2023:DHC:8906-DB

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 07 December 2023**
Judgment pronounced on: 13 December 2023

\+ VAT APPEAL 3/2023, CM APPL. 9639/2023 (Interim Stay)

HDFC BANK LIMITED ..... Appellant
Through: Mr. Kumar Visalaksh, Mr. Udit Jain, Mr. Arihant Tater and Mr. Ajitesh Dayal Singh, Advs.

versus

COMMISSIONER OF VALUE ADDED TAX, DELHI ..... Respondent
Through: Mr. Rajeev Aggarwal, ASC

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

1. The present appeal is directed against the order dated 06 December 2022 passed by the **Delhi Value Added Tax, Appellate Tribunal**[1] affirming the imposition of penalty upon the appellant. The appellant questions the aforesaid order asserting that the Tribunal has not only misconstrued the earlier orders of remit as framed by this Court, it has also proceeded in complete ignorance of the ambit of the penalty provision, namely, Section 86 of the **Delhi Value Added Tax Act, 2004**[2].

[1] Tribunal
[2] Act

2. According to the appellant, the Tribunal has not only misinterpreted the provisions of Section 86 of the Act, as mandating the imposition of a penalty, it has also clearly erred in failing to bear in mind that sub-sections (10), (14) & (15) of Section 86 were not attracted in the facts of the present case. According to the appellant, in the absence of it having submitted a false, misleading or deceptive return or having submitted one with particulars which could be said to fall within the meaning of the expressions "*false*", *"misleading"* or *"deceptive*", the penalty itself was wholly unjustified. However, and before proceeding further we deem it appropriate to notice the following salient facts.

3. The dispute essentially emanates from assessment orders passed for **Financial Year**[3] 2005-06 and FY 2008-09 raising a demand of tax and interest on the sale of repossessed vehicles. The issue of taxability was answered against the appellant and culminated in the Assessing Authority issuing notices of demand dated 20 January 2012 and 12 July 2012 under Section 33 of the Act. The record would reflect that the issue of tax being leviable on the sale of repossessed vehicles ultimately came to be settled insofar as this Court is concerned in terms of its decision rendered in **Citi Bank vs Commissioner of Sales Tax**[4]. The said decision was followed by this Court in its order dated 26 September 2016 passed inter partes in **HDFC Bank vs. Commissioner of Value Added Tax, Delhi**.[5] The correctness of that judgment,

[3] FY
[4] 2015 SCC OnLine Del 14023
[5] VAT Appeal Nos. 26 & 27/2016

however, and presently, forms subject matter of challenge before the Supreme Court in **HDFC Bank Ltd. vs Commissioner of Value Added Tax, Delhi**[6] and upon which an interim order operates restraining the respondents from taking coercive action against the petitioner therein towards recovery of the disputed amounts of tax.

4. The orders framed by the Assessing Authority dated 20 January 2012 and 12 July 2012 and which purported to demand penalties were questioned by the appellant before the **Objection Hearing Authority**[7]. The OHA negated the objections and confirmed the demands of tax, interest and penalty in terms of its order dated 11 July 2013. It would be pertinent to note that the OHA while confirming penalty had observed that the levy thereof is consequential to the default in payment of tax due. The aforesaid order passed by the OHA was assailed by the appellant before the Tribunal, which however in terms of a common order dated 31 May 2016 confirmed the demand of tax, interest and penalty. This led to the appellant approaching this Court by way of VAT Appeal Nos. 26 & 27 of 2016. The Division Bench in the said case, acknowledging the judgment rendered in *Citi Bank*, which had come to be handed down in the meanwhile, upheld the imposition of tax. However, and insofar as the question of penalty at 200% of the demand was concerned, the Division Bench held as follows:

> "**2.** The appellant/assessee urges that having regard to the circumstances, the fact that the leviability itself was debatable as is evident from the judgment in *Citi Bank (supra)*, and in the absence of clarity, imposition of 200% penalty was not justified and is

[6] Special Leave Petition (Civil) No. 37919/2016
[7] OHA

> disproportionate. This court is of the view that imposition of 200% penalty is facially disproportionate. It needs to be recollected that whether sale of repossessed cars in the light of Section 8 of Banking Regulation Act is subject to VAT levy was a question of law framed by this court and answered in *Citi Bank (supra)*.
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> **3.** In these circumstances, it could not be said that the point was not debatable; undoubtedly it was. The levy of 200% penalty, therefore, is not sustainable; this court, at the same time, opines that it would not be appropriate to act as an adjudicating authority as to the proportionateness of the penalty to be imposed having regard to the fact that the issue was debatable. The matter is accordingly remitted to the Tribunal on the limited question of extent of penalty to be properly levied under these circumstances."

