalty is never automatic and depends upon the facts and circumstances

of each case and such imposition of penalty is always discretionary and if the Assessing Authority on the appreciation of relevant evidence comes

to the conclusion that there was no deliberate admission on the part of the assessees to evade the tax in view of his bonafide contention that a

commodity would be taxable at lower rate falling in particular entry, even if such contention is not accepted, it would not attract the penalty under

Sec.65 of the Act, which can be imposed in the case of concealment of deliberate furnishing of inaccurate particulars by the assessees or for

evasion of tax.

Therefore, the Tax Board in the impugned order dated 24.7.03 has only rightly observed that learned Commissioner has committed error while

remanding the case to learned Assessing Authority with a direction that appellants were required to pay not only tax but also interest and penalty

under Sec.65 of the Act and, therefore, these observations of learned Commissioner in the impugned order under Sec.87 of the Act were set aside

by the Tax Board while allowing the appeal of the respondent-assessee. Sec. 87 of the Act confers revisional jurisdiction upon the Commissioner

only if order of subordinate authority is erroneous or is prejudicial to the interest of State Revenue. Non-imposition of penalty under Sec.65 of the

Act which is discretionary by Assessing Authority, cannot be held tobe revisable under Sec.87 of the Act.

33. The Constitution Bench of Hon''ble Apex Court in Hindustan Petroleum Corporation Ltd. (supra) while examining the scope of revisional

jurisdiction vis-a-vis appellate jurisdiction, when both the expressions are employed in the statute, made a micro analysis of both the jurisdictions

and defined ambit and scope of the respective jurisdictions. The Court held:

We are in full agreement with the view expressed in Sri Raja Lakshmi Dyeing Works that where both expressions ""appeal"" and ""revision"" are

employed in a statute, obviously, the expression ""revision"" is meant to convey the idea of a much narrower jurisdiction than that conveyed by the

expression ""appeal"". The use of two expressions ""appeal"" and ""revision"" when used in one statute conferring appellate power and revisional power,

we think, is not without purpose and significance. Ordinarily, appellate jurisdiction involves a re-hearing while it is not so in the case of revisional

jurisdiction when the same statute provides the remedy by way of an ''appeal'' and so also of a ''revision''. If that were so, the revisional power

would become co-extensive with that of the trial Court or the subordinate Tribunal which is never the case. The classic statement in Dattonpant

that revisional power under the Rent Control Act may not be as narrow as the revisional power Under Section 115 of the Code but, at the same

time, it is not wide enough to make the High Court a second Court of first appeal, commends to us and we approve the same. We are of the view

that in the garb of revisional jurisdiction under the above three Rent Control Statutes, the High Court is not conferred a status of second Court of

first appeal and the High Court should not enlarge the scope of revisional jurisdiction to that extent.

34. Division Bench of this Court, in Jain Construction Co. (supra), had the occasion to consider the revisional powers of Commissioner of

Income-tax under Section 263 of the Act. The Division Bench found that the revisional powers are not liable to be invoked for mere change of

opinion. The Court held:

Settled legal position for limitation on the revisional powers of Commissioner under Section 263 of the Act is that, firstly, they are limited in nature,

and secondly, such revisional powers are not be invoked merely for reviewing the order passed by the Assessing Authority on a mere change of

opinion.

35. In view of legal position emerged out, and upon examination of the materials available on record in conjunction with Section 87 of the RST

Act, in my opinion, the learned Commissioner has over-stepped its jurisdiction in finding fault with the orders passed by the Assessing Authority for

non-imposition of penalty. As a matter of fact, there is nothing on record to show that the Assessing Authority has exercised its discretion

arbitrarily or capriciously and therefore interference with the discretionary orders of the Assessing Authority by the learned Commissioner is per-se

a decision based on mere ipse-dixit or change in the opinion. While upholding the said order, the learned Tax Board has not at all cared to examine

the nature of powers of the revisional authority under Section 87 of the RST Act rendering the said order too vulnerable. Resultantly, the question

No. 1 and 5 deserves answer in favour of assessee and against revenue.

36. Question No. 2 and 6 essentially embraces the issue relating to violation of principles of justice by the Assessing Authority before imposition of

penalty. Therefore, both these questions are dealt with in unison. The answer of the first and the fifth question favouring cause of the assessee has

its obvious ramification on these two questions.

