2026 INSC 933

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1052 OF 2013

M/S. SAUDI ARABIAN AIRLINES **APPELLANT(S)**

VERSUS

UNION OF INDIA & ORS. **RESPONDENT(S)**

J U D G M E N T

UJJAL BHUYAN, J.

Appellant has preferred this appeal being aggrieved by the judgment and order dated 09.08.2010 passed by the High Court of Judicature at Bombay (briefly 'the High Court' hereinafter) in Writ Petition No. 3269 of 2004 (*M/s. Saudi Arabian Airlines Vs. Union of India*) alongwith three other writ petitions.

2. By the aforesaid judgment and order dated 09.08.2010 (impugned judgment and order), the High

Court has dismissed the writ petition filed by the appellant seeking the following reliefs:

(a) to declare the provisions of Section 38(3) of Chapter V of the Finance Act, 1979, as amended by the Finance Act, 1994, as unconstitutional and *ultravires* Article 14 of the Constitution of India;

(b) to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction, calling for the papers and proceedings pertaining to the passing of the orders dated 8th August 2001, 9th January, 2003 and 29th October, 2004 and after going into the legality, validity and propriety thereof, to quash and/or set aside the said orders;

(c) to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, directing the respondents to forthwith refund the sum of Rs 17,00,000.00 deposited by the petitioners pursuant to the order dated 12th July, 2002 passed by the respondents together with interest thereon at the rate of 15% per annum from the date of deposit till payment and/or realization thereof;

3. The matter relates to imposition of penalty under Section 38(3) of the Finance Act, 1979 (briefly 'The Finance Act' hereinafter) for delayed payment of Foreign Travel Tax ('FTT' for short) into the Government treasury.

4. Briefly stated, appellant is an airline company carrying on the business of transporting passengers between various locations in India and abroad under the name and style of M/s. Saudi Arabian Airlines. It has a license to operate flights to and from India.

5. As required under the Finance Act, appellant has to deposit FTT into the Government treasury within the time stipulated thereunder as well as in terms of the Foreign Travel Tax Rules, 1979 (briefly 'the 1979 Rules' hereinafter), framed under the Finance Act. Appellant in the course of its business collected FTT from the passengers

going abroad in its aircrafts in accordance with the Finance Act and the 1979 Rules.

6. For the months of July, 1995, December, 1996 and November, 1997, there was delay in payment of FTT of only 1 day. There was a delay of 3 days in deposit of FTT for the month of August, 1994 and a delay of 11 days for the month of April, 1996. Further, there was delay of 2 months and 3 days i.e. 63 days in making payment of FTT for the month of December, 1995. However, in 5 out of the 6 instances of delay, the demand drafts were purchased by the appellant through the concerned banks before the due dates for making the payment but there were delays in depositing the demand drafts by 1 day, 3 days, 11 days and 63 days respectively, as noted above. That apart, the total short payment of FTT in 7 cases was an aggregate amount of Rs. 14,000.00 out of which Rs. 12,000.00 has been held to be barred by limitation. As such, only Rs. 2,000.00 was payable by the appellant.

7. 14 separate show cause notices were issued on different dates to the appellant whereby it was called upon to show cause as to why the FTT short payment should not

be recovered from it alongwith interest and penalty under Section 38 of the Finance Act and as to why interest should not be levied and penalty should not be imposed on it under the said provision for late payment of FTT.

8. Appellant submitted reply to the show cause notices. Primary contention of the appellant was that short payment or late payment of FTT was not deliberate; it was because of technical reasons. Therefore, the same should be condoned.

9. Adjudicating authority after hearing the authorized representative of the appellant noted that there were total 19 cases where the appellant had contravened the provisions of the Finance Act and the 1979 Rules. In 6 cases, FTT collected by the appellant should have been deposited into the Government treasury before the expiry of 30 days, as specified under Rule 4 of the 1979 Rules. However, in these 6 cases, it was found that the FTT collected were deposited into the Government treasury after expiry of 30 days, further noting that there was delay from 1 day to 2 months in these 6 cases. The adjudicating authority also noted that interest at the rate of 20 percent per annum on such late payment

of FTT as leviable under Section 35A of the Finance Act was not paid by the appellant for the period for which there was delay in payment of FTT. According to the adjudicating authority, the total interest leviable for this late payment of FTT worked out to Rs. 2,58,630.00 as on the dates of payment of the respective amount of FTT. The adjudicating authority also found that in 9 cases, the actual amount of FTT required to be deposited by the appellant under Section 35(2) of the Finance Act was Rs. 5,50,74,600.00 but the appellant had paid only Rs. 5,49,86,900.00; thus there was shortfall of Rs. 87,700.00. That apart, interest at the rate of 20 percent per annum on the short payment of FTT was also not paid by the appellant. The interest amount for this short payment of FTT was Rs. 45,632.00. The adjudicating authority also found that in 13 cases, the monthly returns were belatedly filed beyond the specified period. There was delay of 1 day to 2 months in these 13 cases.

9.1. Holding that the appellant had contravened the provisions of the Finance Act and the 1979 Rules which made it liable to penal action, the adjudicating authority *vide* the order-in-original dated 14.06.1999 while confirming the demand of FTT to the extent of Rs. 87,700.00, which was the short payment, also confirmed the levy of interest of Rs. 2,58,630.00 on late payment of FTT to the extent of Rs. 3,56,45,700.00. Invoking the provisions of Section 38(3) of the Finance Act, the adjudicating authority also imposed penalty on the appellant to the extent of Rs. 12,000.00 in respect of 6 cases of late payment of FTT, Rs. 18,000.00 in respect of 9 cases of short payment of FTT, and Rs. 6,000.00 in respect of 3 cases of late submission of monthly return.

10. Aggrieved by the aforesaid order-in-original dated 14.06.1999, appellant preferred an appeal before the third respondent, being the appellate authority. The appellate authority passed order-in-appeal dated 24.11.1999, remanding the matter back to the adjudicating authority to enable the appellant to produce satisfactory evidence to substantiate its claim. Adjudicating authority was directed to look in the issue afresh after granting proper opportunity of personal hearing to the appellant.

11. On remand, the Deputy Commissioner of Customs i.e. the adjudicating authority confirmed the short payment of FTT to the extent of Rs. 14,000.00. For such short payment, interest at the rate of 20 percent as provided under Section 35A(1) of the Finance Act was levied till payment. Further, because of late payment of FTT to the extent of Rs. 3,56,45,700.00, interest of Rs. 2,58,630.00 i.e. at the rate of 20 percent per annum was levied under the aforesaid provision of the Finance Act. Thereafter, the adjudicating authority referred to Section 38(3) of the Finance Act and took the view that for failure to pay FTT to the credit of the Central Government under Section 35(2), appellant was liable to pay penalty in addition to the FTT and the interest so levied. Moreover, in view of the delay in the submission of FTT returns, penal action as provided under Rule 10A(1) of the 1979 Rules were liable to be taken. Accordingly, *vide* the *de novo* order-in-original dated 08.08.2001, the adjudicating authority directed the appellant to pay the following amounts:

(i) Rs. 14,000.00 on account of short payment of FTT;

(ii) interest of Rs. 2,58,630.00 for late payment of FTT to the extent of Rs. 3,56,45,700.00;

(iii) interest at the rate of 20 percent on the short payment of Rs. 14,000.00 till actual payment of the said amount;

(iv) penalty of Rs. 71,29,140.00 was imposed under Section 38(3) of the Finance Act in respect of 6 cases of late payment of FTT;

(v) penalty of Rs. 2,800.00 in respect of 7 cases of short payment of FTT; and

(vi) penalty of Rs. 47,000.00 was imposed for 3 cases of late submission of monthly return.

