(2017) 03 GUJ CK 0226

GUJARAT HIGH COURT

Case No: 1908 of 2009

RIDDHI SIDDHI GLUCO BIOLS LTD		APPELLANT
	Vs	
STATE OF GUJARAT		RESPONDENT

Date of Decision: March 16, 2017

Acts Referred:

- Karnataka Sales Tax Act, 1957, Section 18, Section 22A -
- Gujarat Sales Tax Act, 1969, Section 45, Section 45, Section 47, Section 47, Section 67, Section 67, Section 45(1)(a), Section 45(1)(a), Section 45(5), Section 45(5), Section 41(3), Section 41(3), Section 47(4A), Section 47(4A), Section 45(6), Section 45(6), Section 45(1)(b), Section 45(1)(b), Section 45(1)(b), Section 45(1)(b), Section 47(4)(A), Section 47(4)(A), Section 47(4B), Section 47(4B) - Imposition of penalty in certain cases and bar to prosecution. - Payment of tax and deferred payment of tax etc. - Revision : - Imposition of penalty in certain cases and bar to prosecution. - Imposition of penalty in certain cases and bar to prosecution. - Assessment of taxes. - Payment of tax and deferred payment of tax etc. - Imposition of penalty in certain cases and bar to prosecution. - Imposition of penalty in certain cases and bar to prosecution. - Imposition of penalty in certain cases and bar to prosecution. - Payment of tax and deferred payment of tax etc. - Payment of tax and deferred payment of tax etc.

Hon'ble Judges: M.R. Shah, B.N. Karia

Bench: Division Bench

Advocate: TUSHAR HEMANI, VAIBHAVI K PARIKH, HARDIK VORA

Judgement

1. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Gujarat Value Added Tax Tribunal, Ahmedabad (hereinafter referred to as the "learned Tribunal") passed in Second Appeal No. 1138 of 2005, by which, the learned Tribunal has dismissed the said appeal preferred by the appellantdealer and has confirmed the order dated 29.10.2005 passed by the First Appellate Officer in First

Appeal as well as Suo Motu Revision proceeding, the appellantdealer has preferred present Tax Appeal to consider the following substantial question of law:

(1) Whether on facts and in the circumstances of the case the order of the Hon''ble Gujarat Value Added Tax Tribunal is proper and legal in as far as it has not considered the question of jurisdiction of the revising authority for levying penalty under section 45(6) of the The GST Act for the first time in revision?

(2) Whether Whether on facts and in the circumstances of the case the order of the Hon''ble Gujarat Value Added Tax Tribunal is proper and legal in as far as in applying the ratio of the judgment of Honourable Supreme Court in the case of M/s. Shree Balaji rice Mill 140 STC 267 and not following ratio of decision of Honourable Gujarat High Court in the case of M/s. Bhavnagar Chemical Works Ltd. 83 STC 409?

(3) Whether on facts and in the circumstances of the case the order of the Hon''ble Gujarat Value Added Tax Tribunal is proper and legal in as far as it has not wrongly interpreted the provisions of subsections 5 and 6 of section 45 by adjusting the amount of interest against the tax paid and then arriving at the difference of twenty five per cent?

(4) Whether on facts and in the circumstances of the case the order of the Hon''ble Gujarat Value Added Tax Tribunal is proper and legal in as far as it has not considered the question of imposition of penalty in light of absence of intention to evade tax?

2. The facts leading to the present appeal in nutshell are as under:

2.1. That the appellant/ registered dealer was assessed for the year 200001 by the learned Deputy Commissioner, Sales Tax by order dated 31.03.2005. That at the time of return, the dealer deposited Rs. 43,89,416/towards tax liability. That feeling aggrieved and dissatisfied with the order passed by the AO, the appellantdealer preferred appeal before the First Appellate Authority. On perusing the record, the First Appellate Authority found that instead of purchase tax on lignite to be charged at 25%, the AO levied the purchase tax on lignite at 19.75%. The First Appellate Authority was also of the opinion that on the balance amount due and payable, the penalty under Section 45(6) of the Gujarat Sales Tax Act leviable, the adjudicating authority did not impose any penalty under Section 45(6) of the Act and therefore, the dealer was served with the notice in form nos. 45, 49 and 38 and in exercise of suo motu powers. The First Appellate Authority who was also the Revisional Authority held that total tax payable would be Rs.54,83,267/against which at the time of return, the dealer made the payment of Rs.

43,89416/and therefore, the difference of tax payable was Rs. 10,93,851/and therefore, First Appellate Authority exercising the suo motu revisional powers also imposed penalty at 20% under Section 45(6) of the Act.

2.2. Feeling aggrieved and dissatisfied with the order passed by the First Appellate Authority, more particularly, by the Revisional Authority in exercise of suo motu revisional powers, the dealer preferred appeal before the learned Tribunal being Second Appeal No. 1138 of 2005. Before the learned Tribunal, the learned advocate for the appellant did not press the appeal charging interest under Section 47(4) (a) of the Gujarat Sales Tax Act. However, challenged the order imposing penalty under Section 45(6) of the Act. That the appellantdealer challenged the order of the First Appellate Authority / Revisional Authority imposing the penalty under Section 45(6) of the Act for sum of Rs. 2,24,717./on the following grounds:

''(i). The Assessing Officer has not imposed penalty in assessment order. Therefore, the learned Revising Authority cannot initiate suo motu revision proceedings and imposed penalty under Section 45(6) of the Act.