5. It becomes relevant to note that while framing the aforesaid order of remand, the Division Bench had pertinently observed that the imposition of 200% penalty was not justified and clearly disproportionate. It also noted that the question of whether the sale of repossessed cars could be subjected to a levy of tax under the Act was one which came to be answered decisively only in terms of the judgment rendered in *Citi Bank*. It was in the aforesaid context that it observed that the question of taxability being disputed and debatable, the levy of 200% penalty would not sustain. It, accordingly framed the directions of remand as extracted hereinabove.

6. Pursuant to the directions framed by this Court, the issue of penalty came to be raised for consideration before the Tribunal yet again and this time in terms of a common judgment dated 14 December 2021, it upheld the imposition of penalty albeit reducing the quantum thereof. The aforesaid order was assailed by the appellants by way of VAT Appeal Nos. 12-16/2022 which came to be allowed on 31 May 2022 with the Court observing as under:

> "5. Having perused the impugned judgment, we have attempted to ferret the reasoning of the Tribunal, as to why it has reached the conclusion which it did.
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> 5.1 We have failed as the impugned judgment is completely bereft of reasons. According to us, the Tribunal ought to have examined the matter closely, especially having regard to the directions/ observations contained in the remand order issued by this Court.
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> 6. In these circumstances, we are constrained to set aside the impugned judgment dated 14.12.2021.
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> 6.1 It is ordered accordingly.
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> 6.2 The above-captioned appeals are remanded to the Tribunal for a *de novo* hearing. While doing so the Tribunal will mind the directions/ observations contained in the remand order issued by this Court."

7. The order which is impugned in this appeal came to be passed pursuant to the directions aforenoted. A reading of the impugned order would seem to indicate that the Tribunal understood the directions of remit as confirming it to the issue of quantification of penalty and the proportionality thereof. This is evident from the following observations as appearing in the impugned order:

> "**15.** As can be gathered from the above two paragraphs, Hon'ble High Court was of the view that imposition of 200% penalty was facially disproportionate; that the levy of 200% penalty was not sustainable (when the question of levy of VAT on sale of repossessed cars- a question of law- was framed and answered by the Hon'ble High Court in Citi Bank vs. Commissioner of Sales Tax, decided in March 2016 (reported in 2016 (1) AD (DEL) 581).
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> Having so observed, Hon'ble High Court deemed it appropriate to remit the matter to the Appellate Tribunal for the first time, on the following limited question :-
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> In view of the above and clear observations made by the Hon'ble High Court in the previous remand order, coupled with the second remand order, subject matter or scope of these appeals, on remand, is the limited question of extent of penalty to be properly levied.

As regards the submission made on behalf of the appellant before this Appellate Tribunal, while arguing the appeals challenging the penalty, it may be mentioned that Shri Shammi Kapoor, learned counsel then representing the appellant before this Appellate Tribunal, submitted as under:

> "Ld. Counsel for the appellant has submitted that the impugned order passed by the Ld.OHA is disproportionate in the given circumstances, and as such the impugned order deserves to be modified."

Therefore, learned counsel for the Revenue has rightly submitted that Shri Shammi Kapoor, Advocate, earlier representing the appellant here argued only for modification of the impugned order on the ground that in the given circumstances the same was disproportionate.

l6. In the given situation, this Appellate Tribunal proceeds to decide the appeals only on the scope of the orders of remand – which clearly limit the scope to the extent of penalty.

Herein, while framing notice of assessment of penalty, learned Assessing Authority furnished reasons as explained in separate sheet i.e. Annexure 'P'. He specifically mentioned in the assessment that reasons being in the Annexure as software did not permit the Assessing Authority inclusion of lengthy note of reasons.