12. Aggrieved by the aforesaid *de novo* order-in-original dated 08.08.2001, appellant preferred appeal before the appellate authority i.e. Commissioner of Customs (Appeal) (respondent No. 3 herein). The appellate authority upheld the *de novo* order-in-original by rejecting the appeal *vide* the appellate order dated 09.01.2003. Though it was specifically argued on behalf of the appellant that in the initial order-in-original, the penalty imposed was

much less than what came to be imposed in the *de novo* order-in-original on remand by the appellate authority, thus placing the appellant in a worse of condition, the appellate authority held that the adjudicating authority had only imposed the minimum penalty provided under the statute which was inadvertently overlooked in the initial proceedings. Appellate authority held that penalty is imposable not only where the carrier has not paid the tax but also in cases where there is delay in payment of the tax. Delay in payment of tax beyond the due date amounts to failure to pay the tax. In such a case, Section 38(3) of the Finance Act would be applicable. Interestingly, the appellate authority observed that all the submissions made by the appellant may be genuine but because the tax was deposited beyond the time limit, penalty would be attracted automatically. However, while determining penalty i.e. between the maximum and the minimum amounts, the circumstances under which the payment of tax was delayed and intention of the carrier or the other person may be taken into consideration. But taking the view that adjudicating authority had looked into all these aspects while imposing the minimum penalty, the appellate authority held that no discretion has been conferred either on the adjudicating authority or on the appellate authority to impose penalty less than the minimum prescribed.

13. It may be mentioned that appellant preferred a revision application under Section 129 of the Customs Act, 1962 before Government of India, Ministry of Finance, Department of Revenue. By order dated 29.10.2004, the revisional authority disposed of the revision application in terms of the said order.

13.1. In the aforesaid order, the revisional authority accepted the contention of the appellant that in 5 cases the show cause notices were issued beyond the prescribed time limit of 6 months under Rule 7 of the 1979 Rules. Accordingly, the demand of interest for those 5 cases were set aside on the ground of limitation. However, the revisional authority did not accept the other contentions of the appellant including on the question of penalty. It opined that under Section 38 (3) of the Finance Act, there is no discretion with regard to the minimum quantum of penalty which is a statutory compulsion. Once there is a delay, imposition of penalty is automatic. Insofar enhancing the quantum of penalty is concerned, Central Government was of the view that in the *de novo* order-in-original, the adjudicating authority had only imposed the minimum prescribed penalty under the statute which was overlooked through inadvertence in the initial order-in-original. However, on the aspect of demand of interest of Rs.2,58,630.00 on account of delayed payment of FTT amounting to Rs.3,56,45,700.00, the revisional authority remanded the case back to the adjudicating authority for the limited purpose of ascertaining whether the show cause notices for demanding interest on the delayed payment of the aforesaid amount of FTT were issued within the prescribed time limit under Rule 7 of the 1979 Rules and thereafter to decide the same in accordance with law.

14. The aforesaid revisional order dated 29.10.2004 came to be challenged before High Court by way of a writ petition being Writ Petition No. 3269 of 2004 seeking the reliefs quoted supra. The basic thrust of the writ petition pertained to imposition of penalty, rather enhancement of the same in the *de novo* order-in-original.

14.1. Before the High Court contentions advanced on behalf of the appellant were that under the proviso to Rule 11 of the 1979 Rules, no officer of customs is competent to impose penalty under Section 38 (3) of the Finance Act for more than rupees five thousand. Rule 11 is a part of the statute. It provides for lesser penalty than provided for in Section 38 (3) of the Finance Act. Proviso to Rule 11 being beneficial to the assessee, it should be given effect. Sub-section (3) of Section 38 came to be inserted in the statute by way of amendment in 1994. However, there was no amendment to the proviso to Rule 11 which was retained. Such omission to amend the proviso to Rule 11 is a conscious decision of the legislature. However, such contention on behalf of the appellant was rejected by the High Court by holding that provisions of the Finance Act will prevail over the 1979 Rules. Reconciliation between sub-section (3) of Section 38 and the proviso to Rule 11 is not possible as there is a clear conflict between the two. Therefore, the subordinate legislation will have to give way to the parent statute.

14.2. Insofar the question of *mens rea* is concerned, the High Court took the view that the penalty leviable under Section 38 is in respect of default or failure to pay statutory dues. In other words, such penalty is for breach of civil obligation. In such a provision, there is no element of any criminal aspect or requirement for criminal intendment as is generally contemplated under criminal proceedings. Therefore, there is no need to establish proof of criminal motive or any *mens rea* on the part of the defaulter. It is not an essential element for imposing penalty under the Finance Act and the 1979 Rules.

14.3. After posing to itself that the sole question that arose for consideration was whether the authorities below were justified in imposing and sustaining the penalty in consonance with sub-section (3) of Section 38 of the Finance Act ignoring the proviso to Rule 11 of the 1979 Rules, the High Court answered the said question by holding that breach of civil obligation against the appellant stood established which was sufficient to attract the penalty which was in the nature of fine. Imposition of such penalty is irrespective of the fact whether or not the contravention made by the defaulter was with any guilty intention.

14.4. The High Court also rejected the contention advanced on behalf of the appellant that there is a distinction between ‘failure to pay the tax’ and ‘delay in the payment of the tax’. The contention was that only when there is a ‘failure to pay the tax’, sub-section (3) of Section 38 would get attracted; in other words, mere delay in payment of tax would not amount to ‘failure to pay the tax’; therefore, delayed payment does not attract penalty. Rejecting such contention, the High Court held that delayed payment is equivalent to non-payment i.e. ‘failure to pay the tax’. According to the High Court, once the limitation period for deposit of the tax is over, then it is immaterial when the defaulter in future makes the payment. Once there is default, Section 38 (3) is attracted and the prescribed authority cannot impose a penalty which is below the minimum amount of penalty prescribed by the statute.

14.5. Lastly, the High Court also repelled the contention of the appellant that it was not open to the adjudicating authority to enhance the quantum of penalty after it was sent back on remand. The High Court held that the remand was not limited; rather it was made to enable the adjudicating authority to consider all the issues after complying with the principles of natural justice. Since it was not a limited remand, it was open for the adjudicating authority to enhance the amount of penalty in consonance with the provisions of sub-section (3) of Section 38 of the Finance Act.

14.6. Accordingly, *vide* the impugned judgment and order dated 09.08.2010, the High Court dismissed the writ petition preferred by the appellant.

15. Mr. P.V. Dinesh, learned senior counsel for the appellant, at the outset, submits that the issue which arises for consideration in this case is whether any penalty is liable to be imposed upon the appellant under Section 38(3) of the Finance Act when there is no wilful failure to pay or any wilful default or wilful delayed payment? He further submits that an associated question which arises for consideration is whether the quantum of penalty liable to be paid for violation of Section 35(2) of the Finance Act

should be exclusively as per Section 38(3) of the said Act or in conjunction with the provisions of the 1979 Rules. Mr. Dinesh submits that there is one more issue which this Court may consider and that is whether unintentional delay in payment of the tax can be equated with non-payment and thereby attract penalty?

15.1. Learned senior counsel has drawn the attention of the Court to various provisions of the Finance Act and the 1979 Rules including the amendments to Section 38 introduced in 1994. In fact, he submits that sub-sections (3) and (4) of Section 38 came to be introduced in the statute only by way of an amendment in 1994 but there was no amendment to Rule 11 of the 1979 Rules.

15.2. Adverting to sub-section (4) of Section 38 of the Finance Act which also came to be introduced by way of the aforesaid amendment in 1994, Mr. Dinesh submits that whenever there is violation of the 1979 Rules, Section 38(4) would be attracted in which event the penalty shall not be less than Rs. 500.00 but which may extend to Rs. 50,000.00 and where the breach is a continuing one, a further penalty which shall extend to Rs. 500.00 per day during the period when such breach continues. Though this point was argued before the High Court, the same was not considered or discussed by the High Court.

