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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
M.R. SHAH; J., B.V. NAGARATHNA; J.
CIVIL APPEAL NO. 3481 OF 2022; APRIL 17, 2023
State of Gujarat and Anr. *versus* **M/s Saw Pipes Ltd. (known as Jindal Saw Ltd.)**

Gujarat Sales Tax Act, 1969 - Penalty and interest leviable under Sections 45(6) and 47(4A), respectively, are statutory and mandatory in nature and there is no discretion vested in the Commissioner / Assessing Officer to levy or not to levy the penalty and interest other than as prescribed.

For Appellant(s) Ms. Aastha Mehta, Adv. Ms. Deepanwita Priyanka, AOR

For Respondent(s) Mr. V. Lakshmikumaran, Adv. Ms. Charanya Lakshmikumaran, AOR Ms. Apeksha Mehta, Adv. Mr. Sahil Parghi, Adv. Ms. Neha Choudhary, Adv. Ms. Falguni Gupta, Adv.

J U D G M E N T

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 04.08.2016 passed by the High Court of Gujarat at Ahmedabad in Tax Appeal No. 1283/2006, by which, the Division Bench of the High Court has set aside the penalty and interest levied under sub-section (6) of Section 45 of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as the Act, 1969), the State of Gujarat has preferred the present appeal.

2. The respondent company - assessee is engaged in the business of executing indivisible works of undertaking contract of coal tar and enamel coating on pipes. The respondent - assessee had opted for payment of lump-sum tax as provided under Section 55A of the Gujarat Sales Tax Act, 1969. The respondent - assessee deposited tax at the rate of 2% on sales involved in the execution of works contract of coating of pipes by treating the same as civil works contract as prescribed in Entry-1 of the notification dated 18.10.1993 issued by the Government of Gujarat. The Assessing Officer (AO) *vide* order dated 30.03.2005 for assessment year (AY) 2002-03 held that the contract of coating of pipes is not a civil works contract and therefore, the composition amount is payable not at the rate of 2% as deposited by the respondent but it falls under Residuary Entry-8 to the notification dated 18.10.1993. The AO raised the total demand as under: -

Particulars	**Amount**
Tax	2,36,55,529/-
Interest u/s47(4A)	1,04,56,181/-
Penalty u/s 45(6)	1,41,93,312/-
Total	4,83,05,013/-

2.1 The assessee preferred a first appeal before the First Appellate Authority i.e., Joint Sales Tax Commissioner. By order dated 30.07.2005, the First Appellate Authority dismissed the said appeal. The assessee approached the Gujarat Value Added Tax Tribunal by filing Second Appeal No. 820/2005. The learned Tribunal *vide* order dated 29.09.2006 dismissed the appeal and confirmed the orders passed by the AO as well as the First Appellate Authority and thereby confirmed the aforesaid demand of difference in tax as well as the levy of interest under Section 47 (4A) and penalty under Section 45(6) of the Act, 1969. The assessee preferred a further appeal before the High Court being

Tax Appeal No. 1283/2006. Before the High Court, the learned Senior Advocate appearing on behalf of the assessee fairly conceded that looking to the fact that the authority has passed the assessment order on the basis of material available with it, they were required to pay the tax on the basis of 12% and that has been paid by the assessee since the opinion of the expert was turned out, however, the respondent – assessee restricted the appeal to the extent of challenging the levy of penalty and interest only by submitting that the assessee was under a bonafide belief that the works contract of the assessee would fall under Entry-1 requiring payment of tax at the rate of 2% only. Reliance was placed on the decision of the High Court in the case of **Brooke Bond India Limited Vs. State of Gujarat; 1998 JX (Guj) 128** and it was prayed that the imposition of penalty and interest not be upheld. By the impugned judgment and order, the High Court has set aside the penalty and interest on the ground that the assessee was under the bonafide opinion and following the advice, paid the tax at 2% and that thereafter, when the enhanced tax as imposed has already been paid by the assessee, the penalty and interest is not required to be paid by the assessee. The High Court allowed the appeal to the aforesaid extent, deleting the penalty and interest levied under Section 45(6) and Section 47 (4A) of the Act, 1969.

2.2 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court whereby the penalty and interest has been set aside, the State has preferred the present appeal.

3. Ms. Aastha Mehta, learned counsel has appeared with Ms. Deepanwita Priyanka, on behalf of the State.

3.1 Ms. Mehta learned counsel appearing on behalf of the State has vehemently submitted that in the facts and circumstances of the case, the High Court has committed a serious error in deleting the penalty and interest levied under Section 45(6) and Section 47(4A) of the Act, 1969.

3.2 It is further submitted that while deleting the penalty, the High Court has not at all considered sub-section (6) of Section 45 of the Act, 1969 in its true spirit.

3.3 It is next submitted that the High Court has not properly considered the fact that the penalty leviable under Section 45(6) of the Act, 1969, is a statutory penalty and hence, is compulsorily leviable.