Relevant extracts from Annexure 'P' are reproduced for ready reference as under:

> "I. The dealer bank was also engaged in financing the vehicles and other moveable assets and a large number of financed vehicles/assets were re-possessed from the defaulters and later on disposed off in the market and VAT was not paid on such sales.
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> The consolidated annual reports were submitted by the dealer for the year 2005-06 and 2006-07 for its all branches situated in whole of the India and information about the tax paid or due on the above context was not verifiable from these documents and returns filed by the dealer.
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> The dealer also did not furnish the information about
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> (1) Trading account for the period 2005-06 & 2006-07 for Delhi Branch only;
>
> (2) Details of fixed assets as per prescribed proforma of the Income Tax for Delhi Branch only and

(3) No. of vehicles re-claimed/re-possessed from defaulters and sold for the year 2005-06 and 2006-07 by Delhi Branch which made the issue more complex to know the exact status of payment of VAT on; the sale of vehicles & other moveable assets disposed off after repossessing the same form defaulters.

2. The dealer had submitted consolidated annual report for whole of the country. Since no exclusive audited balance sheet of Delhi branch was furnished to department to arrive at correct figures of purchases, sales, other incomes, sale of assets, scraps etc, for Delhi, it also made the issue complex to assess the exact tax liability of the dealer.

3. In the annual report submitted by the dealer it was reflected that "the Bank imports bullion including precious metal bars on a consignment basis for selling to its wholesale and retail customers. The wholesale consignment imports are on a back to back basis and are priced to the customer based on the price quoted by the supplier. The Bank earns a fee on the wholesale bullion transactions. The fee was classified under commission income. The bank consolidates the sales and prices the bullion with the supplier. The gain or sale is classified under commission income". The bank also borrows and lends gold which is cheated as borrowing or as lending respectively with the interest paid/received classified as interest expense/income. Further, the bank had not declared any income from sales of Gold in the schedules to the accounts declared in the Annual Report. It had shown the income from commission/exchange & brokerage under schedule-14 (meant for other income). It required proper examination of all the transactions made on above accounts to know as to whether the tax has properly been charged/paid by the bank for the transactions covered under income from commission /exchange & brokerage under schedule-14 (meant for other income) as per the definition of sale?

4. Section 48 of DVAT Act, 2004 read with rule 42 of the DVAT rules, 2005 stipulates maintenance of certain records like a monthly account. Purchase records, showing details of purchases. Sales records, Record of inter-state sales; details of input tax calculations, Stock records etc, by the dealer at its principal place of business. The dealer bank has number of branches in Delhi, involved in the trading of gold and also in financing the vehicles and other moveable assets. It required examination as to how the DVAT 30 & 31 and other books of

accounts required under DVAT Act & Rules are being maintained by the dealer?

5. The dealer had made heavy transactions of outward stock transfer and not submitted the complete F forms. It required examination as to whether the huge amount of stock transfer has been taken place to the genuine branches or the sale has been made to the out stationed gold dealers as consignment sale.

6. Discrepancies on point of deduction of TDS on work contract were also noticed on examination of the bills of the work got executed by the bank on contract basis, (for setting up its various branches/ATMs in Delhi from time to time). Since the dealer has number of branches/ ATMs operating in Delhi, it also required examination in details as on which date the dealer has set up its various branches/ ATM since the introduction of VAT and has got the work executed on contract basis and has, therefore, not deducted the TDS required under the provision of the VAT Act & Rules.

Since it was observed that the tax was not paid/less tax was not paid by reason of concealment/omission/failure to disclose fully material particulars on the part of the dealer, the period of assessment of the dealer was also extended upto six years from the date on which the dealer has furnished a return under section 26 or sub-section (1) of section 28 of this Act. M/s PK Singhal & Co. Chartered Accountant (auditor appointed by the Commissioner to conduct the special audit) after conducting the audit of business affairs of the dealer reported following major negative observations in r/o the dealer:

> 1. The Auditee has admitted in his books of accounts that has not paid any VAT on the sales of old re-possessed vehicles and fixed assets made during the year 2005-06 for Rs. 18,91,77,931/- and Rs. 22,80,693/- resp. This amount is admitted liability where the auditee is unable to pay the tax with interest u/s 42 of DVAT Act as also penalty u/s 86 read with sec 33.
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> 2. The Auditee has got work done for his business affairs but he has not deducted TDS as per section 36 of DVAT Act on an admitted paid amount on execution of total contract work of Rs. 8,06,87,702/-. This amount is admitted liability where the auditee is liable to pay the deductible tax with interest u/s 42 of DVAT Act as also penalty under different sub sections 36A of DVAT Act.