(ii). Alternatively difference between the tax assessed and tax paid is less than 25% and therefore, as per Section 45(5) r/w section 45(6), no penalty can be imposed.''

2.3. That relying upon the decision of the Hon''ble Supreme Court in the case of Sree Balaji Rice Mill, Bellary vs. State of Karnataka reported in (2005) 4 SCC 21 ; 140 STC 267, by impugned judgment and order the learned Tribunal has dismissed the said appeal preferred by the appellantdealer and has confirmed the order of penalty imposed under Section 45(6) of the Act. That the learned Tribunal has also negatived the second alternative submission on behalf of the dealer that as the tax assessed and tax paid was less than 25% and therefore, as per Section 45(5) r/w Section 45(6) of the Act, no penalty can be imposed. For the aforesaid, learned Tribunal relying upon and considering Section 47(4A) and 47(4B) of the Act held that if the amount paid towards interest is first deducted/ adjusted and thereafter tax liability is concerned, the difference between tax paid and tax payable is more than 25%. Consequently, by impugned judgment and order, the learned Tribunal has dismissed the appeal preferred by the dealer.

2.4. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Tribunal, the appellantdealer has preferred the present appeal with the aforesaid questions of law.

3. At the outset, it is required to be noted that as such question nos. 1, 2 and 4 would be a common question and question no.3 would be an independent question to be considered.

3.1. Shri Tushar Hemani, learned advocate for the appellant - dealer has vehemently submitted that in the facts and circumstances of the case the learned Tribunal has materially erred in confirming the penalty imposed under Section 45(6) of the Act imposed by the First Appellate Authority/ Revisional Authority in exercise of suo motu revisional powers.

3.2. It is vehemently submitted by Shri Tushar Hemani, learned advocate for the assessee that as such the learned Tribunal has materially erred in applying ratio of the judgment of the Hon''ble Supreme Court in the case of Sree Balaji Rice Mill, Bellary (supra).

3.2.1. It is vehemently submitted by Shri Tushar Hemani, learned advocate for the assessee that while applying the ratio of the judgment of the Hon''ble Supreme Court in the case of Shree Balaji Rice Mill, Bellary (supra), learned Tribunal has not properly appreciated the distinguishing feature in the Karnataka Sales Tax Act and Gujarat Sales Tax Act.

3.2.2. It is vehemently submitted by Shri Tushar Hemani, learned advocate for the assessee that as such considering the relevant provisions of the Gujarat Sales Tax Act, the Division Bench of this Court in the case of Bhavnagar Chemical Works Ltd vs. Commissioner of Sales Tax, Ahmedabad reported in 83 STC 409 held that in case where AO has omitted imposing the penalty at the time of passing assessment order, the Revisional Authority in exercise of suo motu revisional power has no jurisdiction to impose penalty for the first time. It is submitted that in the case of Bhavnagar Chemical Works Ltd (supra), the Division Bench of this Court has specifically observed and held that the penalty proceeding are distinct from the assessment proceedings and therefore only in a case where the original authority issued the notice, but omitted to impose penalty, penalty may be imposed by the Revisional Authority in exercise of suo motu Revisional powers.

3.2.3. It is vehemently submitted by Shri Tushar Hemani, learned advocate for the assessee that decision of the Division Bench of this Court in the case of Bhavnagar Chemical Works Ltd (supra) was as such referred to by the Hon''ble Supreme Court while deciding the case of Sree Balaji Rice Mill, Bellary (supra). It is submitted that even in the case of Sree Balaji Rice Mill, Bellary (supra), the Hon''ble Supreme Court did consider the

distinguishing features in / under other Sales Tax Act and under the Karnataka Sales Tax Act and only thereafter the Hon''ble Supreme Court has confirmed the penalty imposed by the Revisional Authority, by observing that considering the provisions of the Karnataka Sales Tax Act, entire assessment proceedings were at large before the Revisional Authority. It is submitted that the aforesaid has not been properly appreciated by the learned Tribunal and the learned Tribunal has materially erred in relying upon and / or applying the law law laid down by the Hon''ble Supreme Court in the case of Sree Balaji Rice Mill, Bellary (supra).

3.2.4. It is vehemently submitted by Shri Tushar Hemani, learned advocate for the assessee that as such the decision of the Division Bench of this Court in the case of Bhavnagar Chemical Works Ltd (supra) holds the field which deals with the provisions of Gujarat Sales Tax Act and therefore, the learned Tribunal ought to have applied the decision of the Division Bench of this Court in the case of Bhavnagar Chemical Works Ltd (supra).