3.4 It is contended by Ms. Mehta, learned counsel appearing on behalf of the State that the penalty leviable under Section 45(6) of the Act, being a statutory penalty, there is no discretion vested with the Commissioner to levy or not to levy, as long as the assessee falls under Section 45(5) of the Act, 1969.

3.5 It is further contended that even the Commissioner has no discretion and/or authority to levy the penalty other than the penalty provided under Section 45(6) of the Act, 1969.

3.6 It is submitted by the learned counsel appearing on behalf of the State that the moment it is found that the amount of tax assessed or reassessed exceeds the amount of tax already paid by the dealer under Section 47 in respect of such period by more than 25% of the amount of tax so paid, the dealer can be deemed to have failed to pay the tax to the extent of the difference between the amount so assessed or reassessed and the amount paid and in that eventuality the dealer is liable to pay a penalty not exceeding one and one-half times the difference and/or, on such dealer, who is deemed to have failed to

pay the tax to the extent mentioned in subsection (5) of Section 45, a penalty shall be levied not exceeding one and one-half times the difference. It is further submitted that even the Commissioner has no jurisdiction and/or authority to levy the penalty lesser than one and one-half times the difference.

3.7 It is contended by Ms. Mehta learned counsel appearing on behalf of the State that the phrase used in sub-section (6) of Section 45 of the Act is "shall be levied". Reliance was placed on the decision of a three-judge bench of this Court in the case of **Union of India and Ors. Vs. Dharamendra Textile Processors and Ors.; (2008) 13 SCC 369** wherein it has been held that when the term is used "shall be leviable" the adjudicating authority will have no discretion.

3.8 It is further submitted that the penalty leviable under sub-section (6) of Section 45 of the Act, is a statutory penalty and legislature has consciously used the word "shall" and even for interest the same language is employed in Section 47(4A) of the Act. That the assessee is statutorily liable to pay the penalty and interest. That therefore, the High Court has committed a serious error in deleting the penalty and interest, mainly, on the ground that the amount of tax has already been paid by the assessee and that the assessee was under the bonafide belief that it was liable to pay the tax at rate of 2%.

3.9 It is further contended by Ms. Mehta, learned counsel appearing on behalf of the State that the non-payment of penalty is met with consequences under Section 45 of the Act, 1969, and is recoverable as an arrear of land revenue. That it is well-settled that when non-compliance or violation of a provision is met with a consequence, then, the language of the provision is deemed to be mandatory in nature. It is therefore submitted that the statutory penalty cannot be done away with.

3.10 It is submitted that in case the penalty is a statutory penalty, there is no requirement to prove *mens rea* or to consider the aspect regarding bonafide belief of the assessee while computing payment of penalty and interest. In support of the above submissions, learned counsel appearing on behalf the State has heavily relied upon the decisions of this Court in the cases of **State of Gujarat Vs. Arcelor Mittal Nippon Steel India Limited; (2022) 6 SCC 459** and **Chairman, SEBI Vs. Shriram Mutual Fund and Anr.; (2006) 5 SCC 361; Guljag Industries Vs. Commercial Taxes Officer (2007) 7 SCC 269; Competition Commission of India Vs. Thomas Cook (India) Limited and Anr. (2018) 6 SCC 549**, as well as the decisions of the Gujarat High Court in the cases of **Riddhi Siddhi Gluco Biols Ltd. Vs. State of Gujarat; (2017) 100 VST 305 (Guj)** and **State of Gujarat Vs. Oil and Natural Gas Corporation Limited; (2017) 97 VST 506 (Guj)**.

3.11 It is submitted that *mens rea* can only be expressly included in the law by the legislature. The Court cannot fill in the gaps and purport the requirement of an intention or guilty mind of the assessee before levying penalty and interest where the same is not prescribed by the legislature.

3.12 In so far as the decision of this Court in the case of **Hindustan Steel Ltd. Vs. State of Orissa; 1969 (2) SCC 627** relied upon on behalf of the assessee is concerned, it is vehemently submitted by the learned counsel appearing on behalf of the State that the said decision shall not be applicable while considering penalty and interest levied under Section 45(6) and 47(4A) of the Act, 1969. It is contended that even otherwise in the present case, the learned Tribunal had specifically recorded findings that the said decision shall not be applicable since there is nothing on record to prove that there was in fact a bonafide belief of the respondent assessee.