This clearly demonstrates that the books of accounts of the dealer are not reliable and the dealer was intentionally filing

false & deceptive returns which has made the dealer liable to pay the tax with interest u/s 42 of DVAT Act as also penalty u/s 86 read with section 33."

The comments from the dealer bank were also sought on the report furnished by the auditors appointed by the Commissioner and the dealer has stated that:-

> 1- The bank has been issued a license by the Reserve Bank of India under sec 22 of the banking regulation Act, 1949 to carry out its activities of banking. On going through the object clauses of the bank as given in its Memorandum of Association, the bank is into the business of borrowing and lending money and such related activities. This borrowing and lending of money is carried out for various purposes including inter alia car loan, house loan etc. The bank is not into the business of sale and purchase of cars for any consideration whatsoever and hence, it cannot be said to be a dealer. The Auditor without proper application of mind has concluded that the bank is dealer in sale and purchase of cars and hence liable to pay tax on repossessed vehicles. The bank position is only acting as a facilitator for borrower to recover its loan amount. But he failed to prove. How he is a facilitator. ln fact he is selling the vehicles after taking possession. It would be, therefore, in appropriate to say that the bank is the dealer of cars and hence liable to pay VAT. Further Sec 8 of the RBI Act, a banking company is categorically barred from directly or indirectly dealing in buying and selling of goods. Thus, it would be absolutely inappropriate to say that the bank is the seller or dealer engaged in sale and purchase of cars. Further, it is pertinent to mention herein that the bank never had the ownership of the cars. The bank does not have the right to use or manage the car as it only facilitates the customer by extending a loan so that the customer can purchase a car of his choice. At no point of time, the bank is having ownership of cars. The bank does not have the right to use or manage the car as it only facilitates the customer by extending a loan so that the customer can purchase a car of his choice. At no point in time, the ownership of the car is in name of the bank. The Auditor has misconstrued the activities carried out by the bank in so far as treating the bank as dealer dealing in sale and purchase of cars and hence, wrongly computed tax under the provisions of the DVAT Act. There are many recent judicial pronouncements in favour of the bank which

clearly state that bank is not a dealer engaged in sale or purchase of cars.

2. The bank had given works contract amounting to Rs. 8,06,87,702/- during the year 2005-06. The bank has admitted that he has neither deducted TDS nor deposited in the treasury. A list of contractors along with value of the contract has been furnished along with declarations of various contractors for WCT contract value to the tune of Rs. 8,06,87,702/-.

While furnishing the above comments on the report. The dealer bank had raised objections over the conduct of audit and therefore, clarifications from the auditors were also sought on the dealer comments/contentions to have a fair idea of the process adopted for audit and the auditors had clarified that the audit been conducted after giving sufficient time and opportunities to the dealer to produce the records and other documents etc. in support of his contention and every documents/judgment cited by the dealer has been considered and taken on record though the dealer has not furnished complete required records/document. Further the dealer has failed to prove how he is a facilitator.

After examining each and every issue in detail and applying the provisions of the DVAT Act, I am of the considered view that the returns filed by the dealer are incomplete, false and incorrect which attract penalty u/s 86 (10) of DVAT Act. The dealer has not paid due tax by reasons of concealment and has also failed to disclose fully material particulars of sales by not including the turnover of repossessed vehicle/ fixed assets in the returns filed in Form DVAT- 16. Further due to the reasons stated above, there is a tax deficiency which attract penalty u/s 86 (12) of DVAT Act. Moreover the dealer has prepared records and accounts in a manner that is false misleading or deceptive, so it attract penalty u/s 86 (15) of DVAT Act, 2004. Besides, the dealer has not deducted and deposited TDS, disclosed bullions sale very late and above all offered no plausible comments/ explanation on the auditors findings as to why default assessment be not carried out u/s 32 for furnishing deceptive, incorrect and false returns moreover the dealer has miserable failed to prove how he is a facilitator.