37. Well it is true that the learned Commissioner has accepted the revision under Section 87 of the RST Act for remanding the matter back to the

Assessing Authority for imposition of penalty against the assessee under Section 64 of the RST Act, this order has not ipso facto conferred

jurisdiction on the Assessing Authority to impose penalty without adhering to principles of natural justice. After remand order, the Assessing

Authority has imposed penalty twice the amount of tax for each assessment year against the assessee without giving any notice or opportunity of

hearing to it. Every action which visits someone with evil and civil consequences is required to be in strict adherence of audi-altrem-partem.

38. Observance of principles of natural justice, in the instant case, has acquired significance for obvious reasons. In that background, if the

application of the Assessing Authority addressed to the Commissioner for invoking its jurisdiction under Section 87 of the RST Act is examined,

then it would ipso facto reveal that the application refers to Section 65 of the RST Act and not Section 64 of the RST Act. As observed supra,

Section 64 envisage penalty for violation of declaration whereas Section 65 authorizes Assessing Authority to impose penalty for avoidance or

evasion of tax. Both the sections are covering two aspects for fastening penalty on the assessee. The complete text of Section 64 and 65 reads as

under:

64. Penalty for violation of declaration

Where any dealer uses any declaration form against the provisions of the Act or the rules made thereunder, or after having purchased any goods,

other than the goods purchased under section 10, in respect of which he has made declaration under the provisions of this Act or the rules made

thereunder, fails without reasonable cause to use or dispose of the goods in accordance with the declared purpose, the Assessing Authority may

direct that such person shall pay by way of penalty in addition to the tax payable under sub-section (2) of section 11, a sum equal to double the

amount of tax to the extent to which it was not required to be paid by such dealer on the strength of the declaration forms furnished by him.

65. Penalty for avoidance or evasion of tax

Where any dealer, whether or not registered, has concealed any particulars from any return furnished by him or has deliberately furnished

inaccurate particulars therein or has concealed any transaction of sale or purchase from his accounts, registers and documents required to be

maintained under this Act or has avoided or evaded tax in any other manner, the Assessing Authority may direct that such dealer shall pay by way

of penalty, in addition to the tax payable by him under law, a sum equal to double the amount of tax avoided or evaded.

39. Therefore, in terms of the application submitted by the Assessing Authority, the learned Commissioner ought to have examined the assessment

orders for all these assessment years for imposition of penalty against assessee on the touchstone of Section 65 of the RST Act.

40. Preparing its defence against invocation of revisional jurisdiction of the learned Commissioner under Section 87, the assessee has also put-forth

the defence to wriggle out from penalty envisaged under Section 64 of the RST Act. Therefore, while passing the order exercising revisional

jurisdiction under Section 87 of the RST Act, the learned Commissioner ought to have called upon the assessee to put its defence before resorting

to invoke Section 64 of the RST Act for imposition of penalty. As a matter of fact, the action of the learned Commissioner for switching on to

Section 64 instead of 65 for imposition of penalty, has seriously prejudiced the cause of the assessee which cannot be overlooked, may it be,

under the RST Act - a taxing statute. The tax proceedings are no-doubt quasi judicial proceedings and the sales-tax authorities are not bound

strictly by rules of evidence, nevertheless, the authorities must base their orders on materials, which are known to the assessee, and after he is given

a chance to rebut the same.

41. The folly, which is apparently clear from the order passed by the learned Commissioner under Section 87 of the RST Act, has been further

perpetuated by the Assessing Authority after the remand order, inasmuch as the Assessing Authority has also not cared to issue any notice to the

assessee before imposing penalty under Section 64 of the RST Act. It is clearly apparent that after remand order, all the assessment orders were

passed by the Assessing Authority castigating the assessee for violation of declaration exposing it for the penalty envisaged therein without

affording opportunity of being heard. Non-observance of principles of natural justice in the backdrop of facts and circumstances of the instant case

has not been properly addressed by the first appellate authority as well as by the learned Tax Board and this vital issue has been dealt with in an

absolutely casual and cavalier manner. There remains no quarrel that the taxing authorities are acting as watchdogs to prevent pilferage of tax for

enriching revenue but at the same time being quasi judicial authorities, they are not expected to act at their whims and fancy to decide the matter

unilaterally. Section 69 of the Act of 1994 also opens with non-obstante clause that no penalty under this Act shall be imposed unless a reasonable

opportunity of being heard is afforded to the dealer or the person concerned. In this view of the matter, even on the touchstone of RST Act,

observance of principles of natural justice is to be adhered to mandatorily before imposition of penalty against an erring assessee.