15.3. Submission of Mr. Dinesh is that even assuming that there is a violation of sub-section (2) of Section 35, the penalty can be imposed only in accordance with Section 38(4) of the Finance Act and not the penalty provided for in sub-section (3) of Section 38. He reiterates his contention that though sub-section (4) was introduced in Section 38 by way of an amendment in 1994, the legislature consciously did not delete Rule 11 which says that the maximum penalty can only be Rs. 5,000.00.

15.4. However, the core submission of Mr. Dinesh is that Section 38(3) deals with a situation where there is absolute non-payment of the tax i.e. failure to pay the tax. Belated payment of tax but before issuance of the show cause notice cannot be treated as non-payment of tax or failure to pay the tax.

15.5. Referring to the 6 instances where payment of tax was delayed, he submits that in respect of 5 instances, the demand drafts were issued by the concerned bank before the due dates, but the demand drafts could be deposited into the Government treasury for delays ranging from 1 day to 11 days and only in respect of one case, there is delay of 63 days in depositing the tax. He submits that insofar the 5 cases are concerned, the delay in depositing the demand drafts was because of security restrictions and in the sole case of 63 days, the concerned employee entrusted with the task of depositing the tax was on emergency leave.

15.6. Adverting to Section 35A of the Finance Act, he submits that the aforesaid provision deals with a situation such as the one in the present case. Section 35A provides for levy of interest for default in payment of FTT. For such default, the minimum interest rate is 20 per cent and the maximum is 30 per cent per annum.

15.7. Learned senior counsel submits that a penalty being penal in nature can only be imposed in the case of absolute non-payment or wilful default and not where there is mere delay in paying the tax or depositing the bank draft. In this connection, learned senior counsel for the appellant has placed reliance on the decision of this Court in the case of *U.S. Technologies International Private Limited Vs. Commissioner of Income Tax*[1].

15.8. Finally, learned senior counsel submits that appellant had raised the ground of limitation in issuing the demand notices as per Rule 7. The appellate authority observed that though the said submission of the appellant may be genuine but the fact remained that the tax was deposited beyond the time limit. In revision, the revisional authority considered the question of limitation in the case of short payment of tax but did not apply Rule 7 in the case of delayed payment of tax leading to imposition of the penalty.

15.9. Learned senior counsel submits that not only the authorities below, but the High Court also fell in error in upholding the penalty imposed on the appellant. He submits that the same cannot be sustained and is liable to be set aside. Therefore, the appeal may be allowed with consequential relief to the appellant.

[1] (2023) 8 SCC 24

16. *Per contra*, Mr. Arijit Prasad, learned senior counsel appearing for the respondents referred to the contours of the present adjudication. He submits that the present civil appeal is concerned with delayed crediting of payment of FTT by the passengers embarking on international journey as collected by the carrier which is authorized by the Central Government. As admitted by the appellant itself, there are 6 instances of delayed payment, the delay ranging from 1 day to 11 days in 5 cases and 63 days in the last case.

16.1. After referring to the Finance Act and the 1979 Rules including the amendments brought in by the 1994 amendment, more particularly to sub-section (3) of Section 38, he submits that it is the stand of the revenue that when there is a default in payment of FTT, it becomes mandatory to impose penalty, the minimum of which cannot be less than one-fifth of the amount of tax not paid, though the quantum of penalty may extend to three times the amount of tax not so paid.

16.2. According to him, the controversy in the present appeal arises from the imposition of penalty under Section

38(3) of the Finance Act in cases involving delay in the deposit of FTT by the carrier. Admittedly, the carrier i.e. the appellant had not credited the tax on 6 instances within the specified period after having collected the tax from the passengers.

16.3. He submits that the entire foundation of the appellant's case proceeds on a fundamental misconception of the statutory scheme. Appellant has sought to invoke the limitation under Rule 7 of the 1979 Rules whereas the present proceedings are not governed by Rule 7 at all. The proceedings in question are purely penal in nature and are governed by Rule 12 which deals with issuance of show cause notice and compliance with the principles of natural justice prior to imposition of penalty. While Rule 7 applies to cases where tax has not been paid, short paid or erroneously refunded and provides a limitation period for issuance of notice in such recovery proceedings, Rule 12 operates in a completely different field which governs penalty proceedings and mandates that no penalty shall be imposed without the issuance of show cause notice and the grant of an opportunity of hearing. Significantly, Rule 12 does not prescribe any period of limitation. On that basis, he submits that insofar as the quantum proceedings are concerned, those are governed by Rule 7 whereas penal proceedings are governed by Rule 12. In the instant case, Rule 12 has been complied with.

16.4. Elaborating further, learned senior counsel submits that the distinction between Rule 7 and Rule 12 is clear and well-established. Rule 7 pertains to recovery of tax dues and carries a limitation period whereas Rule 12 pertains to imposition of penalty and is guided solely by the principles of natural justice. The related proceedings being for imposition of penalty under Section 38(3), falls squarely within the ambit of Rule 12. Therefore, the submission of the appellant that the proceedings are barred by limitation under Rule 7 are misconceived and legally untenable.

16.5. Adverting to Section 38(3) of the Finance Act, Mr. Prasad submits that the said provision creates a statutory liability for imposition of penalty in cases where a carrier fails to pay the FTT within the prescribed time limit. The expression used in the statute is 'fails to pay' which is of wide import and does not require proof of intention, *mens rea* or wilful default. The provision is structured as a strict liability clause within a fiscal statute. The scheme of the Finance Act clearly demonstrates a three-fold consequence in cases of non-compliance: liability to pay the tax, liability to pay the interest for the period for which the tax was not paid, and liability to pay penalty for failure to pay the tax. The legislative intent is clear: delay or non-payment of tax is not to be treated lightly. When there is a breach of payment, penal consequences are attracted automatically in addition to levy of interest. He submits that in the context of the statutory scheme, delay in payment of the tax is equivalent to non-payment of tax. Any other interpretation would be incongruous and would do violence to the plain language of the statute. The statute does not carve out any exception for minor delays or *bona fide* conduct.

16.6. Referring to the decision of this Cout in *Mathuram Agrawal Vs. State of Madhya Pradesh*[2], he submits that the intention of the legislature in a fiscal statute must be governed strictly from the plain language

[2] (1999) 8 SCC 667

used and where the words are clear, there is no scope for any intendment or equity. As a matter of fact, in fiscal matters, adherence to timelines is of paramount importance and the legislature has consciously adopted a strict framework.

16.7. Learned senior counsel has placed reliance on the decisions of the High Court in *Iran National Airlines Vs. Union of India*[3] and that of the Delhi High Court in *Combatta Aviation Ltd. Vs. Union of India*[4].

16.8. He, therefore, submits that the High Court has correctly held that the penalty leviable under Section 38 is a penalty in case of default or failure of statutory obligation. In other words, it is for breach of civil obligation. There is no element of any criminal aspect as is generally contemplated under criminal proceedings. In support of his contentions, learned senior counsel has placed reliance on the following decisions:

i. *J.K. Industries Ltd. Vs. Chief Inspector of Factories and Boilers*[5];

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[3] 2006 (202) ELT 588 (Bom.)
[4] 2000 (115) ELT 622 (Del.)
[5] (1996) 6 SCC 665

ii. *R.S. Joshi Vs. Ajit Mills Limited*[6]; and

iii. *Gujarat Travancore Agency Vs. Commissioner of Income Tax*[7].

16.9. Urging upon the Court to uphold the penalty imposed by the revenue on the appellant, learned senior counsel seeks dismissal of the appeal.