In view of my findings above, the dealer has separately been assessed; u/s 32 for non-payment of tax @12.5% on turnover of sales amounting to Rs.2,30,02,959/- pertaining to repossessed vehicles & fixed assets during the month of Dec. 2005, which is

> an admitted liability, payable with penalty u/s 86(10), (12) & (15) of DVAT Act 2004, as the dealer has not come forward to deposit the deficient tax with interest. Since the tax deficiency has now been detected & assessed, the dealer is liable to pay the penalty on deficiency of tax, as per the provisions of sec 86 (10), (12) & (15) of DVAT Act 2004."
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> So the Assessing Authority framed assessment of penalty u/s 86(10) and 86(15) of DVAT Act in view of the above reasons."

8. It is proceeding on that fundamental premise which has led to the Tribunal distinguishing the various decisions cited on behalf of the appellant for its consideration by merely observing at more than one place that those were not judgments dealing with the question of whether the penalty imposed was "*disproportionate*".

9. Although the Tribunal has taken note of the judgments rendered by the Supreme Court in **Hindustan Steel Ltd. vs State of Orissa**[8] as well as **Pratibha Processors vs Union of India**[9] and which had underlined the well-settled principle of penalty being quasi criminal proceedings and thus liable to be sustained only where it be found that mens rea existed or the assessee being guilty of contumacious or dishonest conduct, it has essentially addressed the questions raised before it tested only on the anvil of proportionality and upheld the imposition of penalties under Sections 86(10), (14) & (15) of the Act albeit at a reduced quantification.

10. Appearing in support of the appeal, learned counsel submitted that the Tribunal has committed a manifest illegality in proceeding on the assumption that it was obliged to consider the issue solely on the

[8] (1969) 2 SCC 627
[9] (1996) 11 SC 101

anvil of proportionality. It was the submission of learned counsel that this Court had in unambiguous terms noted that the position with respect to taxability of revenues generated from the sale of repossessed vehicles was in a state of flux till the issue ultimately came to be laid to rest by the Court in terms of its judgment in *Citi Bank*. It was contended on behalf of the appellant that the aforesaid question however has still not been conclusively settled bearing in mind the pendency of the appeal of the appellant itself before the Supreme Court and on which an interim order operates.

11. Quite apart from the above, learned counsel submitted that the first order of remand as framed by this Court would itself indicate that that it had found the levy of penalty to be wholly unjustified bearing in mind the indubitable fact that the issue of the present transactions being subject to tax was itself one which was not free from doubt and had remained unsettled till this Court came to pronounce judgment in *Citi Bank*. According to learned counsel, the order of 26 September 2016 thus cannot possibly be interpreted as being confined to the quantification of penalty alone. Viewed in light of the above it was his submission that the order of the Tribunal impugned herein is liable to be set aside on this score alone.

12. Learned counsel has further assailed the imposition of penalty based on the provisions contained in Section 86 itself. We deem it apposite to extract sub-sections (10), (14) & (15) of Section 86 hereinbelow:

> **"86. Penalties**
>
> xxxx xxxx xxxx

> **(10)** Any person who—
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> (*a*) furnishes a return under this Act which is false, misleading or deceptive in a material particular; or
>
> (*b*) omits from a return furnished under this Act any matter or thing without which the return is false, misleading or deceptive in a material particular;
>
> shall be liable to pay, by way of penalty, a sum of ten thousand rupees or the amount of the tax deficiency, whichever is the greater.
>
> xxxx xxxx xxxx
>
> **(14)** Any person who fails to comply with the requirement under sub-section (2) or sub-section (3) of Section 59 of this Act shall be liable to pay, by way of penalty, a sum of fifty thousand rupees.
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> **(15)** Where a person who is required to prepare records and accounts under this Act, prepares records and accounts in a manner that is false, misleading or deceptive, the person shall be liable to pay, by way of penalty, a sum of one lakh rupees or the amount of the tax deficiency, if any, whichever is greater."

13. Drawing our attention to the language employed in the aforenoted provisions, learned counsel pointed out that the levy of penalty is clearly predicated on an assessee having made a "*false, misleading or deceptive*" disclosure. Learned counsel submitted that the assertion of the appellant that revenues generated from the sale of repossessed vehicles would not be exigible to tax under the Act cannot possibly be viewed as being a "*false, misleading or deceptive*" disclosure. According to learned counsel, the Tribunal has manifestly erred in taking a view in ignorance of the aforesaid facets of the penalty provision as contained in the Act.