3.2.5 It is vehemently submitted by Shri Tushar Hemani, learned advocate for the assessee that even otherwise there is a difference between Section 18 A r/w Section 22 A of the Karnataka Sales Tax Act and Section 67 of the Gujarat Sales Tax Act. It is submitted that under the Karnataka Sales Tax Act the entire assessment proceedings shall be at large before the Revisional Authority. However, considering the language used under Section 67 of the Gujarat Sales Tax Act, before the Revisional Authority / First Appellate Authority only the record of the order and not entire record the assessment proceedings shall be before the First Appellate Authority / Revisional Authority. It is submitted that therefore, the First Appellate Authority who is also Revisional Authority can only consider the legality and validity of the assessment order only and either may enhance the tax or reduced the same. However cannot impose penalty under Section 45(6) of the Act for the first time when AO did not impose the penalty.

3.3. It is vehemently submitted by Shri Tushar Hemani, learned advocate for the assessee that in the present case, therefore, when the AO did not impose the penalty and even no notice of penalty was issued by the AO, calling upon the assessee / dealer to show cause as to why penalty should not be imposed and as observed by the Division Bench of this Court in the case of Bhavnagar Chemicals Works Ltd (supra) the assessment proceedings and the penalty proceedings are distinct and independent, thereafter it is not open for the First Appellate Authority / Revisional Authority to impose penalty for the first time and that too in exercise of suo motu revisional powers.

3.4. Shri Tushar Hemani, learned advocate for the assessee has also relied upon the decision of this Court in the case of State of Gujarat vs. Dashmesh Hydraulic Machinery

rendered in Tax Appeal No. 28 of 2015.

3.5. It is vehemently submitted by Shri Tushar Hemani, learned advocate for the assessee that even otherwise the imposition of penalty under Section 45(6) of the Act was erroneous and bad in law. It is submitted that considering Section 45(6) of the Act no penalty under Section 45(6) of the Act can be imposed unless difference between tax payable and tax paid with the return is more than 25%. It is submitted that in the present case the tax assessed as per the assessment order is Rs. 53,16,858/and the tax paid by the appellant as per the assessment order is Rs.43,89,416/and therefore, difference comes to Rs. 9,27, 442/. It is submitted that now the difference of 25% of the tax paid comes to Rs. 10,97,354/. It is submitted that therefore, in the present case difference of tax paid and tax assessed would be less than 25% and therefore, the AO rightly not imposed penalty under Section 45(6) of the Act. It is further submitted that further on revision of the order of assessment the tax dues is enhanced to Rs. 54,83,267/while the tax paid is Rs. 43,89,416/. It is submitted that therefore, the difference comes to Rs.10,93,851/it would be again less than 25% and therefore, also the penalty under Section 45(6) was not leviable. It is submitted that learned Tribunal is not justified in first deducting / adjusting amount of interest of Rs. 28,234/from the tax paid by the dealer and then arrive at a difference of tax and tax assessed as more than 25% and therefore, the learned Tribunal has materially erred in confirming the levy of penalty.

Making above submissions and relying upon the above decisions, more particularly, decision of the Division Bench of this Court in the case of Bhavnagar Chemicals Work Ltd (supra), it is requested to allow / admit the present appeal and to quash and set aside the impugned judgment and order passed by the learned Tribunal imposing / confirming the order of penalty imposed under Section 45(6) of the Act.

4. Present appeal is vehemently opposed by Shri Hardik Vora, learned Assistant Government Pleader appearing on behalf of the respondent State.

4.1. It is vehemently submitted by Shri Vora, learned AGP that in the facts and circumstances of the case, no error has been committed by the learned Tribunal in confirming the penalty imposed by the First Appellate / Revisional Authority, imposed under Section 45(6) of the Act.

4.2. It is vehemently submitted by Shri Vora, learned AGP that in the facts and circumstances of the case as such the learned Tribunal has rightly not applied the decision of the Division Bench of this Court in the case of Bhavnagar Chemicals Works Ltd (supra). It is vehemently submitted by Shri Vora, learned AGP that that as such there

is distinction between the penalty imposable under Section 45(1)(b) of the Act, 1969 and the penalty imposable under Section 45(6) of the Act. It is vehemently submitted by Shri Vora, learned AGP that penalty under Section 45(6) of the Act is mandatory and therefore, non levy of mandatory penalty in assessment order would be omission on the part of the Assessing Authority. It is submitted that therefore, Revising Authority can invoke the powers under section 67 of the Gujarat Sales Tax Act to revise such an order. In support of his above submission that the penalty under Section 45(6) of the Act is mandatory in nature, Shri Vora, learned AGP has relied upon the decision of the Division Bench of this Court in the case of State of Gujarat vs. Oil and Natural Gas Corporation Ltd reported in (2016) 68 taxmann. Com 64 (Guj). In support of his submission that any omission on the part of the Assessing Authority, powers under Section 67 can be invoked, Shri Vora, learned AGP has relied upon para 10 of the decision of the Division Bench of this Court in the case of Bhavnagar Chemicals Works Limited (supra).