17. Submissions made by the learned counsel for the parties have received the due consideration of the Court.

18. At the outset, it would be appropriate to refer to the statutory scheme governing Foreign Travel Tax (already referred to as 'FTT').

19. The Finance Act, 1979 (already referred to as 'the Finance Act' hereinabove) has been enacted to give effect to the financial proposals of the Central Government for the financial year 1979-80. It received the assent of the President of India on May 10, 1979 and on the same day was published in the Official Gazette of India

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[6] (1977) 4 SCC 98

[7] (1989) 3 SCC 52

Extraordinary. Chapter V comprising Sections 33 to 42 deals with FTT.

20. Section 35 is specific to FTT. Sub-section (1) says that there shall be levied on all passengers embarking on international journeys a tax, called FTT, at the rate of Rs. 300.00 (initially Rs. 100.00) for every such journey to any place outside India other than a place in a neighbouring country, and at the rate of Rs. 100.00 (earlier Rs. 50.00) for every such journey where such journey is to a place in a neighbouring country. Explanation to sub-section (1) defines 'neighbouring country' to mean any country which the Central Government may, having regard to the classes of persons who generally perform journeys to such country, the distance between India and such country, the means of communications available for reaching such country and any other relevant circumstances, specify in this behalf by notification in the official gazette.

20.1. As per sub-section (2), in accordance with the rules made under Chapter V, FTT shall be collected by the officers of customs appointed under the Customs Act, 1962 or by such officers of the Central Government or the State Government or the International Airports Authority of India or such carriers as may be authorized in this behalf by the Central Government by notification in the official gazette and paid to the credit of the Central Government.

21. By the Finance Act, 1994, to be precise by Section 97 thereof, the Finance Act was amended by way of insertion of Section 35A after Section 35. Section 35A reads as follows:

> 35-A. *Interest for default in payment of foreign travel tax-*
>
> (1) Where any carrier or other person fails to pay the foreign travel tax to the credit of the Central Government under sub-section (2) of Section 35, in accordance with the rules made under this Chapter, he shall pay an interest on the amount of tax not so paid for the entire period for which payment of such tax has been delayed, at such rate, not below twenty per cent, and not exceeding thirty per cent, per annum, as the Central Government may, by notification in the Official Gazette, specify in this behalf.
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> (2) Where, on or before the date of commencement of Section 97 of the Finance Act, 1994, the foreign travel tax had not been paid by any carrier or other person to the credit of the Central Government, in accordance with the rules made under this Chapter, the carrier or other person

> shall pay the amount of such tax within a period of thirty days of such commencement, failing which he shall be liable to pay the interest in accordance with the provisions of sub-section (1).

21.1. Thus, sub-section (1) of Section 35A says that where any carrier or other person fails to pay the FTT to the credit of the Central Government under sub-section (2) of Section 35 and in accordance with the rules made under Chapter V, he shall pay an interest on the amount of tax not so paid for the entire period for which payment of such tax has been delayed at such rate, not below 20 per cent and not exceeding 30 per cent per annum as the Central Government may by notification in the official gazette, specify in this behalf.

21.2. In terms of sub-section (2), where on or before the date of commencement of Section 97 of the Finance Act, 1994, FTT had not been paid by any carrier or other person to the credit of the Central Government in accordance with the rules made under Chapter V, the carrier or other person shall pay the amount of such tax within a period of 30 days of such commencement, failing which he shall be liable to pay the interest in terms of sub-section (1).

22. As per Section 37, no carrier or other person in charge of a ship or an aircraft shall allow any passenger to board the ship or aircraft unless such passenger has paid the tax payable by him under Chapter V.

23. Section 38 deals with penalties. Sub-section (1) provides that every passenger who embarks or attempts to embark on an international journey without paying the tax payable by him under Chapter V shall, in addition to his liability to pay the tax, be liable to a penalty not exceeding Rs. 200.00.

23.1. As per sub-section (2), every carrier or other person in charge of a ship or an aircraft, who in contravention of the provisions of Section 37 allows any passenger or passengers to board the ship or aircraft, shall be liable to a penalty not exceeding three times the amount or the aggregate amount of the tax payable by the passenger or passengers so allowed to board the ship or aircraft.

23.2. Original sub-section (3) provided that any penalty under Section 38 may be adjudged, collected and paid to the credit of the Central Government by such authority and in such manner as may be specified in the rules made under Chapter V. However, by the Finance Act, 1994, more particularly Section 97 thereof, the original sub-section (3) has been substituted by the following sub-sections:

> (3) Every carrier or other person who fails to pay the foreign travel tax to the credit of the Central Government under sub-section (2) of Section 35 shall, in addition to the payment of such tax and the interest leviable thereon, be liable to pay penalty which shall not be less than one-fifth but which may extend to three times of the amount of the tax not so paid to the credit of the Central Government.
>
> (4) Any rule made under this Chapter may provide that in case of breach thereof by the carrier or other person, he shall be liable to a penalty which shall not be less than five hundred rupees but which may extend to fifty thousand rupees, and where the breach is a continuing one, with further penalty which may extend to five hundred rupees for every day after the first during which such breach continues.
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> (5) Any penalty under this section may be adjudged, collected and paid to the credit of the Central Government by such authority and in such manner as may be specified in the rules made under this Chapter:
>
> Provided that no order for imposing a penalty shall be passed by such authority unless the carrier or other

> person on whom the penalty is proposed to be imposed is given an opportunity of being heard in the matter by such authority.

23.3. As per the substituted sub-section (3), every carrier or other person who fails to pay the FTT to the credit of the Central Government under sub-section (2) of Section 35 shall, in addition to the payment of such tax and the interest leviable thereon, be liable to pay penalty which shall not be less than one-fifth but which may extend to three times of the amount of the tax not so paid to the credit of the Central Government. Sub-section (4) is interesting. It says that any rule made under Chapter V may provide that in case of breach thereof by the carrier or other person, he shall be liable to a penalty which shall not be less than Rs. 500.00 but which may extend to Rs. 50,000.00 and where the breach is a continuing one, with further penalty which may extend to Rs. 500.00 for everyday after the first day during which such breach continues.

23.4. The new sub-section (5) corresponds to the earlier sub-section (3) of Section 38 with the proviso thereto making compliance to the principles of natural justice explicit.

24. It may be mentioned that as per Section 97 of the Finance Act, 1994, Section 38A has been inserted in the Finance Act after Section 38. Section 38A provides for modes of recovery.

25. Section 40 of the Finance Act empowers the Central Government to make rules for carrying out the purposes of Chapter V.

26. In exercise of the powers conferred by Section 40 of the Finance Act, the Central Government has made the Foreign Travel Tax Rules, 1979 (already referred to as 'the 1979 Rules' hereinabove).

27. As per Rule 4, the tax collected in any month by any carrier shall be paid by such carrier before the expiry of 30 days from the end of that month into the treasury at the place where the customs port or customs airport of departure of the ship or aircraft is situated. In terms of the proviso, the Collector of Customs may, on sufficient cause being shown and having regard to the system of accounting

adopted by any carrier, allow such carrier to pay the tax before the expiry of a longer period than the period of 30 days aforesaid.

28. Rule 7 deals with a situation where the tax is not paid or underpaid or erroneously refunded. As per sub-rule (1), when any tax due has, for any reason whatsoever either not been paid or has not been paid in full into the treasury under Rule 4 or has been erroneously refunded under Rule 5, the Assistant Collector of Customs may within six months from the relevant date, serve notice upon the carrier concerned requiring it to show cause why it should not pay the amount specified in the notice. However, as per the proviso, when it is a case of collusion or wilful mis-statement or suppression of facts by the carrier, the limitation period of six months gets extended to two years.