3.13 In so far as the reliance placed on behalf of the assessee upon the decision of this Court in the case of **Dharamendra Textile Processors (supra)** is concerned, it is submitted by Ms. Mehta, learned counsel appearing on behalf of the State that the said decision also shall not be applicable to the facts of the case at hand, more particularly, considering the statutory provisions, namely, Section 45(6) and Section 47(4A) of the Act. It is submitted that in the said case, this Court was considering Section 11AC of the Central Excise Act. That the Parliament in its wisdom has specifically incorporated the element of *mens rea* in Section 11AC by employing the words, "fraud, collusion or any wilful misrepresentation or any wilful misstatement or suppression of facts" and "intent to evade payment of duty". It is submitted that only when an intention is built into the provision and when the assessee's intention is made relevant by the Parliament, can the courts interpret and go into the issue as to whether or not the evasion was bonafide or malafide. No such language is employed in Section 45(6) and Section 47(4A) of the Act, 1969. That a similar decision of this Court relied upon on behalf of the assessee in the case of **Commissioner of Central Excise, Chandigarh Vs. Pepsi Foods Ltd; (2011) 1 SCC 601** is misconceived and shall not be applicable to the facts of the case at hand since it interprets Section 11AC of Central Excise Act and the language of the provision at hand and that in Section 11AC is starkly opposite.

3.14 Ms. Mehta, learned counsel appearing on behalf of the State has further contended that even the reliance placed by the assessee upon the decision of the Gujarat High Court in the case of **Jyoti Overseas P. Ltd. Vs. State of Gujarat; 2017 SCC Online Guj 2511: (2017) 6 GSTL 388,** is also misconceived and shall not be applicable to the facts of the case at hand. It is submitted that in the said case, the High Court was dealing with Section 34(7) of Gujarat VAT Act, in which the language used is "If the Commissioner is satisfied that the dealer, in order to evade or avoid payment of tax…" That under the VAT Act, not only is the Commissioner vested with discretion but the said penalty provision is applicable specifically when the assessee has an intention to "evade or avoid payment of tax." That in the present case, the legislature in its wisdom imposed a liability of penalty and interest without reference to any requirement of *mens rea* on the part of the assessee.

3.15 Making the above submissions and relying upon the above decisions, it is prayed that the present appeal be allowed and the impugned judgment and order deleting the penalty and interest levied under Section 45(6) and Section 47(4A) of the Act, 1969 be quashed and set aside.

4. The present appeal is vehemently opposed by Shri V. Lakshmikumaran, learned counsel appearing on behalf of the respondent – assessee – dealer. It is submitted at the outset that the penalty and interest is not payable by the assessee in the facts of the present case. It is further submitted that with reference to imposition of penalty, as per statutory provision, penalty is leviable only if differential tax liability (difference between tax assessed and tax paid) is more than 25%. That according to the assessee, the differential tax liability on merits is less than 25%, however, for the sake of argument, it is assumed that the condition of 25% is fulfilled.

4.1 Learned counsel appearing on behalf of the respondent – assessee has made the following submissions in support of the case on behalf of the assessee that the assessee is not liable to pay the penalty and interest: -

(1) That for the purpose of argument that penalty is not payable, the respondent is within his legal rights to argue that quantum of tax demand is not correct, even if the same was not pressed before the High Court.

(2) That section 45(5) of Gujarat Sales Tax Act, 1969 creates a presumption which is rebuttable in nature.

(3) That for the purpose of imposition of penalty under Section 45(6) Gujarat Sales Tax Act, 1969, *mens rea*, blameworthy conduct, deliberate violation, evil doing, fraud, suppression (either one or more of them) must be proved.

(4) That section 45(6) of the Act, 1969 provides for imposition of penalty not exceeding one and one-half times the differential tax. The provision provides for an upper limit for imposition of penalty; however, no minimum penalty is prescribed. This indicates that in appropriate cases where there is no *mens rea*, the authority has the discretion to impose no penalty.

(5) That in case the claim of the dealer for payment of composition amount of 2% is rejected, the dealer could pay the tax on actual value of goods involved in the execution of a works contract. Even in such a scenario, the additional tax payable would be less than 25% and hence, the provision for penalty will not be attracted.

(6) No interest is payable under Section 47(4-A) of Gujarat Sales Tax Act, 1969.

4.2 Elaborating the above submissions, it is submitted that the levy of penalty under Section 45(6) of the Act would depend upon the liability of the dealer to pay tax. That accordingly, in case where there is a dispute regarding imposition of penalty under Section 45(6), it becomes necessary to determine if the dealer is liable to pay additional tax. It is submitted that this position would remain unaltered even when the correctness of imposition of tax has not been argued before the High Court.

4.3 It is next submitted that the respondent can, in an appeal filed by the opposite party, recanvass for reversal of a finding reached against him in the judgment. Reliance is placed upon the decisions of this Court in the case of **J.K. Cotton Spg. and Wvg. Mills Co. Ltd. Vs. CCE; (1998) 3 SCC 540** and **BHEL Vs. Mahendra Prasad Jakhmola; (2019) 13 SCC 82.** Learned counsel appearing on behalf of the assessee has also relied upon the decision of the Gujarat High Court in the case of **Elecon Engineering Vs. State of Gujarat; (1994) 93 STC 397.**

4.4 Relying upon the decision of this Court in the case of **Director of Elementary Education Vs. Pramod Kumar Sahoo; (2019) 10 SCC 674**, it is submitted that as held by this Court any concession in law made by either counsel would not bind the parties, as it is legally settled that advocates cannot throw away legal rights or enter into arrangements contrary to law.