42. There cannot be two opinions that observance of principles of natural justice is pre-requisite even in the matter of imposition of tax and penalty

against the erring assessee. Therefore, in totality, in my view, violation of principles of natural justice by the Commissioner as well as Assessing

Authority after the remand order is apparent in the instant case, which was completely lost sight by the learned Tax Board, to make it fallible.

Therefore, in conclusion, Question No. 2 and 6 deserves answer against the revenue and in favour of assessee.

43. The threadbare discussion on Question No. 2 and 6 and its affirmative answer favouring the cause of the assessee has persuaded me to base

my conclusions on Question No. 3 and 7 also. Therefore, these two questions also deserve answer against the revenue and in favour of assessee.

44. Now, I propose to deal with Question No. 4. Chapter VI of the RST Act deals with interest, penalties, composition and prosecution. The

word ""penalty"" is of wide amplitude. In common parlance, a penalty is in the nature of a punishment for non-performance of an act, or performance

of an unlawful act and in the former case stands in lieu of the act to be performed. Under taxing and fiscal statutes, a penalty is ordinarily levied on

an assessee for some contumacious conduct, or for a deliberate violation of the provisions of a particular statute. The essence of invoking penalty

provision pre-supposes guilty animus on the part of assessee or its mens-rea. Every contravention of a statutory provision cannot expose an

assessee for penalty in want of proof about mens-rea.

45. Hon''ble Apex Court in Hindustan Steel Ltd. (supra), while construing the penalty provisions under Section 9(1), 12(5) and Section 25(1)(a)

of the Orissa Sales Tax Act 1947, has concluded that for imposing penalty under these provisions, proceedings undertaken by the competent

authority is of quasi criminal nature. The Court held:

Under the Act penalty may be imposed for failure to register as a dealer: Section 9(1) read with Section 25(1)(a) of the Act. But the 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 quasi-criminal 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. Even if a minimum penalty is

prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach

of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the

statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the

Company was not a dealer. Granting that they erred, no case for imposing penalty was made out.

46. This Court, in case of Sojat Lime Company (supra), while construing Section 16(1)(a) of the Rajasthan Sales Tax Act 1954, observed that it

is obvious that the penalty is attracted when the act of the dealer is conscious act of concealment of any particulars, or of deliberate furnishing of

inaccurate particulars in his return.

47. In Gaurav Steels Ltd. (supra), learned Single Judge of this Court, while dealing with the penalty provision under Section 78(2) of the RST Act,

has reiterated the same principle that existence of mens-rea is sine-qua-non for imposition of penalty.

48. In Guljag Industries (supra), on which the learned counsel for the revenue has placed reliance, Hon''ble Apex Court, while dealing with Section

78(5) of the RST Act, has viewed that imposition of penalty for a tax delinquency is a civil obligation, which is remedial and coercive in nature, and

therefore different from penalty for a crime. The Court held:

Existence of mens rea is an essential ingredient of an offence. However, it is a rule of construction. If there is a conflict between the common law

and the statute law, one has to construe a statute in conformity with the common law. However, if it is plain from the statue that it intends to alter

the course of the common law, then that plain meaning should be accepted. Existence of mens rea is an essential ingredient in every offence; but

that 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. A

penalty imposed for a tax delinquency is a civil, obligation, remedial and coercive in its nature, and is different from the penalty for a crime.

49. The judgment in Guljag Industries (supra) is clearly distinguishable for the reason that it deals with a mandatory provision for imposition of

penalty under sub-sec. (5) of Section 78 of the RST Act. Bare reading of sub-sec. (5) of Section 78 of the RST Act makes it crystal clear that an

authorized officer, or incharge of the check-post, after making inquiry shall impose fine on owner of the goods, or person authorized in writing by

such owner, or the person incharge of the goods, for possession or movement of goods, whether seized or not, in violation of the provisions of

clause (a) of sub-sec.(2), or for submission of false or forged documents or declaration. The penalty envisaged under sub-sec.(5) of Section 78 is

30% of the value of such goods. If the provisions of Section 64 and 65 of the RST Act are examined vis-a-vis the provisions under Section 78(5)

of the RST Act, then it will ipso facto reveal that the provision for penalty envisaged under these Sections is not mandatory but discretionary. As

such, this judgment is of no avail to the revenue.