28.1. Sub-rule (2) of Rule 7 provides that the Assistant Collector of Customs after considering the representation, if any, made by the carrier on whom notice is served under sub-rule (1), shall determine the amount of tax to be paid by such carrier, which shall not be in excess of the amount specified in the notice whereafter the carrier shall pay the amount so determined.

29. Rule 8 mandates that at each customs port or customs airport to which Chapter V of the Finance Act extends, in respect of every voyage by a ship or by an aircraft, the carrier concerned shall prepare three copies of the passenger manifest showing therein the details of the passengers going on the voyage and present them at the time of departure to the jurisdictional officer of customs.

30. Submission of returns regarding tax collected etc. is provided for in Rule 9. Under Rule 9, every carrier required under Rule 4 to pay the tax into the treasury shall file a return in respect of every month before the expiry of 30 days from the end of that month before the Collector of Customs or his nominee having jurisdiction showing the particulars of the flights operated, number of passengers carried, amount of tax collected and paid into the treasury etc.

30.1. As per the proviso, the Collector of Customs may allow such carrier to file returns before expiry of a longer period than the period of 30 days having regard to the system of accounting adopted by the carrier.

31. While Rule 10 provides for preservation of records by the carrier, Rule 11 deals with adjudication of penalties. Rule 11 being relevant is extracted hereunder:

> 11. *Adjudication of penalties.* – In every case in which any person is liable to penalty under Section 38 of the Act, such penalty may be adjudged by an officer of customs mentioned in Section 3(c) or Section 3(d) of the Customs Act:
>
> Provided that no officer of customs mentioned in Section 3 of the Customs Act shall be competent to impose a penalty exceeding five thousand rupees in any such case.

31.1. Thus what Rule 11 contemplates is that in a case where a person is liable to penalty under Section 38 of the Finance Act, such penalty may be adjudged by an officer of customs as mentioned in Section 3 of the Customs Act, 1962. However, the proviso clarifies that no officer of customs shall be competent to impose a penalty exceeding five thousand rupees in any such case.

32. Rule 12 provides for issuance of show cause notice before levy of penalty. It says that no order imposing any penalty on any person shall be made unless such person:

(a) is given a notice in writing informing him of the grounds on which it is proposed to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds for imposition of the penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter.

32.1. However, the proviso says that such a notice may at the instance of the person concerned be made orally.

33. While Rule 13 provides for appeal, Rule 14 deals with powers of revision. On the other hand, the Central Government is conferred with the power of revision under Rule 15.

34. Having surveyed the statutory framework, we may focus our attention on Section 38 which got enlarged by way of an amendment in 1994. As noticed above, Section 38 deals with penalties. Both sub-sections (1) and (2) may not be relevant for the present case but nonetheless for completion of the analysis, we may deal with these two sub-sections as well. As per sub-section (1), every passenger

who embarks or attempts to embark on an international journey without paying FTT would be liable to penalty at the rate mentioned thereunder, in addition to the FTT not paid by him. So, this sub-section is specific to a passenger who does not pay FTT. On the other hand, sub-section (2) says that every carrier or person in charge of a ship or an aircraft allowing any passenger to board the ship or aircraft without paying FTT shall be liable to a penalty as per the prescription mentioned therein. Here also, if the carrier or other person in charge of the carrier violates Section 37, which mandates that no carrier or other person in charge of a ship or an aircraft shall allow any passenger to board the ship or aircraft unless such passenger has paid the FTT, it shall be liable to a penalty which is prescribed in sub-section (2). Therefore, both sub-sections (1) and (2) deal with a situation where a passenger does not pay the FTT. In the first scenario, the passenger will have to pay the prescribed penalty and in the second scenario, the carrier or person in charge of the carrier shall have to pay the penalty for allowing such passenger to board the ship or aircraft without payment of FTT.

35. That brings us to sub-section (3) of Section 38. Though we have already extracted the said provision, for the purpose of a detailed examination, the same is re-extracted hereunder:

> (3) Every carrier or other person who fails to pay the foreign travel tax to the credit of the Central Government under sub-section (2) of Section 35 shall, in addition to the payment of such tax and the interest leviable thereon, be liable to pay penalty which shall not be less than one-fifth but which may extend to three times of the amount of the tax not so paid to the credit of the Central Government.

35.1. Thus, what sub-section (3) of Section 38 provides is that every carrier or other person who fails to pay the FTT to the credit of the Central Government as is required under sub-section (2) of Section 35, shall in addition to the payment of the defaulting FTT and the interest leviable thereon, be also liable to pay penalty which shall not be less than one-fifth but which may extend to three times of the amount of the tax not so paid to the credit of the Central Government. There are two crucial expressions in this provision. The first one is 'fails to pay the foreign travel tax' appearing at the beginning of the provision; and the second one is ‘the amount of the tax not so paid’ at the end of the provision. Both these expressions find place in the same provision i.e. sub-section (3) of Section 38. Before we enter into an analysis of the above two expressions, we need to keep in mind that this provision contemplates a scenario where FTT is collected from the passengers, but the carrier or the other person fails to pay the same to the credit of the Central Government. In that context, the expression ‘fails to pay the foreign travel tax’ would mean that there is failure on the part of the carrier or the other person in paying the FTT to the credit of the Central Government. ‘Failure to pay’ would mean ‘non-payment’. ‘Failure to pay’ would not mean and cannot be equated with ‘delay in making payment’. The legislature has carefully used the expression ‘fails to pay the foreign travel tax’ to imply non-payment of FTT. If the legislative intent would have been to cover delayed payment of tax, then the legislature would have used a different expression. It is trite law of interpretation that when it comes to interpretation of taxation and fiscal statutes, we are not to import further meaning(s) to the expression used by the legislature by our own interpretative expansion which is not permissible. Now, if the expression ‘fails to pay the foreign travel tax’ is used in conjunction with the expression ‘the amount of the tax not so paid’, the legislative intent becomes crystal clear. It means sub-section (3) of Section 38 contemplates a scenario where there is failure to pay the tax or non-payment of the tax into the credit of the Central Government. Therefore, sub-section (3) of Section 38 would not cover a situation where a carrier or other person is charged for delayed payment of FTT. We are clear in our mind that in the context of sub-section (3) of Section 38, failure to pay the FTT or non-payment of FTT is not to be equated with delayed payment of FTT.

36. A similar issue like the present one came up for consideration before this Court in *US Technologies International Private Limited.* The question before a two-Judge Bench of this Court was imposition of penalty under Section 271-C of the Income Tax Act, 1961 (briefly ‘the 1961 Act’) on failure of the respective assessees to deposit the tax deducted at source (TDS) or for belated remittance of TDS. After analyzing the rival submissions, the Bench

posed the question for consideration to itself as to whether in case of belated remittance of TDS after deducting the TDS, such an assessee is liable to pay penalty under Section 271-C of the 1961 Act? The Bench also considered the associated question as to the meaning and scope of the expression 'fails to deduct' occurring in Section 271-C(1)(a). Whether an assessee who causes delay in remittance of TDS deducted by him can be said to be a person who 'fails to deduct TDS'? In other words, the question was whether delay in remittance of TDS is equivalent to failure to deduct.

36.1. Since Section 271-C of the 1961 Act is relevant, the same is extracted hereunder:

> 271-C. *Penalty for failure to deduct tax at source.*—
> (1) If any person fails to—
>
> (*a*) deduct the whole or any part of the tax as required by or under the provisions of Chapter XVII-B; or
>
> (*b*) pay the whole or any part of the tax as required by or under—
>
> (*i*) sub-section (2) of Section 115-O; or
>
> (*ii*) the second proviso to Section 194-B;

> then, such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct or pay as aforesaid.
>
> (2) Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner.