4.3. It is vehemently submitted by Shri Vora, learned AGP that under the Gujarat Sales Tax Act levy of tax and penalty is assessed in the single order of the assessment. It is submitted that so non levy of penalty, which is otherwise leviable in the assessment order would entitle authorities to invoke powers under Section 67 of the Act. In support of his above submission, he has heavily relied upon the decision of the Hon''ble Supreme Court in the case of Sree Balaji Rice Mill, Bellary (supra),

4.4. Now, so far as the attempt on the part of the appellant to draw distinction between Kanataka and Gujarat Act namely record of proceeding visavis record of order, it is submitted by Shri Vora, learned AGP that in taxation, record of proceedings and record of order would always remain same. It is submitted that there cannot be any separate record or proceedings. It is submitted that therefore, distinction sought to be made by the appellant on the basis of the aforesaid two proposition is clearly against the fundamental principles and practice of tax laws. It is submitted that before First / Revisional Authority the entire record of proceedings will be available. It is submitted that there is nothing like separate ''record of order'' as contended on behalf of the appellant. It is submitted that therefore, the decision of the Hon''ble Supreme Court in the case of Sree Balaji Rice Mill, Bellary (supra) shall be applicable with full force.

4.5. It is further submitted that even otherwise on bare reading of Section 67 of the Act, it is very clear that extensive power to invoke revisional powers on entire record of the order is given to revising authority.

4.6. Now, so far as the submission on behalf of the appellant that while considering the difference of 25% between tax paid and tax payable any amount paid is to be first adjusted/ applied towards tax and if that is done in the present case difference would be

less than 25% and therefore, the penalty under Section 45(6) of the Act is not leviable is concerned, relying upon Section 47(4B) of the Act, it is submitted that as per the said provision any amount paid by the assessee shall be first applied towards interest amount, thereafter the penalty and the balance if any, towards amount of Tax. It is submitted that therefore, the calculation of revising authority is as per the Act. It is submitted that therefore, when the difference between the tax paid and tax payable is more than 25%, the Revisional Authority has rightly imposed penalty under Section 45(6) of the Act.

Making above submissions, it is requested to dismiss the present appeal and answer the question in favour of the revenue and against the assessee.

5. Heard the learned advocates for the respective parties at length. The short question which is posed for the consideration of this Court is whether in the facts and circumstances of the case the learned Tribunal is right in law and in facts in confirming the order passed by the Revisional Authority imposing penalty under Section 45(6) of the Act which has been imposed upon the Revisional Authority for the first time as the same was not imposed by the AO while passing the original order of assessment ?

5.1. The another question which is posed for the consideration of this Court is whether that while calculating / considering the difference of 25% between tax paid and tax payable, while imposing penalty under Section 45(6) of the whether any amount paid by the assessee / dealer is first to be applied towards tax payable as sought to be contended on behalf of the appellant - assessee or the same is required to be first applied towards interest, thereafter for penalty and thereafter for tax as contended on behalf of the Revenue ?

6. While considering the first question few facts which emerge from the record are required to be considered. That by order dated 31.3.2005 under Section 41(3) of the Gujarat Sales Tax Act for AY 200001, the Assessing Authority raised the additional demand of tax of Rs. 14,95,390/. Feeling aggrieved and dissatisfied with the assessment order passed by the AO raising additional demand of tax of Rs. 14,95,390/, the appellant hereinassessee - dealer preferred the appeal before the First Appellate Authority. At this stage, it is required to be noted that the First Appellate Authority and the Revisional Authority is the same authority. That in the appeal, the First Appellate Authority found that the AO has materially erred in levying purchase tax at 19.75% only, against the levy of purchase tax on lignite at 25%. The First Appellate Authority / Revisional Authority also found that though the penalty was leviable under Section 45(6) of the Act, the AO did not levy / impose the penalty under Section 45(6) of the Act and therefore, the First Appellate Authority in exercise of revisional powers directed to issue notice in the form of 45, 49 and 38 of the Act. The assessee / dealer was called upon to show cause as to why the

penalty on the difference of amount on tax paid and amount of tax payable under Section 45(6) of the Act may not be imposed. The assessee appeared before the First Appellate Authority / Revisional Authority through the advocate and also through its Accountant. It was submitted that as there was no mala fide intention on the part of the assessee to avoid the payment of tax and there was a genuine mistake on the part of the dealer in not paying correct tax, it was requested not to impose penalty and the interest. Thereafter, considering the submissions made by the assessee, the First Appellate Authority/ Revisional Authority imposed the penalty under Section 45(6) of the Act on the difference of amount of tax paid and tax payable. Therefore, in the present case, even the First Authority also enhanced the amount of tax liability and raised additional demand of tax being difference in purchase tax between 19.75% as levied by the AO and 25% as was leviable (as held by the Appellate Authority). At this stage, it is required to be noted that so far as demand of additional tax liability is concerned, the assessee is not disputing to the same and what is challenged is penalty under Section 45(6) of the Act. It is required to be noted and it is not in dispute that as per the order passed by the Appellate Authority tax payable (not disputed by the appellant assessee) was Rs. 54,83,267/. The assessee paid rs. 43,89,416/towards tax with the return. As per the appeal order, a sum of Rs.18040/was towards interest for late payment under Section 47(4A) and Rs. 10194/under Section 47(4B). Thus, Rs.28234/was by way of interest. Considering Section 47(4A) and 47(4B) the aforesaid amount of Rs. 28234/by way of interest was first required to be deducted from the amount paid by the assessee and after deducting the same, amount of tax paid by the assessee can be said to be Rs. 43,61,182/. As observed herein above, tax payable was rs. 54,83,267/and therefore, the difference between tax paid and tax payable would be Rs. 11,22,085/. Having found that difference is more than 25% of the total amount paid along with return, the penalty under Section 45(6) of the Act is imposed. In light of the aforesaid facts and circumstances of the case, the questions which are posed for the consideration before this Court are required to be considered.