50. In Sanjiv Fabrics (supra), Hon''ble Apex Court examined the requirement of mens-rea in relation to the taxing statute and has held:

35. The Court in Cement Marketing case finally held that it was elementary that Section 43 of the State Act which provided for imposition of

penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, the section cannot be invoked for

imposing penalty. It was emphasised that if the view canvassed by the Revenue were to be accepted, the result would be that even if a dealer

raises a bona fide contention that a particular item was not liable to be included in the taxable turnover, he will have to show it as forming part of

the taxable turnover in his return and pay taxes upon it on pain of being held liable for penalty in case his contention is ultimately found by the Court

to be not acceptable. That surely could never have been the intention of the legislature.

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 10-A of the Act, burden would be on the Revenue to prove the

existence of circumstances constituting the said offence.

37. Furthermore, it is evident from the heading of Section 10-A of the Act that for breach of any provision of the Act, constituting an offence under

Section 10 of the Act, ordinary remedy is prosecution which may entail a sentence of imprisonment and the penalty under Section 10-A of the Act

is only in lieu of prosecution. In light of the language employed in the section and the nature of penalty contemplated therein, we find it difficult to

hold that all types of omissions or commissions in the use of Form C will be embraced in the expression ""false representation"". In our opinion,

therefore, a finding of mens rea is a condition precedent for levying penalty under Section 10(b) read with Section 10-A of the Act.

51. Thus, the position of law is clear. The contention of the assessee for proving its bonafide for claiming 100% exemption from tax by furnishing

form ST-17 is ascertainable from the fact that for all these assessment years when provisional assessment was made by the Assessing Authority,

complete books of accounts were furnished. It may be noteworthy that none of the taxing authorities including learned Commissioner has found

any discrepancy in the books of accounts of the assessee, for all these assessment years, showing details about purchase and sale transactions by

the assessee, is sufficient to dispel the conclusion that assessee has misused the declaration forms. This sort of situation has persuaded the

Assessing Authority while passing provisional assessment order to conclude that the alleged act or omission of the assessee was bonafide and it

has not intended to use declaration forms for the purpose other than mentioned therein. Furthermore, there is nothing on record to show any

concealment on the part of the assessee and the tax exemption claimed by the assessee was approved after through scanning of record by the

Assessing Authority. Therefore, in totality, the explanation tendered by the assessee in construing Notification dated 13th June 1994 to claim

100% exemption from tax appears to be a bonafide act and not a contumacious or a deliberate act to use the declaration form dehors the

provisions of the RST Act and the rules made thereunder, or an attempt was made to avoid or evade payment of tax. It is an admitted fact that in

terms of provisional assessment, the petitioner assessee has deposited the requisite amount of tax as well as interest and therefore there is no

question of any loss to the revenue.

52. The contention of the learned counsel for the revenue that the petitioner assessee has claimed tax exemption by furnishing Form ST-17

deliberately despite the fact that it was abreast about the extent of exemption of tax it is entitled, appears to be quite alluring; however, it is equally

true that the taxing authorities were also in know of the Notification, then why the assessments were made for all these years by granting 100%

exemption to the assessee. Precisely, the argument of the revenue is that ignorance of law is no excuse.

53. Hon''ble Apex Court, in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, AIR 1979 SC 621 : (1979) 118 ITR

326 : (1979) 2 SCC 409 : (1979) 2 SCR 641 : (1979) 44 STC 42 , while dealing with the doctrine of promissory estoppel has seriously disputed

the legal position regarding presumption that every person knows the law. The Court held:

....Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that every one is presumed to

know the law, but that is not a correct statement: there is no such maxim known to the law. Over a hundred and thirty years ago, Maule, J.,

pointed out in Martindala v. Faulkner [1846] 2 C.B. 786: ""There is no presumption in this country that every person knows the law: it would be

contrary to common sense and reason if it were so"". Scrutton, L.J., also once said: ""It is impossible to know all the statutory law, and not very

possible to know all the common law."" But it was Lord Atkin who, as in so many other spheres, put the point in its proper context when he said in

Evans v. Bartlem [1937] AC 473""...the fact is that there is not and never has been a presumption that every one knows the law. There is the rule

that ignorance of the law does not excuse, a maxim of very different scope and application."" It is, therefore, not possible to presume, in the

absence of any material placed before the Court, that the appellant had full knowledge of its right to exemption so as to warrant an inference that

the appellant waived such right by addressing the letter dtd 25th June, 1970. We accordingly reject the plea of waiver raised on behalf of the State

Government.