36.2. The Bench noted that it was a case of belated remittance of TDS though deducted by the assessee and not a case of non-deduction of TDS at all. After due consideration, the Bench held that the expression 'fails to deduct' occurring in Section 271-C(1)(a) cannot be read into the expression 'failure to deposit the tax deducted'. This Court declared that on mere delay in remittance of TDS after deducting the same by the assessee concerned there shall not be any penalty leviable under Section 271-C and held that the assessee had remitted the TDS belatedly; it is not a case of non-deduction of TDS at all. Therefore, the assessee is not liable to pay the penalty under Section 271-C of the 1961 Act. This Court declared as a proposition of law that on mere belated remitting of the TDS after deducting the same by the assessee, no penalty shall be leviable under Section 271-C of the 1961 Act. Relevant portion of the judgment in *US Technologies International Private Limited* are extracted hereunder:

> 37. Even otherwise, the words "fails to deduct" occurring in Section 271-C(1)(a) cannot be read into "failure to deposit/pay the tax deducted".
>
> 38. Therefore, on true interpretation of Section 271-C, there shall not be any penalty leviable under Section 271-C on mere delay in remittance of the TDS after deducting the same by the assessee concerned. As observed hereinabove, the consequences on non-payment/belated remittance of the TDS would be under Section 201(1-A) and Section 276-B of the 1961 Act.
>
> 39. In view of the above in all these cases as the respective assessees remitted the TDS though belatedly and it is not case of non-deduction of the TDS at all they are no (*sic*) liable to pay the penalty under Section 271-C of the Income Tax Act. Therefore, any question on applicability of Section 273-B of the Act is not required to be considered any further.
>
> 40. In view of the above and for the reasons stated above, all these appeals succeed. Impugned judgment(s) and order(s) passed by the High Court are hereby quashed and set aside and the question of law on interpretation of Section 271-C of the Income Tax Act is answered in favour of the assessee(s) and against the Revenue and it is

> specifically observed and held that on mere belated remitting the TDS after deducting the same by the person / assessee concerned, no penalty shall be leviable under Section 271-C of the Income Tax Act. Present appeals are accordingly allowed. No costs.

37. We now take up sub-section (4) of Section 38 which is re-extracted hereunder:

> (4) Any rule made under this Chapter may provide that in case of breach thereof by the carrier or other person, he shall be liable to a penalty which shall not be less than five hundred rupees but which may extend to fifty thousand rupees, and where the breach is a continuing one, with further penalty which may extend to five hundred rupees for every day after the first during which such breach continues.

37.1. A reading of sub-section (4) would indicate that when there is a breach of any rule made under Chapter V of the Finance Act, by the carrier or other person, such carrier or other person shall be liable to a penalty which shall not be less than Rs. 500.00 but which may extend to Rs. 50,000.00 and where the breach is a continuing one, a further penalty is to be levied which may extend to Rs. 500.00 for every day of breach. Any analysis of sub-section

(4) would be incomplete without an analysis of the corresponding provisions of the 1979 Rules because sub-section (4) encompasses any rule under the 1979 Rules for breach of which the carrier or other person shall be liable to a penalty. Therefore, such a rule becomes part of the statutory scheme conceptualized under sub-section (4).

37.2. Rule 4 provides a time limit of 30 days for deposit of the FTT collected in any month by any carrier into the Government treasury. However, as per the proviso, on sufficient cause being shown and having regard to the system of accounting adopted by any carrier, the Collector of Customs may grant a longer period beyond the period of 30 days for deposit of such tax. Coming to Rule 9, we find that as per this provision, every carrier required to pay the tax into the treasury under Rule 4 shall have to file a return in respect of every month before expiry of 30 days from the end of that month. Such return will have to be filed before the Collector of Customs or his nominee having jurisdiction providing the details as required under Rule 9. The proviso, however, gives discretion to the Collector of Customs to grant further time to such carrier to file the return beyond the period of 30 days.

37.3. Therefore, sub-section (4) of Section 38 of the Finance Act will have to be read alongwith Rules 4 and 9 of the 1979 Rules because this is the statutory scheme of sub-section (4) of Section 38. Further, it is evident that sub-section (4) of Section 38 read with Rules 4 and 9 of the 1979 Rules deal with a situation of delayed payment of FTT into the Government treasury. As already discussed above, delayed payment of FTT into the Government treasury cannot be equated with non-payment of FTT into the Government treasury. A hypothetical scenario may arise. For example, a defaulting carrier may deposit the FTT so collected into the Government treasury after receiving a show cause notice under Rule 9. Will it be a case of non-payment or delayed payment? The answer to our mind is obvious. Any deposit made after issuance of the show cause notice cannot clothe the default as an instance of delayed payment. It will be a case of non-payment. Conversely, any payment made prior to issuance of show cause notice would be construed to be a case of delayed payment.

37.4. There is one more aspect. As noticed above, Rule 4 provides a timeline of 30 days for deposit of FTT collected from the passengers for any month by a carrier into the Government treasury. But, in terms of the proviso, a discretion is vested on the Collector of Customs to grant a longer period to such carrier beyond the period of 30 days for deposit of the FTT. Of course, the carrier must show sufficient cause for the delay in such deposit as well as having regard to the system of accounting adopted by the carrier. If on the above two grounds the Collector of Customs is satisfied and the delay in depositing the FTT is condoned, the question of delay in the deposit of FTT would not arise. Therefore, in such a case, the further question of imposition of penalty would not arise. Likewise under Rule 9, every carrier which is required to deposit the FTT into the Government treasury under Rule 4, shall also have to file a monthly return within a period of 30 days from the end of the concerned month. Again, the proviso thereto gives discretion to the Collector of Customs to condone the delay in the filing of such return by the carrier. Once the delay is condoned, there would not arise any question of imposition of penalty for such delay. Thus, what transpires from the above discussion, is that the timeline for deposit of FTT into the Government treasury or the timeline for filing of monthly return by the carrier is not inflexible. It is flexible but on the exercise of the discretion conferred upon the Collector of Customs. Therefore, the view taken by the lower authorities and by the High Court that the moment the timeline for deposit of FTT or filing of return is breached, imposition of penalty is automatic is not the correct view.

38. This brings us to Rule 11 of the 1979 rules which deals with adjudication of penalties. Rule 11 is not specific to any sub-section of Section 38 but generally to Section 38 of the Finance Act. It says that in every case in which a person is liable to penalty under Section 38 of the Finance Act, such penalty may be adjudged by an officer of customs as mentioned in Section 3(c) or Section 3(d) of the Customs Act. However, the proviso puts a cap by declaring that no officer of customs as mentioned in Section 3 of the Customs Act shall be competent to impose a penalty exceeding Rs. 5,000.00 in any such case. *Prima facie*, there appears to be

a conflict between sub-section (3) of Section 38 and Rule 11 as regards the quantum of penalty. The High Court says, and rightly so, that whenever there is a conflict between the parent statute and the subordinate legislation, the provisions of the parent statute will prevail. There cannot be any dispute with such a proposition. However, since we have held that the present case would not come within the ambit of sub-section (3) of Section 38, we need not delve into and render a definitive finding on the inter-play between sub-section (3) of Section 38 and Rule 11.