4.5 It is contended that in the present case, since the penalty and interest were proposed to be waived by following the decision in case of **Brooke Bond India Limited (supra)**, the advocate of the dealer did not press the issue of demand on merits. That in case the judgment of High Court is proposed to be reversed and penalty is proposed to be imposed, it will become necessary to adjudicate the dispute on merits as the same is detrimental to the imposition of penalty.

4.6 It is further contended that Section 45(5) of the Act, 1969, provides that in case difference between assessed tax and tax paid by the dealer is more than 25%, the dealer

shall be deemed to have failed to pay the tax to the extent of the difference. That therefore, Section 45(5) creates presumption against the dealer.

4.7 It is submitted that as held by this Court in the case of **Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik; (2014) 2 SCC 576**, there is a clear distinction in law between a legal fiction and presumption. Legal fiction assumes existence of a fact which may not really exist. However, a presumption of a fact depends on satisfaction of certain circumstances. In support of above submissions, reliance is also placed on another decision of this Court in case of **Bhuwalka Steel Industries Ltd. Vs. Union of India; (2017) 5 SCC 598**.

4.8 It is next submitted that even otherwise Section 45(5) of the Act creates a presumption against the dealer and such presumption is rebuttable in nature. That the term "burden of proof" connotes the obligation to prove a fact or facts, by adducing the necessary evidence. It is submitted that any statutory provision by way of which penalty is imposed by tax authorities, the burden of proof to prove *mens rea* lies with revenue, however, a statute can shift the burden on the dealer in certain circumstances. That therefore, such presumption would be rebuttable in nature.

4.9 It is submitted that Section 45(5) provides a presumption that in case differential tax is more than 25%, the dealer shall be deemed to have failed to pay the tax. That the presumption contained in sub-section (5) is not irrebuttable but rebuttable in nature. That this is specifically so because, subsection (6) of Section 45 grants discretionary power to the assessing officer to impose penalty. It is submitted that in case the presumption is rebutted by the dealer, the assessing officer will not impose penalty in exercise of its discretionary power. Reliance is placed upon the decision of this Court in the case of **State of M.P. Vs. Bharat Heavy Electricals; (1997) 7 SCC 1**. That therefore, Section 45(5) of the Act, 1969, merely shifts the burden of proof, however, the presumption contained in the Section is not irrebuttable.

4.10 As regards the other preposition that for the purpose of imposition of penalty under Section 45(6), *mens rea*, etc., must be proved, it is vehemently submitted that it is a general principle of law, based on the maxim of "*actus non facit reum mens sit rea*" that an act does not make a man guilty, unless it can also be shown that he was aware that he was doing wrong. It is submitted that legislative attitude towards the concept of *mens rea* in tax laws and the judicial practice in emphasising its importance therefore, deserves careful consideration. Learned counsel appearing on behalf of the respondent - assessee has also relied upon the decision of this Court in the cases of **Hindustan Steel Ltd. (supra)**; **Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Ors.; 1980 (6) ELT 295 (S.C.)** and **Commissioner of Central Excise, Chandigarh (supra)** in support of his above submissions to the effect that before levy of penalty and interest *mens rea* has to be proved by the department.

4.11 It is further submitted by the learned counsel appearing on behalf of the respondent – assessee that Section 45(6) of the Act, 1969, provides for imposition of penalty "not exceeding" one and one-half times the differential tax demand. That employment of the term "not exceeding" postulates that the authority has been conferred with a discretionary jurisdiction to levy penalty. By necessary implication, the authority may not levy penalty. If it has the discretion not to levy penalty, existence of *mens rea* becomes relevant factor. Relance is placed upon the decision of the Gujarat High Court in the case of **Jyoti Overseas P. Ltd. (supra)**.

4.12 Learned counsel appearing on behalf of the assessee has submitted that on the aforesaid grounds the interest levied under Section 47(4A) of the Act, 1969, is also bad in law and therefore, the High Court has rightly set aside the same.

4.13 Making the above submissions, it is prayed that the present appeal be dismissed.

5. We have heard learned counsel appearing on behalf of the respective parties at length.

6. At the outset, it is required to be noted that the assessing officer levied the penalty and interest against the respondent – assessee under the provisions of Section 45(6) and Section 47(4A) of the Act, 1969, which levy came to be confirmed by the learned Tribunal. However, by the impugned judgment and order, the High Court has set aside the levy of penalty and interest, mainly on the grounds that the tax imposed had already been paid and that the assessee was under a bonafide opinion as to its tax liability and was following expert advice and therefore, paid the tax at the rate of 2%. Therefore, according to the High Court, though not specifically mentioned/opined, there was no *mens rea* on the part of the respondent – assessee in not paying the tax at the rate of 2% and in making the payment of the tax at 2%. Therefore, the short question which is posed for consideration of this Court is whether while imposing/levying penalty and interest leviable under Section 45(6) and Section 47(4A) of the Act, 1969, *mens rea* on the part of the assessee is required to be considered.