54. Penalty as such is not a source of revenue, is aptly dealt with by this Court in Gaurav Steels Ltd. (supra). The Court made following

observations in this behalf:

After all, the penalty is not tax and huge collections in the form of penalties cannot be allowed to be made attractive source of revenue or a target

fulfilling method and the departmental authorities cannot be made to go out of the way to impose and collect illegally imposed penalties leaving the

traders and transporters to sort out their grievances in the departmental remedies or even the remedies before this Court and even up to the apex

Court, the very foundation of which from the side of Revenue was never so legally sustainable. The indirect loss of trade volume by such an

atmosphere of Penalty Raj or Inspector Raj cannot be lost sight of and imposition of penalties on such technical or venial breaches if at all they can

be said to be even that, cannot be allowed in a welfare State governed by the rule of law.

55. The outcome of the above discussion is that this question deserves answer in favour of assessee and against the department, and consequently,

in my opinion, the department is not justified in imposing penalty against the assessee.

56. The last question, namely question No. 8, relates to clubbing of all the assessments by the revisional authority, more particularly two

assessments for the Assessment Years 1997-98 and 1998-99.

57. The objection regarding limitation vis-a-vis these two assessment years was strenuously canvassed by the assessee, before the learned Tax

Board, but the effort of the assessee proved unproductive, and the contention is turned down.

58. I have examined the impugned order of the learned Tax Board in conjunction with Question No. 8, and in my opinion the issue has not been

properly dealt with by the learned Tax Board. The learned Tax Board, while rejecting the contention of the assessee, has simply referred to Rule

34 of the Rules of 1995 without discussing the point in issue threadbare. The rival parties have joined issue on this question and requisite material is

also available to embark on this question. I have also made endeavor to examine this question de-novo on the touchstone of relevant provisions

governing the said province. Insofar as Assessment Years 1997-98 and 1998-99 are concerned, the Assessing Authority has passed the order on

11th August 2000 and revision under Section 87 is admittedly laid by the Assessing Authority to the learned Commissioner prior to expiry of five

years. The revision petition is decided by the learned Commissioner on 10th of August 2005. Therefore, in terms of sub-sec.(2) of Section 87 of

the RST Act, revisional power has been exercised by the learned Commissioner within five years. The contention of the learned counsel that order

though passed by the learned Commissioner on 10th August 2005 was conveyed to the assessee on 26th of August 2005, i.e. after expiry of five

years, appears to be quite attractive, but I am afraid that this contention is prima facie an ambitious plea which lacks merit. A plain reading of sub-

sec.(2) of Section 87 makes it crystal clear that learned Commissioner can exercise revisional powers under sub-sec.(1) of Section 87 within a

period of five years from the date order sought to be revived was passed. The order passed by the learned Commissioner speak volumes about

the fact that the same was passed on 10th August 2005 and therefore I am not persuaded to hold that it has exercised powers of revision vis-a-vis

two assessment year after expiry of period of limitation. As such, this question deserves answer in favour of revenue and against the assessee.

59. In view of answer to first seven questions favouring the cause of assessee, the answer to last question in favour of revenue has not made any

difference to tilt result of all the revision petitions in favour of revenue. The cumulative effect of finding on all the questions has persuaded me to

accept these revision petitions.

60. The upshot of above discussion is that all these revision petitions are allowed, impugned judgment and order passed by the learned Tax Board

is set aside, and the order dated 10th of August 2005 passed by the Commissioner, Commercial Taxes, Rajasthan, Jaipur, is also hereby annulled.

Setting aside of the order of learned Tax Board as well as learned Commissioner entails setting at naught all consequential orders/proceedings.

61. Costs are made easy.