39. Finally, we may consider Rule 12 of the 1979 Rules. It provides for issuance of show cause notice before levy of penalty. Therefore, Rule 12 will have to be read in conjunction with Rule 11 which deals with adjudication of penalties because issuance of prior show cause notice is a part of the adjudicatory process before levy of penalty. Further, Rule 12 is an elaboration of the proviso to sub-section (5) of Section 38 which says that no order of penalty shall be passed without giving the affected person an opportunity of being heard. The language of Rule 12 is interesting. There is a negative injunction, like the proviso

to sub-section (5) of Section 38. It says no order imposing any penalty on any person shall be made unless the affected person is given a written notice containing the grounds on which penalty is proposed. Thereafter, the affected person shall be given an opportunity of making a representation in writing for which reasonable time may be specified in the notice. The representation in writing shall be against the grounds for imposition of the penalty as specified in the notice. At the end of this process, the affected person shall be given a reasonable opportunity of being heard in the matter. In other words, the concept of personal hearing is acknowledged in the scheme of Rule 12 which has to be read in conjunction with the proviso to sub-section (5) of Section 38.

39.1. If this be the position and the noticee makes out a case that the grounds for imposition of the penalty are not justified and that imposition of penalty is not warranted, the officer of customs adjudicating imposition of penalty, as provided in Rule 11, may not impose the penalty proposed. This discretion is manifest in the very scheme of Rule 12. But if the officer of customs is not satisfied with the representation and by the explanation of the noticee, he shall impose the penalty. If he decides to impose the penalty, then the penalty so imposed will have to be within the range provided for in sub-sections (2), (3) and (4) of Section 38, as the case may be.

40. What transpires from the above discussion is that two distinct facets are clearly discernible. Firstly, the timeline fixed for deposit of FTT by the carrier into the Government treasury as well as for submission of return is not inflexible. In an appropriate case the Collector of Customs on sufficient cause being shown may allow such deposit or filing of return beyond the limitation of 30 days. If such delay is condoned and allowed then *stricto sensu* there is no cause for imposition of penalty on the ground of delay. We have already held that delay in payment of FTT cannot be equated with non-payment of FTT which stands on a different footing altogether. For non-payment of FTT, sub-section (3) of Section 38 is attracted and for delay in deposit of payment of FTT, sub-section (4) of Section 38 would come into play. Insofar imposition of penalty is concerned, be it under any of the sub-sections of Section

38 i.e. sub-sections (2), (3) and (4), it is not automatic, notwithstanding the word 'shall' appearing therein. It is trite law of interpretation that merely because the word 'shall' appears in a particular provision, the same would not be rendered mandatory. Whether a provision is mandatory or discretionary would have to be discerned from the context and the overall scheme of the provision. It cannot be said as a thumb rule that the moment there is a breach of the timeline, imposition of penalty is automatic. This is so, firstly, because of the very nature of the provisions of Rule 4 and Rule 9 and, secondly, because of the adjudicatory process contemplated under Rule 12. In an appropriate case, the officer of customs may decide not to impose a penalty, be it under sub-sections (2), (3) or (4), if he is satisfied that imposition of penalty is unwarranted. But if he decides to impose penalty, the quantum of penalty that may be imposed would be guided by the range provided for in each of the sub-sections.

41. Having analyzed the statutory framework as above, we may now deal with some of the cases relied upon by the parties.

42. *Hindustan Steel Ltd. Vs. State of Orissa*[8], is a three-Judge Bench decision of this Court. In proceedings for assessment of tax under the Orissa Sales Tax Act, 1947, the Sales Tax Officer held that appellant was a dealer in building material and had sold the material to contractors. On that account it was liable to pay tax at the appropriate rates under the aforesaid Act. Accordingly, the Sales Tax Officer directed the appellant to pay the tax and also imposed penalty in addition to the tax for failure to register itself as a dealer. However, the Tribunal while upholding the liability of the appellant to pay the tax, however, substantially reduced the penalty imposed upon the appellant. On the question of imposability of penalty, the matter travelled to this Court. It was in that context that the three-Judge Bench held as follows:

> 8. 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-

[8] (1972) 83 ITR 26

> 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.

42.1. Thus, this Court was of the view that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and that 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. The Bench opined that 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. Importantly, the three-Judge Bench held that 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.

43. A seven-Judge Bench of this Court in *R.S. Joshi* dealt with the question as to whether it was permissible for the State Legislature to enact, having regard to the triple Lists of the Seventh Schedule and Articles 14 and 19, that sums collected by dealers by way of sales tax but are not exigible under the state law and, indeed, prohibited by it shall be forfeited to the public exchequer punitively under Entry 54 read with Entry 64 of List II. There were conflicting verdicts by various high courts. We need not enter into the intricate details of the constitutional controversy. Suffice it to say that the seven-Judge Bench

considered in the aforesaid context as to what is the true character of a forfeiture? Is it punitive in infliction, or merely another form of exaction of money by one from the other? If it is penal, it falls within implied powers. If it is an act of mere transference of money from the dealer to the State, then it falls outside the legislative entry. The Bench noted that there was a contention that the expression 'forfeiture' did not denote a penalty but opined that the same may have to be decided in the specific setting of a statute. But, generally speaking, it took the view that forfeiture has a punitive impact. In that context, the Bench held as follows:

> 19. ………………………………………………………
>
> This word "forfeiture" must bear the same meaning of a penalty for breach of a prohibitory direction. ………………Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be preceded by *mens rea*. The classical view that "no *mens rea*, no crime" has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude *mens rea*.

44. In *Gujarat Travancore Agency*, a two-Judge Bench of this Court considered the question as to whether element of *mens rea* was required to be proved in the proceedings undertaken by the Income Tax Officer under Section 271(1)(a) of the Income Tax Act, 1961 (already referred to as 'the 1961 Act' hereinabove) against the assessee for the assessment years under consideration. The Bench, after due analysis, held that element of *mens rea* was not required to be proved in a proceeding under Section 271(1)(a) of the 1961 Act against the assessee. It has been held as follows:

> 5. Accordingly, we hold that the element of *mens rea* was not required to be proved in the proceedings taken by the Income Tax Officer under Section 271(1)(*a*) of the Income Tax Act against the assessee for the assessment years 1965-1966 and 1966-1967.

45. *J.K. Industries Ltd.* is a case where a two-Judge Bench of this Court was considering the question as to whether in the context of the Factories Act, 1948 in the case of a company which owns or runs the factory, is it only a director of the company who can be notified as the

occupier of the factory within the meaning of the proviso (ii) to Section 2(n) of the Factories Act, 1948 or whether the company can nominate any other employee to be the occupier by passing a resolution to the effect that the said employee shall have ultimate control over the affairs of the factory.

45.1. In that case, the Chief Inspector of Factories had called upon the appellants to file applications seeking renewal of the registration of license of their respective factories signed by a director of the company in his capacity as the occupier of the factory, clarifying that a nominee of the Board of Directors, other than a director, could not make such an application as an occupier. It is the correctness of such direction which came up for consideration in *J.K. Industries Ltd.*

45.2. After considering various provisions of the Factories Act, 1948, the Bench observed that the aim and object of the aforesaid enactment is essentially to safeguard the interest of workers, stop their exploitation and take care of their safety, hygiene and welfare at their place of work. The Bench noted that numerous restrictions have been enacted in the public interest in the Factories Act, 1948. Observing that providing restrictions in a statute would be a meaningless formality unless the statute contains a provision for penalty for the same, the Bench turned its attention to Section 92 of the aforesaid Act which contains a general provision for penalties for offences under the Factories Act for which no express provision has been made elsewhere. Examining the scope and ambit of Section 92 of the aforesaid enactment, the Bench observed that the offences under the Factories Act are not a part of the general penal law but arise from the breach of a duty provided in a socially beneficial legislation which creates absolute or strict liability without proof of any *mens rea*. The offences are strict statutory offences for which establishment of *mens rea* is not an essential ingredient. Referring to the decision in *R.S. Joshi*, the Bench observed that absolute offences are not criminal offences but acts which are prohibited in the interest of welfare of the public and the prohibition is backed by sanction of penalty.