6.1 While appreciating the submissions made on behalf of the respective parties on the levy of the penalty and interest under Section 45(6) and Section 47(4A) of the Act, the relevant sections i.e., Section 45 and Section 47(4A) of the Act, 1969 are required to be referred to, which are as under: -

"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 sub-section (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 (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) 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 assessed under section 41 or reassessed under section 44 or revised under section 67 a sum not exceeding one and one-half 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.

(3A) If a dealer fails to furnish any declaration or any return by the prescribed date as required under sub-section (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 [as required by proviso to sub-section (1) or subsection (2) of section 40], the Commissioner may impose upon the dealer by way of penalty, a sum not exceeding two thousand rupees.

(5) Where in the case of a dealer the amount of tax -

(a) assessed for any period undersection 41 or 50; or

(b) reassessed for any periodunder section 44;

exceeds the amount of tax already paid under sub-section (1), (2) or (3) of section 47 by the dealer in respect of such period by more than twenty five per cent 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) [Where under sub-section (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 one-half times the difference referred to in subsection (5).]"

XXX XXX XXX

"47. Payment of Tax and Deferred Payment of Tax, etc.

(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 the date of payment of the amount of tax, simple interest, at the rate of [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 sub-section (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 on any less amount thereof remaining unpaid during such period."

6.2 On a fair reading of Section 45 of the Act, it can be seen that as per sub-section (2) of Section 45 of the Act, 1969, penalty is leviable if it appears to the Commissioner that a dealer has concealed the particulars of any transaction or deliberately furnished inaccurate particulars of any transaction liable to tax. In the present case, it cannot be said that the dealer has concealed the particulars of any transaction or deliberately furnished inaccurate particulars of any transaction liable to tax. However, in so far as penalty leviable under sub-section (6) of Section 45 of the Act, 1969 is concerned, the penalty leviable under the said provision is as such, a statutory penalty and there is no discretion vested with the Commissioner as to whether to levy the penalty leviable under sub-section (6) of Section 45 of the Act, 1969 or not. Sub-section (5) of Section 45 provides that in the case of a dealer where the amount of tax assessed for any period under sections 41 or 50 or re-assessed 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, the dealer shall be deemed to have failed to pay the tax to the extent of difference between amount so assessed or re-assessed as aforesaid and the amount paid. Considering

sub-section (5) of Section 45 of the Act, 1969, if a dealer is deemed to have failed to pay the tax to the extent mentioned in sub-section (5), there **shall** be levied on such dealer a penalty not exceeding one and one-half times the difference referred to in sub-section (5). Under the circumstances, to the aforesaid extent and on the difference of tax, as per sub-section (5) of Section 45, the respondent – assessee – dealer shall be liable to pay the penalty as mentioned under sub-section (6) of Section 45.

6.3 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, in so far as penalty imposable under Section 45(5) and 45(6) of the Act is concerned, it has 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 re-assessed for any period under Section 44; exceeds the amount of tax already paid by the dealer under sub-section (1), (2) or (3) of Section 47 of the Act, 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 re-assessed as aforesaid and the amount paid. Sub-section (6) of Section 45 provides that where under sub-section (5), a dealer is deemed to have failed to pay the tax to the extent mentioned in the said sub-section, there **shall** be levied on such dealer a penalty not exceeding one and one-half times the difference referred to in sub-section (5). Thus, on a bare reading of sub-sections (5) and (6) of Section 45, it is evident that it is integral part of the assessment that the penalty be levied on the difference of amount of tax paid and amount of tax payable as per the order of assessment or re-assessment as the case may and the same shall be automatic. Therefore, when the penalty on the difference of amount of 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.

6.4 From the language of Section 45(6) of the Act, it can be seen that the penalty leviable under the said provision is a statutory penalty. The phrase used is “shall be levied.” The moment it is found that a dealer is deemed to have failed to pay the tax to the extent mentioned in sub-section (5) of Section 45, there shall be levied on such dealer a penalty not exceeding one and one-half times the difference referred to in sub-section (5). As per sub-section (5), where in the case of a dealer the amount of tax assessed or re-assessed 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, the dealer shall be deemed to have failed to pay the tax to the extent of the difference between the amount so assessed or re-assessed and the amount paid. Therefore, the moment it is found that a dealer is to be deemed to have failed to pay the tax to the extent mentioned in subsection (5), the penalty is automatic. Further, there is no discretion with the assessing officer either to levy or not to levy and/or to levy any penalty lesser than what is prescribed/mentioned in Section 45(6) of the Act, 1969. In that view of the matter, there is no question of considering any *mens rea* on the part of the assessee/dealer.