6.1. While considering the aforesaid questions, relevant provisions of the Gujarat Sales Tax, more particularly, Sections 45, 47, 47(4A) and 47(4B) and Section 67 of the Act are required to be referred to, which are as under:

SECTION 45 : Imposition of penalty in certain cases and bar to prosecution

(1) Where any dealer or Commission agent becomes liable to pay purchase tax under the provisions of subsection (1) or (2) of section 16 , then, the Commissioner may impose on him, in addition to any tax payable,

(a) if he has included the purchase price of the goods in his turnover of purchase as required by subsection by subsection (1) of section 16 , a sum by way of penalty not

exceeding half the amount of tax, and

(b) if he has not so included the purchase price as aforesaid, a sum by way of penalty not exceeding twice the amount of tax.

(2) [xxx] if it appears to the Commissioner that such dealer.

(a) has failed to apply for registration as required by section 29 , or

(b) has without reasonable cause, failed to comply with the notice under section [41 . 44 or 67] or

(c) has concealed the particulars of any transaction or deliberately furnished inaccurate particulars of any transaction liable to tax, the commissioner may impose upon the dealer by way of penalty, in addition to any tax 139 [assessed under Sections 41 or reassessed under section 44 or revised under section 67] a sum not exceeding one and onehalf times the amount of the tax.

(3) if a dealer fails to present his Licence, recognition or as the case may be permit for cancellation as required by Section 35 , or 36 , the Commissioner may impose upon the dealer by way of penalty, a sum not exceeding two thousand rupees.

140 [3A)lf a dealer fails to furnish any declaration or any return by the prescribed date as required under subsection (1) of section 40 , the commissioner shall impose upon such dealer by way of penalty for each declaration or return, a sum of two hundred rupees for every month or part of a month comprised in the period commencing from the day immediately after the expiry of prescribed date and ending on the date on which a declaration or return is furnished.

(4) If a dealer fails without sufficient cause to furnish any declaration or any return 141 [as required by proviso to subsection (l) or subsection (2) of section 40], the Commissioner may impose upon the dealer by way of penalty, a sum not exceeding two thousand rupees.

142 [(5) Where in the case of a dealer the amount of tax (a) assessed for any period under section [*] 41 or 50 ''; or (b) reassessed for any period under section 44 ; exceeds

the amount of tax already paid under subsection (1), (2) or (3) of section 47 by the dealer in respect of such period by more than 144 [twenty five percent] of the amount of tax so paid, the dealer shall be deemed to have failed to pay the tax to the extent of the difference between the amount so assessed or reassessed as aforesaid and the amount paid.

(6) 145 [where under subsection (5), a dealer is deemed to have failed to pay the tax to the extent mentioned in the said subsection, there shall be levied on such dealer a penalty not exceeding one and onehalf times the difference referred to in subsection (5.)]

(7) Wherever any person fails without sufficient cause, to furnish any information required by section 38 , the Commissioner may, by an order in writing, impose upon the dealer by way of penalty a sum not exceeding two thousand rupees.

(8) If any dealer contravenes the provisions of Section 57 , the Commissioner may direct him to pay by way of penalty a sum not exceeding ten percent of the amount of the bill or cash memorandum in respect of which such contravention has been made.

(9) If the Commissioner has reason to believe that any person is liable to a penalty under any of the provisions of this section, he shall serve on him a notice requiring him on a date and at a place specified in the notice to attend and to show cause why a penalty as provided in such provision should not be imposed on him.

(10) The Commissioner shall thereupon hold an inquiry and shall make such order as he thinks fit.

(11) This section as amended by section 4 of Gujarat Sales tax (Amendment) Ordinance, 1991 shall apply and shall be deemed always to have applied in relation to the liability to pay tax on sale of goods, specified sales and purchases of goods, which have taken place during the period commencing on the 1st April, 1990 and ending immediately before the commencement of the said amending section.

SECTION 47 : Payment of tax and deferred payment of tax etc

(1) Tax shall be paid in the manner herein provided, and at such intervals as may be prescribed.

(2) A registered dealer furnishing declarations or returns as required by subsection (1) of section 40 , shall first pay into a Government treasury, in the manner prescribed, the whole amount of tax due from him according to such declaration or return along with the amount of any penalty payable by him under section 45 .

(3) A Registered dealer furnishing a revised declaration or revised return in accordance with subsection (3) of section 40 which revised declaration or revised return shows that a larger amount of tax than already paid is payable, shall first pay into a Government treasury the extra amount of tax.

(4) (a) The amount of tax ;-

(i) due where declarations or returns have been furnished without full payment therefor, or

(ii) assessed or reassessed for any period under section 41 or section 44 less any sum already paid by the dealer in respect of such period, or assessed under section [50].