14. It was further submitted that the Tribunal has manifestly erred in construing Section 86, and more particularly sub-sections (10), (14) and (15) thereof, as mandating a levy of penalty notwithstanding the

assessee not being guilty of having made a "*false, misleading or deceptive*" disclosure. In view of the aforesaid, learned counsel would contend that the conclusions as recorded by the Tribunal and set out in paragraph 22 of the impugned order are wholly unsustainable. Paragraph 22 is extracted hereinbelow:

> "22. In view of the above provisions, learned Counsel for the Revenue has rightly contended that levy of penalty under Rajasthan VAT Act was discretionary and not mandatory. He has also rightly contended that levy of penalty as provided under Section 86(10) & (15) of DVAT Act is mandatory and not discretionary and that the provisions of Rajasthan VAT Act are not in paramateria with the provisions of DVAT Act."

15. Appearing for the respondents, Mr. Aggarwal learned counsel addressed the following submissions. According to Mr. Aggarwal, the terms of the order of remit as framed by this Court upon the earlier appeals would clearly indicate that the Tribunal was only obliged to evaluate whether the penalty as imposed could be said to be disproportionate. According to Mr. Aggarwal, this is evident not just from a reading of the first order of remand, but also from the order dated 31 May 2022, when the appeals were again disposed of and the matter remitted to the Tribunal with the Court observing that it would have to examine the issue afresh having regard to the directions and observations appearing in the earlier order of the Court.

16. Insofar as the issue of levy of penalty principally is concerned, Mr. Aggarwal sought to draw sustenance from the decision of the Supreme Court in **State of Gujarat & Ors vs M/s Saw Pipes Ltd.**[10] where the following observations came to be rendered:

[10] [2023 INSC 376]

"**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 subsection (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 subsection (5). As per subsection (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 sub section (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/quasicriminal 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/quasicriminal proceeding.
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> 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 15D(b) and Section 15E 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 subsection (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 subject matter with which it deals. A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is different from the penalty for a crime. "

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 checkpost 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.
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> 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 43A, 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 43A or intentional breach as an essential element for levy of penalty. Section 43A 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.
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> 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.
>
> 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 15D(b) and Section 15E 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 43A is on account of breach of a civil obligation, and the proceedings are neither criminal nor quasicriminal; the penalty has to follow. Only discretion in the provision under Section 43A 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 subsection (5) of Section 45 of the Act, 1969.

xxxx xxxx xxxx

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."

17. Since the decision in *Saw Pipes Ltd* revolved around Section 45(6) and 47(4A) of the **Gujarat Sales Tax Act, 1969**[11], we also deem it apposite to notice those provisions as well as some of the submissions that were addressed in that context. We thus additionally reproduce paragraphs 4.10, 6 & 6.1 of the report hereinbelow:

> "**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.
>
> xxxx xxxx xxxx
>
> **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

[11] 1969 Act

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 subsection (1) or (2) of section 16, then, the Commissioner may impose on him, in addition to any tax payable –
>
> (a) if he has included the purchase price of the goods in his turnover of purchase as required by sub section (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 subsection (1) of section 40, the commissioner shall impose upon such dealer by way of penalty for each declaration or return, a sum of two hundred rupees for every month or part of a month comprised in the period commencing from the day immediately after the expiry of prescribed date and ending on the date on which a declaration or return is furnished.

(4) If a dealer fails without sufficient cause to furnish any declaration or any return [as required by proviso to sub-section (1) or sub section (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 under section 41 or 50; or

(b) reassessed for any period under 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 subsection (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).]"

xxxx xxxx xxxx

"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 sub section (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 subsection (1), (2) or (3) and ending on date of order of assessment, reassessment or, as the case may be, revision, simple interest at the rate of [eighteen per cent] per annum on the amount of tax not so paid or on any less amount thereof remaining unpaid during such period."