6.5 At this stage, a few decisions of this Court as well as decisions of the Gujarat High Court (on levy of penalty and interest under the Gujarat Sales Tax Act) are required to be referred to. In the case of **Dharamendra Textile Processors (supra)** after referring and considering another decision of this Court in the case of **Shriram Mutual Fund (supra)**,

it is observed and held that when the term used "shall be leviable," the adjudicating authority will have no discretion.

6.6 In the case of **Shriram Mutual Fund (supra)** while dealing and/or considering similar provision under the SEBI Act, it is observed and held that *mens rea* is not an essential ingredient for contravention of the provisions of a civil Act. While interpreting the similar provision of SEBI Act, it is observed that the penalty is attracted as soon as contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. In the case before this Court, the Tribunal relied on the judgment in the case of **Hindustan Steel Ltd. (supra).** However, this Court did not agree with the view taken by the Tribunal relying upon the decision in the case of **Hindustan Steel Ltd. (supra)** by observing that it pertained to criminal/quasi criminal proceedings. This Court observed that the decision in the case of **Hindustan Steel Ltd. (supra)** shall not have any application as the same relates to imposition of civil liabilities under the SEBI Act and the Regulations and the proceedings under the said Act are not criminal/quasi-criminal proceedings. In paragraphs 34 and 35, it is observed and held as under: -

"34. The Tribunal has erroneously relied on the judgment in *Hindustan Steel Ltd.* v. *State of Orissa* [(1969) 2 SCC 627 : AIR 1970 SC 253] which pertained to criminal/quasi-criminal proceedings. That Section 25 of the Orissa Sales Tax Act which was in question in the said case imposed a punishment of imprisonment up to six months and fine for the offences under the Act. The said case has no application in the present case which relates to imposition of civil liabilities under the SEBI Act and the Regulations and is not a criminal/quasi-criminal proceeding.

35. In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with guilty intention or not. We also further held that unless the language of the statute indicates the need to establish the presence of *mens rea*, it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful perusal of Section 15-D(*b*) and Section 15-E of the Act, there is nothing which requires that *mens rea* must be proved before penalty can be imposed under these provisions. Hence once the contravention is established then the penalty is to follow."

6.7 In the case of **Guljag Industries (supra)** while considering Sections 78(2) and 78(5) of the Rajasthan Sales Tax Act, 1994 which provided for penalty equal to thirty percent of the value of goods for possession or movement of goods, whether seized or not, in violation of the provisions of Clause (a) of sub-section (2) or for submission of false or forged documents or declaration, this Court in paragraph 9 observed as under: -

"**9.** Existence of *mens rea* is an essential ingredient of an offence. However, it is a rule of construction. If there is a conflict between the common law and the statute law, one has to construe a statute in conformity with the common law. However, if it is plain from the statute that it intends to alter the course of the common law, then that plain meaning should be accepted. Existence of *mens rea* is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subjectmatter with which it deals. A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is different from the penalty for a crime. "

That thereafter, after following the decision in the case of **Shriram Mutual Fund (supra),** this Court observed and held that *mens rea* is not an essential ingredient for contravention of the provisions of a civil act. It is further observed that the breach of a civil obligation which attracts penalty under the Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention. In paragraph 30, it is observed and held as under:

"30. In Chairman, SEBI v. Shriram Mutual Fund [(2006) 5 SCC 361] this Court found on facts that a mutual fund had violated the SEBI (Mutual Funds) Regulations, 1996. Under the said Regulations there was a restriction placed on the mutual fund on purchasing or selling shares through any broker associated with the sponsor of the mutual fund beyond a specified limit. It is in this context that the Division Bench of this Court held that *mens rea* was not an essential ingredient for contravention of the provisions of a civil act. The breach of a civil obligation which attracts penalty under the Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention. It was further held that unless the language of the provision intends the need to establish *mens rea*, it is generally sufficient to prove the default/contravention in complying with the statute. In the present case also the statute provides for a hearing. However, that hearing is only to find out whether the assessee has contravened Section 78(2) and not to find out evasion of tax which function is assigned not to the officer at the check-post but to the AO in assessment proceedings. In the circumstances, we are of the view that *mens rea* is not an essential element in the matter of imposition of penalty under Section 78(5)."

6.8 In the case of **Competition Commission of India (supra)** while considering Section 43A of the Competition Act, 2002 which provides for a penalty, it is observed in paragraphs 34 to 37 as under: -

"34. If the ultimate objective test is applied, it is apparent that market purchases were within view of the scheme that was framed. As such the subsequent change of law also did not come to the rescue of the respondents considering the substance of the transaction. The market purchases were part of the same transaction of the combination.