[(iii) provisionally assessed for any period under section 41B less any sum already paid by the dealer in respect of such period.]

(b) the amount of penalty (if any) levied under section 45 or 46 152 [and] (c) the amount of interest, if any, under subsection (4A) Shall be paid by the dealer or the person liable therefor into a Government treasury by such date as may be specified in a notice issued by the Commissioner for this purpose, being a date not earlier than 154 [ten days] from the date of service of the notice:

Provided that the Commissioner or an appellate authority in an appeal under section 65 may, in respect of any particular dealer or person, and for reasons to be recorded in writing, extend the date of payment, or allow him to pay the tax or penalty (if any) by installments :

[Provided further that notwithstanding anything contained in this Act or in the rules made thereunder but subject to such conditions as the State Government or the Commissioner may by general or special order specify, where a dealer to whom incentives by way of deferment of sales tax or purchase tax or both have been granted by virtue of an Eligibility certificate. granted by the Commissioner of Industries, Gujarat State or any officer authorized by him in this behalf and where a loan liability equal to the amount of

any such tax payable by such dealer has been raised by the Gujarat Industrial Investment Corporation Limited or the Gujarat State Financial Corporation limited, then such tax shall be deemed, in the public interest, to have been paid.]

[(4AA) Where provisional assessment is made in respect of any period under subsection(1. of section 41B and thereafter assessment is made in respect of that period or part of that period under section 41 , the amount of tax provisionally assessed and paid by a dealer shall be adjusted against the amount of tax assessed and payable by a dealer.]

[(4A) (a) Where a dealer does not pay the amount of tax within the time prescribed for its payment under subsection (1), (2)or (3), then there shall be paid by such dealer for the period commencing on the date of expiry of the .aforesaid prescribed time and ending on date of payment of the amount of tax, simple interest, at the rate of 158 [eighteen per cent], per annum on the amount of tax not so paid or on any less amount thereof remaining unpaid during such period.

(b) Where the amount of tax assessed or reassessed for any period, under section 41 or section 44 , subject to revision if any under section 67 , exceeds the amount of tax already paid by a dealer for that period, there shall be paid by such dealer, for the period commencing from the date of expiry of the time prescribed for payment of tax under subsection (1), (2) or (3) and ending on date of order of assessment, reassessment or, as the case may be, revision, simple interest at the rate of [eighteen per cent] per annum on the amount of tax not so paid or any less amount thereof remaining unpaid during such period.

(c) Where a dealer does not pay the amount of tax falling under clause (a) of subsection (4) on or before the date specified in the notice issued under that subsection, then there shall be paid by such dealer for the period commencing on the specified date and ending on the date of payment, simple interest at the rate of [eighteen per cent] per annum on the amount of tax not so paid or any less amount thereof remaining unpaid during such period:

Provided that no interest shall be payable under clause (b),

(i) in the case where dealer has furnished the returns or declaration and made payment of the amount of tax in accordance with the provisions of subsection (1), (2) or (3) and the difference between the amount of tax assessed or reassessed for any period and the

amount of tax so paid for such period does not exceed ten per cent of the amount of tax so paid by the dealer;

(ii) [XXX]

(iii) in the case where any assessment is kept pending in accordance with a general or special order of the State Government or the Commissioner, in respect of the period for which the assessment is kept pending;

(iv) in the case where on account of an order passed under section 67 an additional amount of tax becomes payable by a dealer on such additional amount of tax for the period commencing on the date of order of assessment and ending on the date of the order so passed.

(v) in the case where on account of a judgement of the Gujarat High Court or the Supreme Court an additional amount of tax becomes payable by a dealer, on such additional amount of tax for the period ending on the date of such judgement.

(vi) in the case where in assessing the amount of tax from any dealer under this Act in respect of any period, the time taken for making an order of assessment exceeds thirtysix months from the date of expiry of the time prescribed for payment of tax under subsection (1), (2), or (3) of section 47 , in respect of the period exceeding thirtysix months]

[4B] Where a dealer is liable to pay interest under subsection (4A) and he makes payment of an amount which is less than the aggregate of the amount of tax, penalty and interest, the amount so paid shall be first applied towards the amount of interest, thereafter the balance, if any, towards the amount of penalty and thereafter the balance, if any, towards the amount of tax.

(5) -[Any tax, penalty or interest] which remains unpaid after the date specified in the notice for payment, or after the extended date of payment, and any installment not duly paid, shall be recoverable as an arrear of land revenue.

1[(6) This sections as amended by section 5 of the Gujarat Sales Tax (Amendment) Ordinance, 1991 shall apply and shall be deemed always to have applied in relation to the liability to pay tax on sales of goods, specified sales and purchases of goods which have taken place during the period commencing the 1st April, 1990 and ending

immediately before the commencement of the said section.]