18. Having noticed the rival submissions, we at the outset note that it is not disputed before us that the question of levy of tax on the sale of reprocessed vehicles was one which came to be authoritatively pronounced upon by this Court by way of the judgment rendered in *Citi Bank*. This Court being the jurisdictional High Court thus appears to have decided the aforesaid question finally by way of *Citi Bank*. However, we cannot lose sight of the fact that the appeal of the present appellant and which questions the correctness of the view expressed therein is itself presently engaging the attention of the Supreme Court and on which an interim order is said to operate. While it was feebly argued by the respondents that the decision in *Citi Bank* was itself based on earlier judgments rendered on the question, we are of the considered opinion that the same clearly lacks merit since the Court had inter-partes itself noted that the question of levy of tax on sale of reprocessed vehicles was clearly debatable till the issue came to be ruled upon in *Citi Bank*. There thus undoubtedly appears to have been a situation of a flux which operated upon the field till the issue came to

be ultimately decided in terms of the judgment pronounced in *Citi Bank.*

19. Having sketched out the backdrop in which the issues raised in this appeal are liable to be answered, we firstly take up for consideration the correctness of the view as expressed by the Tribunal and which had understood our earlier orders as confining the debate to the question of proportionality of the penalty alone. Having conferred our thoughtful consideration on the two orders which were passed on the earlier appeals preferred by the appellant, we find that the Tribunal has manifestly erred in construing our earlier orders as restricting the consideration to that of proportionality alone.

20. A reading of the order dated 26 September 2016 clearly establishes that the Court had not only accepted the contention of the appellant that the levy of penalty was unjustified since the question of taxability itself was contentious, but also that imposition of penalty at 200% was unjustified and disproportionate. It was in the aforesaid backdrop that it was pertinently observed that since the point had remained arguable, the levy of penalty at 200% would not sustain. It was on an overall conspectus of the aforesaid conclusions that the Court ultimately proceeded to remit the mater for the consideration of the Tribunal. We are thus of the firm opinion that the order of 26 September 2016 cannot possibly be interpreted or understood as confining the challenge of the appellant to the issue of proportionality alone. We find ourselves unable to countenance the submissions to the

contrary as urged on behalf of the respondents for the following additional reasons.

21. As has been observed on more than one occasion, judgments rendered by a Court are not liable to be read or understood as Euclid's theorem. Judgments of a Court should also not be interpreted as mandating authorities to act contrary to a statute or to exercise powers far greater than those that may be statutorily conferred. This aspect assumes significance since the levy of penalty is undoubtedly governed by the provisions of Section 86 of the Act. The order of 26 September 2016 thus cannot possibly be construed as enabling the respondents to levy a penalty even though the pre-conditions as statutorily placed by sub-sections (10), (14) & (15) of Section 86 are not attracted.

22. It appears to us, and which view is reinforced with the respondents seeking to draw support for their submissions from the judgment in *Saw Pipes Ltd*, that they appear to read Section 86 (10, (14) & (15) as envisaging the levy of a statutory penalty. However, in our considered opinion, the aforesaid premise and on which the case of the respondents appears to be founded, is wholly incorrect. As noticed hereinabove, sub-sections (10), (14) & (15) embody the principles of mens rea when they speak of "*false, misleading or deceptive*" conduct of an assessee. It would thus be wholly incorrect to construe those provisions as being representative of penalties statutorily leviable.

23. We note that there are other sub-sections of Section 86 which embody the principles of a statutory penalty. For instance, sub-section (5) deals with the contingency of an assessee failing to comply with

Section 21(1). The aforesaid provision obliges a registered dealer to apprise the Commissioner of circumstances which may warrant amendments in its registration. A similar example of a statutory penalty stands embodied in sub-section (6) and which authorises the levy of a penalty in case a dealer violates Section 22(2). An assessee becomes liable to be penalized under Section 86(9) consequent to a failure to furnish a return or failing to append requisite documents with a return or its refusal to comply with a direction to revise a return. As would be manifest from a close scrutiny of sub-sections (5), (6) and (9) of Section 86, those provisions envisage the levy of penalties consequent to a failure on the part of a registered dealer to discharge certain obligations or a failure on the part of an assessee to comply with statutory duties as imposed. In such situations, the Act envisages penalty to be imposed as a necessary corollary. The aforenoted provisions do not vest the Assessing Officer with any discretion in the matter of imposition of a penalty.

24. In contrast to the above, sub-sections (10), (14) & (15), and which as we had an occasion to note hereinbefore, envisage the levy of a penalty only in case an assessee is charged with "*false, misleading or deceptive*" conduct. The concept of penalty being founded on mens rea and misleading conduct is no longer a principle which can brook of any doubt. This is evident from the following passage as appearing in the decision of the Supreme Court in *Hindustan Steel Ltd.* and which the Tribunal itself had an occasion to notice:

> "8. ….. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of

> a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provision of the Actor where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

25. We also take note of the reiteration of the aforesaid position in law as appearing in the decision of the Supreme Court in *Pratibha Processors*. While the respondents had sought to derive support for their submissions in this respect from the decision of the Supreme Court in *Saw Pipes Ltd.*, we find that those submissions proceed in ignorance of the evident fact that Sections 45(6) and 47(4A) of the 1969 Act constituted instances of statutory penalties.