35. Lastly, the submission raised that there were no mala fides on the part of the respondent as such penalty could not have been imposed. We are unable to accept the submission. The *mens rea* assumes importance in case of criminal and quasi-criminal liability. For the imposition of penalty under Section 43-A, the action may not be mala fide in case there is a breach of the statutory provisions of the civil law, penalty is attracted simpliciter on its violation. The imposition of penalty was permissible and it was rightly imposed. There was no requirement of *mens rea* under Section 43-A or intentional breach as an essential element for levy of penalty. Section 43-A of the Act does not use the expression "the failure has to be wilful or mala fide" for the purpose of imposition of penalty. The breach of the provision is punishable and considering the nature of the breach, it is open to impose the penalty.

36. In SEBI v. Shriram Mutual Fund [SEBI v. Shriram Mutual Fund, (2006) 5 SCC 361] , with respect to imposition of penalty on failure to comply with the civil obligation this Court has laid down thus: (SCC pp. 371 & 376, paras 29 & 35)

"29. … In our opinion, *mens rea* is not an essential ingredient for contravention of the provisions of a civil Act. In our view, the penalty is attracted as soon as the contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. In other words, the breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not. This apart [that] unless the language of the statute indicates the need to establish

the element of *mens rea*, it is generally sufficient to prove that a default in complying with the statute has occurred. … the penalty has to follow and only the quantum of penalty is discretionary.

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35. In our considered opinion, a penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence intention of the parties committing such violation becomes wholly irrelevant. … We also further hold that unless the language of the statute indicates the need to establish the presence of *mens rea*, it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful perusal of Section 15-D(b) and Section 15-E of the Act, there is nothing which requires that *mens rea* must be proved before a penalty can be imposed under these provisions. Hence once the contravention is established then the penalty is to follow."

37. The imposition of penalty under Section 43-A is on account of breach of a civil obligation, and the proceedings are neither criminal nor quasi-criminal; the penalty has to follow. Only discretion in the provision under Section 43-A is with respect to quantum of penalty."

6.9 The Gujarat High Court while considering the very provision and penalty and interest imposed under Section 45(6) and Section 47(4A) of the Act, 1969, has taken a consistent view in the cases of **Riddhi Siddhi Gluco Biols Ltd. (supra)** and **Oil and Natural Gas Corporation Limited (supra)** that the penalty leviable under Section 45(6) of the Act is a statutory and mandatory penalty and there is no question of any *mens rea* on the part of the assessee to be considered. In the aforesaid decisions, it is observed and held that levy of penalty is automatic on the eventualities occurring under sub-section (5) of Section 45 of the Act, 1969.

6.10 In the recent decision in the case of **Arcelor Mittal Nippon Steel India Limited (supra)**, while dealing with the very provision of Section 45 of the Act, 1969, it is observed and held in para 23 and 23.1 as under: -

"23. Now, so far as the levy of penalty is concerned, it is to be noted that the penalty is leviable under Section 45 and such a penalty is leviable under subsections (5) and (6) of Section 45 of the Act, 1969 and the penalty is leviable on purchase tax assessed. It provides that if the difference of tax paid and tax leviable/assessed is more than twenty-five percent, in that case, the dealer shall be deemed to have failed to pay the tax to the extent of the difference between the amount so assessed/reassessed and the amount paid and, in that case, there shall be levied on such dealer a penalty not extending one and one-half times the difference as per sub-section (5). Therefore, there being difference of more than twenty five percent, penalty to the aforesaid extent shall be leviable. This is a clear case of false and wrong claim of exemption, as the exempted goods were transferred to a third person and used in an 'ineligible' industry. This is a case of deliberate violation and evil doing.

23.1 In the present case, as the difference between total tax paid and the purchase tax is more than twenty-five percent, the respondent is deemed to have failed to pay the tax as per sub-section (5) of Section 45 and, therefore, liable to pay the penalty not exceeding one and onehalf times. The words used in subsection (6) of Section 45 is "there shall be levied on such dealer a penalty not exceeding one and onehalf times the difference". As noted above, in the present case, the modus operandi which was adopted by the respondent - Essar Steel warrants a penalty. Though, the raw material was required to be used by itself for the manufacture of their goods, after availing the exemption as eligible unit and instead of using the same for itself/himself, the ESL sold the raw materials to an 'ineligible' entity - EPL, who used it for manufacture of its own goods generating the electricity, which again came to be sold to ESL under the power purchase agreement."

6.11 Even otherwise, the word used in Section 45(6) is “shall be levied”. The dealer shall be liable to pay the penalty not exceeding one and one-half times of the difference of the tax as mentioned in sub-section (5) of Section 45 of the Act, 1969. The language used in Section 45 is precise, plain and unambiguous. The intention of the legislature is very clear and unambiguous that the moment any eventuality as mentioned in Section 45(5) occurs, the penalty shall be leviable as mentioned in sub-section (6) of Section 45. No other word like *mens rea* and/or satisfaction of the assessing officer and/or other language is used like in Section 11AC of the Central Excise Act. It is a well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. As per the settled position of law, the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. The courts cannot aid the legislatures' defective phrasing of an Act; they cannot add or mend, and by construction make up deficiencies which are left there.