46. From an analysis of the above decisions what can be culled out is that there are certain statutory

provisions for violation or breach of which penalty is attracted for which proof of *mens rea* is not required. The question is whether in a given case, for such a statutory breach, imposition of penalty is automatic. Automatic imposition of penalty and exclusion of *mens rea* are two different things. According to us, it cannot be said as a general proposition that in all instances of violation of statutory provisions for which penalty is prescribed, imposition of penalty is automatic. It will all depend on the scheme of the statute and the adjudicatory process provided for imposition of penalty. Where the adjudicatory process prior to imposition of penalty provides for show cause notice, filing of reply or representation against each of the grounds cited for imposition of penalty and hearing, to hold that imposition of penalty is mandatory or automatic or a foregone conclusion would be to render such a provision or adjudicatory process nugatory. After all, the power to impose penalty includes power not to impose penalty. As rightly held by the three-Judge Bench in *Hindustan Steel Ltd*, merely because the statute provides a minimum penalty it would not mean that penalty is automatic. Question of imposition of minimum penalty would arise only when the authority comes to the conclusion that penalty should be imposed.

47. Let us turn to the facts of the present case. The case of the appellant now boils down to 6 instances of delay in payment of FTT. In respect of 5 instances, the delay ranges from 1 day to 11 days. However, in each of these cases, the demand drafts were purchased from the concerned bank before the due dates. But there was delay in depositing the bank draft into the Government treasury. The relevant particulars are furnished below in the form of a statement:

Sl No.	Period	Date of issue of demand draft	Due Date	Delay in payment of FTT	Amount
1.	August, 1994	29.09.1994	30.09.1994	3 days	56,09,100/-
2.	July, 1995	25.08.1995	30.08.1995	1 day	48,93,600/-
3.	April, 1996	27.05.1996	30.05.1996	11 days	4,41,000/-
4.	December, 1996	27.01.1997	30.01.1997	1 day	55,09,200/-
5.	November, 1997	29.12.1997	30.12.1997	1 day	90,61,500/-

47.1. Insofar these 5 instances are concerned, appellant had explained before the authorities that the demand drafts could not be submitted into the concerned treasury because of security restrictions.

47.2. For the month of December, 1995, there was a delay of 63 days in depositing the demand draft into the treasury. This was explained by the appellant by saying that the concerned employee entrusted with the task of submission of demand draft was on emergency leave.

47.3. The appellate authority is on record mentioning in its appellate order dated 09.01.2003 that all the submissions made by the appellant may be genuine but the fact remains that the tax was deposited in the Government account beyond the time limit as laid down under Section 38 (3) of the Finance Act.

48. We are afraid the appellate authority, the revisional authority as well as the High Court fell in grave error in upholding the penalty imposed upon the appellant for three reasons: firstly, it is not a case under Section 38 (3) of the Finance Act, rather it is a case which comes within the ambit of Section 38 (4) of the Finance Act; secondly, there is a provision in Rule 4 for condoning the delay in deposit of FTT, which the authorities below had

overlooked. If the submissions of the appellant were genuine, there is no reason why the appellate authority could not have condoned the delay in depositing the FTT in which event there would not have arisen any cause for imposition of penalty; thirdly, for breach of Section 38 of the Finance Act, be it sub-sections (2), (3) and (4), imposition of penalty is not automatic the moment there is a breach of the aforesaid provisions. Discretion is vested on the officer of customs to adjudicate whether penalty is imposable or not. Only if he arrives at the finding that penalty is imposable, then the quantum of penalty that may be imposed would be guided by the range provided for in sub-sections (2), (3) and (4) of Section 38, as the case may be.

49. Therefore, in the facts of the present case, we are of the view that penalty is not imposable insofar the appellant is concerned.

50. There is one more aspect which we would like to deal with before parting with the record. In the initial order-in-original dated 14.06.1999, the penalty imposed on the appellant in respect of the 6 cases of late payment of FTT

was Rs. 12,000.00. By the order-in-appeal dated 24.11.1999, the appellate authority remanded the matter back to the adjudicating authority for a *de novo* consideration. On remand, the adjudicating authority passed *de novo* order-in-original dated 08.08.2001 as per which penalty of Rs. 71,29,140.00 was imposed on the appellant in respect of the 6 cases of late payment of FTT. Appellant had contended before all the authorities that such abnormal enhancement of penalty put the appellant in a worse off condition because he chose to file an appeal. Had he not filed the appeal, all that he would have had to pay as penalty was Rs. 12,000.00 and not Rs.71,29, 140.00. This contention of the appellant was turned down by the appellate authority, revisional authority and the High Court on the ground that the initial penalty imposed was not in accordance with law. On *de novo* adjudication, correct penalty came to be imposed.

51. On this aspect also the appellate authority, the revisional authority as well as the High Court fell in grave error. We have already held that no penalty is liable to be imposed on the appellant but that is besides the point. The

question is, whether a litigant can be worse off by approaching the appellate forum as provided under the law or by approaching a court of law?

52. The High Court of Judicature at Bombay (already referred to hereinabove as 'the High Court') in *Jyoti Plastic Works Pvt. Ltd. Vs. Union of India*[9] (authored by one of us Justice Ujjal Bhuyan) had considered this aspect in detail. Referring to the latin maxim *reformatio in peius* which means a change towards the worse, the High Court observed that a person should not be placed in a worse position as a result of filing an appeal. The High Court held as follows:

> 40. In this connection we may refer to the maxim *reformatio in peius*. It is a latin phrase meaning a change towards the worse, i.e., a change for the worse. As a legal expression it means that a lower court judgment is amended by a higher court into a worse one for those appealing it. In many jurisdictions, this practice is forbidden ensuring that an appellant cannot be placed in a worse position as a result of filing an appeal. When the above phrase is prefixed by the words 'no' or 'prohibition', which would render the maxim as *no reformatio in peius* or

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> *prohibition of reformatio in peius*, it would denote a principle of procedure as per which using a remedy available in law should not aggravate the situation of the person who avails the remedy. In other words, a person should not be placed in a worse position as a result of filing an appeal. *No reformatio in peius* or *prohibition of reformatio in peius* is a part of fair procedure and, thus, by extension can also be construed as part of natural justice. It is not only a procedural guarantee but is also a principle of equity.

53. The High Court referred to the decisions of the Madras High Court as well as of this Court in *Jawal Neco Limited Vs. Commissioner of Customs*[10] emphasizing this point holding that an appellant cannot be worse off by reason of filing an appeal.

54. In a recent decision of this Court in *Nagarajan Vs. State of Tamil Nadu*[11], after referring to and endorsing the decision of the High Court in *Jyoti Plastic Works Pvt. Ltd.,* this Court held that no appellant by filing an appeal can be worse off than what he was prior to filing the appeal.

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[10] 2015 (322) E.L.T. 561

[11] (2025) 8 SCC 331

55. Thus, having regard to the entire conspectus of the facts of the case and the discussions made above, we are of the view that penalty imposed on the appellant for late deposit of FTT in 6 instances cannot be sustained. The same is accordingly set aside. Consequently, impugned order of the High Court dated 09.08.2010, the revisional order dated 29.10.2004, order-in-appeal dated 09.01.2003 and the *de novo* order-in-original dated 08.08.2001 *qua* imposition of the penalty on the appellant for late deposit of FTT on 6 occasions are set aside and quashed. Any amount paid by the appellant as part of the above penalty shall be refunded by the respondents to the appellant with interest at the rate of 9 percent per annum within 3 months from today. Bank guarantee furnished by the appellant would also stand discharged.

56. Appeal is accordingly allowed. However, there shall be no order as to cost.

……………………………J.
[J. B. PARDIWALA]

……………………………J.
[UJJAL BHUYAN]

NEW DELHI;
SEPTEMBER 01, 2026.