67. REVISION :

(1) subject to the provisions, of section 66 and to any rules which may made in this behalf, :-

(a) the Commissioner on his own motion within three years 1[or on application made to him within one year] from the date of any order passed by any officer appointed under section 27 to assist him, may call for and examine the record of any such order and pass such order thereon as he thinks just and proper 2[within twelve months from the date of service of notice for revision;]

(b) The Tribunal, on application made to it against an order of the Commissioner (not being an order passed under subsection (2) of section 65 in second appeal 3[or under clause (a) in revision on an application)] within four months from the date of the communication of the Order may call for and examine the record of any such order, and pass such order thereon as it thinks just and proper.

(2) Where an appeal lies under section 65 and no appeal has been filed, no proceedings in revision under this section shall be entertained upon application. [Provided that the proceeding in revision may be entertained upon an application where the applicant satisfies the Commissioner that he had sufficient cause for not preferring an appeal against the order in respect of which an application for revision is made.]

(3) No order shall be passed under this section which adversely affects any person, unless such person has been given reasonable opportunity of being heard.

(4) Where the Commissioner or the Tribunal rejects any application for revision under this section, the Commissioner or, as the case may be, the Tribunal shall record the reasons for such rejection.]

6.2. Section 45 confers power to levy / impose penalty in certain cases. In certain cases, enumerated in Section 45 of the Act, the penalty imposable is distinct with the assessment such as Section 45(1)(a)(b). However, so far as penalty imposable under Section 45(5) and 45(6) of the Act is concerned, it is a direct bearing or connection with the order of assessment and the determination of the tax liability. Subsection (5) of

Section 45 provides that where in the case of a dealer the amount of tax assessed for any period under Section 41 or 50; or reassessed for any period under Section 44; exceeds the amount of tax already paid under subsection (1), (2)or (3) of Section 47 of the Act by the dealer in respect of such period by more than 25% of the amount of tax so paid, the dealer shall be deemed to have failed to pay the tax to the extent of the difference between the amount so assessed or reassessed as aforesaid and the amount paid. Subsection (6) of Section 45 provides that where under subsection (5), a dealer is deemed to have failed to pay the tax to the extent mentioned in the said subsection, there shall be levied on such dealer a penalty not exceeding one and onehalf times the difference referred to in subsection (5.). Thus, on bare reading of subsection (5) and (6) of Section 45, it is integral part of the assessment and the levy of penalty on the difference of amount of tax paid and amount of tax payable as per the order of assessment or reassessment as the case may be shall be automatic. Therefore, when the penalty on the difference of amount tax paid and tax payable is more than 25% of the amount of tax so paid, there shall be automatic levy of penalty under Section 45(6) of the Act and therefore, no separate notice is required to show cause as to why penalty under subsection (6) of Section 45 may not be imposed. However, a notice may require to be issued while imposing penalty in other cases, more particularly, Section 45(1)(b). In the case of Oil and Natural Gas Corporation Ltd(supra), it is specifically observed and held by the Division Bench of this Court that penalty leviable under subsection (6) of Section 45 is a statutory penalty and there is no discretion vested in the Commissioner whether to levy penalty leviable under subsection (6) of Section 45 or not. In para 12.1, the Division Bench has observed and held as under:

"12.1. Penalty leviable under subsection (6) of Section 45 is a statutory penalty. There is no distinction vested in the Commissioner whether to levy the penalty leviable under subsection (6) of Section 45 or not. Subsection (5) of section 45 provides that in the case of a dealer the amount of tax assessed for any period under sections 41 to 50 or reassessed for any period under section 45 exceeds the amount of tax already paid by the dealer in respect of such period by more than 25% of the amount of tax so paid, dealer shall be deemed to have paid the tax to the extent of difference between amount so assessed or reassessed as aforesaid and the amount paid. Once considering subsection (5) of section 45 of the Act, 1969, a dealer is deemed to have failed to pay the tax to the extent mentioned in subsection (5), that shall be levied on such a dealer not exceeding a penalty 1/2 times the difference referred to in subsection (5). Under the circumstances, to the aforesaid extent and on the difference of tax, as per subsection (5) of section 45, the respondent ONGC is liable to pay the penalty as mentioned under subsection (6) of section 45.

6.3. Under the circumstances, when the AO failed to impose the statutory penalty, it can be said that there was an omission on the part of the AO and therefore, the same was

revisable by the Revisional Authority in exercise of powers under Section 67 of the Act. Even matter is required to be viewed from another angle. In the present case, even the First Appellate Authority who incidentally was also a Revisional Authority, in fact enhanced the amount of tax payable. The AO levied the purchase tax on lignite at 19.75% while passing the assessment order and the First Appellate Authority held that purchase tax was leviable at 25% and therefore, in fact enhanced demand of tax. Under the circumstances, in the present case even the original assessment order came to be modified by the First Appellate Authority and the tax liability came to be enhanced and therefore, it can be said that the original assessment order merged into order passed by the First Appellate Authority and therefore, also the penalty under Section 45(6) of the Act was leviable / imposable on the difference of tax paid at the time of filing of return and tax payable as determined by the Appellate Authority. Under the circumstances also, penalty imposed under Section 45(6) of the Act is not required to be interfered with.