26. The penalty under Section 45(6) of the said statute which formed the subject matter of consideration became automatically leviable upon a failure of the assessee to pay the amount of tax as assessed or re-assessed. Similarly, section 47(4A) of the 1969 Act provisioned for the levy of a penalty in a situation where a dealer failed to pay tax within the time prescribed. Those provisions thus contemplated the levy of a penalty and the assessee becoming liable to face penal action in case of an admitted failure to adhere with statutory obligations. The penalty contemplated under Section 45(6) and 47(4A) of the 1969 Act thus did not rest on a discretion which may otherwise have been vested in the

authority concerned. It was in the context of the aforenoted two statutory provisions that the observations of the Supreme Court in *Saw Pipes Ltd.* are liable to be appreciated.

27. Reverting then to the facts of our case, we find that Sections 86(10), (14) & (15) of the Act cannot by any stretch of imagination be construed or viewed as provisions *pari materia* to Sections 45(6) and 47(4A) of the 1969 Act, which formed the bedrock for the ultimate decision rendered by the Supreme Court in *Saw Pipes Ltd.* We, for reasons aforenoted, thus find ourselves unable to sustain the conclusion of the Tribunal to the contrary and when it proceeded to observe and interpret Sections 86(10), (14) & (15) of the Act as provisions embodying the principles of statutory penalty.

28. Turning then to the merits of the imposition of penalty itself, we find that the same is not based on any "*false, misleading or deceptive*" statement or disclosure made by the appellants. The appellants had while furnishing their returns proceeded on the bona fide belief that revenues generated from the sale of reprocessed vehicles would not be exigible to tax under the Act. That controversy has till date not been lent a quietus, since notwithstanding the judgment rendered by this Court in *Citi Bank,* the matter still appears to be at large before the Supreme Court and on the appeal of the appellant itself. In any case and since the respondents have not founded the levy of penalty on conduct of the appellant which may qualify as falling within the ambit of sub-sections (10), (14) and (15) of Section 86, we find ourselves unable to sustain the levy of penalty.

29. We also take note of the submissions of the appellant who had assailed the levy of penalty based on the provisions of Section 34. It was pointed out that for the purposes of imposition of penalty pertaining to the period December 2005 to March 2006, the respondents had sought to invoke the extended period of limitation as constructed in terms of the Proviso to Section 34(1) of the Act. It was pointed out that the aforesaid Proviso empowers the respondents to commence proceedings for reassessment in cases where the Commissioner has reason to believe that tax was not paid on account of "*concealment, omission or a failure to disclose material particulars*" by an assessee.

30. Regard must be had to the fact that the non-payment of tax on the sale of repossessed vehicles is not alleged even by the respondents as being an outcome of "*concealment, omission or a failure to disclose all material particulars*". The appellant chose not to deposit any tax in respect of the subject transactions proceeding on the assertion that the revenues obtained therefrom were not exigible to tax under the provisions of the Act. That uncertainty came to be accorded a degree of finality only once the judgment came to be pronounced by the Court in *Citi Bank*. The imposition of penalty therefore, would be rendered unsustainable additionally on this score.

31. In fact, the invocation of the Proviso placed in Section 34(1) lends further credence to our conclusion that the order of the Court dated 26 September 2016 cannot possibly be interpreted as restricting the scope of inquiry to the question of proportionality alone. Accepting such a contention as advanced by the respondents would compel us to

construe the aforesaid decision as intending to empower the respondents to levy a penalty even though the same may not find sanction under the provisions of the Act. This too leads us to the irresistible conclusion that the order of 26 September 2016 did not detract from the right of the appellant to question the very basis for invocation of the penalty provisions.

32. We, accordingly, allow the instant appeal and answer the question of law as framed in favour of the appellant/assessee and against the Department. We also consequently set aside the impugned orders levying penalty upon the appellant and pertaining to FY 2005-06 and 2008-09.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

DECEMBER 13, 2023/kk