6.12 Under the circumstances, on strict interpretation of Section 45 and Section 47 of the Act, 1969, the only conclusion would be that the penalty and interest leviable under Section 45 and 47(4A) of the Act, 1969 are statutory and mandatory and there is no discretion vested in the Commissioner/Assessing Officer to levy or not to levy the penalty and interest other than as mentioned in Section 45(6) and Section 47 of the Act, 1969. It is needless to observe that such an interpretation has been made having regard to the tenor of Sections 45 and 47 of the Act, 1969 and the language used therein.

6.13 In so far as the decisions relied upon by the learned counsel appearing on behalf of the respondent – assessee – dealer, referred to hereinabove, are concerned, none of the decisions shall be applicable to the facts of the case at hand, while dealing with Section 45 and Section 47 of the Act, 1969. The words/language of the relevant provisions that fell for consideration in the decisions relied upon on behalf of the respondent is altogether different from the language used in Section 45 and Section 47 of the Act, 1969. In the case of **Dharamendra Textile Processors (supra)**, this Court was considering Section 11AC of the Central Excise Act. In Section 11AC, the words used are “fraud, collusion or any wilful misrepresentation or any wilful misstatement or suppression of facts” and “intent to evade payment of duty.” In that view of the matter, the *mens rea* will play an important role. Therefore, the said decision shall not be applicable while considering Section 45 and Section 47 of the Act, 1969. A similar decision in the case of **Pepsi Foods Ltd (supra)** also shall not be applicable and/or of any assistance to the respondent – assessee – dealer.

6.14 In so far as the submissions on behalf of the respondent – dealer – assessee that as such the dealer shall not be liable to pay the tax at the rate of 12% and that it was incompetence on the part of the authority to prove the difference of more than 25% and that the concession was wrongly given by the learned Senior Advocate appearing on behalf of the respondent – assessee – dealer before the High Court are concerned, at the outset, it is required to be noted that a conscious decision was taken by the learned Senior Advocate appearing on behalf of the dealer, who appeared before the High Court and therefore, he did not press the issue/question on the liability to pay the tax at the rate of 12% was wrongly given. It is to be noted that the respondent – dealer was represented through a very senior advocate before the High Court. Therefore, it cannot be said that the concession was wrongly given. While referring the submissions made by the learned

Senior Advocate, appearing on behalf of the respondent – assessee – dealer, the High Court has recorded as under: -

"4. Learned Senior Counsel Mr. S N Shel at, appearing with Mr.H A Dave, learned Advocate for the appellant has fairly conceded that looking to the fact that the respondent has passed the assessment order on the basis of material available with it, they were required to pay the tax on the basis of 12% and that has been paid by the appellant since the opinion of the expert was turned out."

It is not true that the learned Senior Advocate, appearing on behalf of the respondent – assessee – dealer, was considering the decision of the in the case of **Brooke Bond India Limited (supra)**. It was a conscious decision taken not to press into service the issue No. 1 and 2, that is with respect to the liability to pay the tax at the rate of 12%. Therefore, the decision relied upon by the learned counsel appearing on behalf of the respondent – assessee on the concession given by the learned Senior Advocate, appearing on behalf of the respondent – assessee before the High Court, would not be applicable to the facts of the case on hand.

6.15 In so far as the reliance placed by the learned counsel on behalf of the respondent – dealer on the decision of this Court in the case of **Hindustan Steel Ltd. (supra)** is concerned, at the outset, it is required to be noted that the learned Tribunal specifically found that there was nothing on record to prove that there was in fact a bonafide belief of the respondent herein, that it would be required to pay tax at 2% only. As observed hereinabove and on plain reading of Section 45 and Section 47 of the Act, 1969 and as observed hereinabove, on the eventualities occurring under sub-section (5) of Section 45, there shall be levied penalty mentioned in sub-section (6) of Section 45 and the liability to pay the interest is incurred as mentioned in Section 47(4A). The impugned judgment and order passed by the High Court on the grounds that the amount of tax has already been paid by the assessee – dealer; that the assessee – dealer was under the bonafide belief that it was liable to pay the tax at the rate of 2%, is unsustainable. None of the aforesaid grounds would justify deletion of the penalty and interest leviable/payable under Section 45(6) and Section 47(4A) of the Act, 1969. As observed hereinabove, in the case of **Shriram Mutual Fund (supra),** this Court distinguished the decision in the case of **Hindustan Steel Ltd. (supra)** and even set aside the order passed by the Tribunal which was relying upon the decision in case of **Hindustan Steel Ltd. (supra)**.

7. In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order passed by the High court is hereby quashed and set aside. The order(s) passed by the Assessing Officer confirmed up to the Tribunal to levy penalty and interest under Section 45(6) and Section 47(4A) of the Act, 1969, are hereby restored. Present appeal is accordingly allowed. In the facts of the case, there shall be no order as to costs.