7. Now, so far as submission of Shri Tushar Hemani, learned advocate for the appellant that on the decision of the Hon''ble Supreme Court in the case of Sree Balaji Rice Mill, Bellary (supra) that the wording in the Karnataka Sales Tax Act are different as that of Section 67 of the Gujarat Sales Tax Act and in the Karnataka Sales Tax Act entire record of the assessment proceedings shall be before the Revisional Authority and so far as under Gujarat Sales Tax Act, before the Revisional Authority and as per Section 67 of the Act only the record of the order (assessment order) shall be before the Revisional Authority and therefore, the Revisional Authority is required to consider the legality and validity of the assessment order only and cannot impose the penalty for the first time, when the AO did not impose the penalty while passing the assessment order is concerned, at the outset, it is required to be noted that as such there is no much distinction between the record of assessment proceedings and the record of the order. The record of the assessment proceedings and the record of the order are same. In any case, when it has been found that the AO omitted to impose the penalty under Section 45(6) of the Act which is held to be mandatory and automatic on the difference of tax paid with the return and tax payable as per the order of assessment / reassessment and as observed herein above, in the present case, even the Appellate Authority modified the assessment order and the additional tax liability has been increased, in the facts and circumstances of the case, it cannot be said that the Revisional Authority has erred in imposing the penalty under Section 45(6) of the Act which as such is a statutory penalty.

8. Now, so far as the reliance placed upon the decision of the Division Bench of this Court in the case of Bhavnagar Chemical Works Ltd (supra) by the learned advocate for the assessee is concerned, at the outset, it is required to be noted that before the Division Bench the question was with respect to the penalty imposed under Section 45(1) (b) of th Act. As observed herein above, the penalty proceedings under Section 45(1)(b) of the Act is independent and distinct from the assessment proceedings. On the other hand, the penalty under Section 45(6) of the Act is integral part of the assessment proceedings and

on determining the tax liability while passing the order of assessment and reassessment as the case may be, on the difference of amount of tax paid with the return and amount of tax payable on assessment and / or reassessment order and if the difference if more than 25%, the Assessing Authority shall levy the penalty under Section 45(6) of the Act. No discretion is vested with the AO not to impose the penalty under Section 45(6) of the Act. Therefore, when the penalty is imposable under Section 45(1)(b) of the Act can be said to be independent and distinct from the assessment proceedings, a separate notice is required to be issued upon the dealer / assessee calling upon him to show cause as to why the penalty under Section 45(1)(b) may not be imposed. Such is not the requirement while imposing the penalty under Section 45(6) of the Act as the same is a statutory penalty and on the difference of amount of tax paid and the tax payable, the Assessing Authority shall impose the penalty. Under the circumstances, the decision of the Division Bench of this Court in the case of Bhavnagar Chemical Works Ltd (supra) shall not be applicable to the facts of the case on hand, more particularly, with respect to the penalty imposed under Section 45(6) of the Act. As rightly observed by the Division Bench of this Court when AO did not imposed the penalty under Section 45(1)(b) of the Act and no notice was issued by the AO calling upon the assessee to show cause as to why the penalty under Section 45(1)(b) of the Act may not be imposed, the Division Bench rightly observed that the same may not be imposed / levied by the Revisional Authority for the first time. However, the same shall not be applicable with respect to the penalty under Section 45(6) of the Act.

9. In view of the aforesaid facts and circumstances of the case, we are of the opinion that the learned Tribunal has not committed any error in confirming the order passed by the Revisional Authority in imposing the penalty under Section 45(6) of the Act on the difference of amount of tax paid with the return and the amount of tax held to be payable by the Appellate Authority. Therefore, question nos. 1, 2 and 4 are held against the assessee and in favour of the revenue.

10. Now, so far as question no.3 and the submission on behalf of the appellantdealer that while considering / calculating 25% difference between the amount tax paid with the return and amount of tax payable while imposing penalty under Section 45(6) of the Act any amount paid by the dealer shall be first adjusted/ applied towards tax liability and not towards interest or penalty as had been done by the Revisional Authority and the learned Tribunal and therefore, if the amount paid along with return is first applied towards the tax, the difference of tax shall be less than 25% and therefore, penalty under Section 45(6) of the Act was not imposable is concerned, the aforesaid cannot be accepted. Section47(4a) and 47(4b) is very clear. That as per the aforesaid provision any amount paid / deposited by the assessee/ dealer shall be first applied towards the interest, thereafter the penalty and thereafter, the balance amount, if any, shall be applied / adjusted towards tax liability. Under the circumstances, applying Section 47(4a) and section 47(4b) of the Act, the difference in the amount of tax paid with the return (after deducting the interest of Rs.28,234/as per the order passed by the Appellate Authority)

and the tax payable would be more than 25% (para 15 of the impugned judgment and order) passed by the learned Tribunal). Under the circumstances, penalty under Section 45(6) is rightly imposed on the difference of tax paid and tax payable. The calculation of the difference of 25% is absolutely in consonance with the provision of the statute, more particularly, Sections 47(4a) and 47(4b) of the at. We are in complete agreement with the view taken by the learned Tribunal. Under the circumstances, question no.3 is also held against the assessee and in favour of revenue.

11. In view of the above and for the reasons stated above, present appeal fails and same deserves to be dismissed and is accordingly dismissed. All the questions are held in favour of the revenue and against the assessee.