

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****TAX APPEAL NO. 638 of 2013****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE M.R. SHAH****and****HONOURABLE MR.JUSTICE R.D.KOTHARI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
  - 2 To be referred to the Reporter or not ?
  - 3 Whether their Lordships wish to see the fair copy of the judgment ?
  - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
  - 5 Whether it is to be circulated to the civil judge ?

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ABDUL KARIMHAJI UMARBHAI RASULBHAI....Appellant(s)  
Versus  
STATE OF GUJARAT....Opponent(s)

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Appearance:

MR. APURVA N MEHTA, ADVOCATE for the Appellant(s) No. 1  
SHRI JAIMIN GANDHI, AGP for the Opponent(s) No. 1

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**CORAM: HONOURABLE MR.JUSTICE M.R. SHAH**  
and  
**HONOURABLE MR.JUSTICE R.D.KOTHARI**

**Date : 21/12/2013**

**ORAL JUDGMENT**  
**(PER : HONOURABLE MR.JUSTICE M.R. SHAH)**

1. **Admit.** Shri Jaimin Gandhi, learned AGP waives service of notice of admission on behalf of the respondent.

2. In the facts and circumstances of the case and with the consent of the learned advocates appearing on behalf of the respective parties, the appeal is taken up for final hearing today.

3. Feeling aggrieved and dissatisfied with the order dated 28.03.2013 passed by the learned Gujarat Value Added Tax Tribunal passed in Second Appeal No. 710 of 2011, the appellant has preferred the present tax appeal to consider the following substantial questions of law:

(i) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in treating the invoices produced by the appellant as "Retail Invoices" even though the nomenclature of a document cannot be conclusive to decide as to whether a invoice produced is a Retail Invoice or a Tax Invoice and even though admittedly, the invoice produced contained all the essential ingredients of a Tax Invoice including details of tax charged separately?

(ii) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that Input Tax Credit can be allowed to the purchasing dealer in the absence of tax invoice only when the retail invoice, debit note or cash memo produced in lieu of tax invoice contains all the

requisite particulars of tax invoice and that the selling dealer is prohibited under the Act from issuance of tax invoice and that the selling dealer has paid the tax amount collected from the purchasing dealer to the State Government?

(iii) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in directing the assessing authority to allow input tax credit on purchases effected through tax invoices after verifying that tax collected from the appellant by the selling dealers has actually been deposited to the state coffers even though such a provision was inserted in the statute book only w.e.f. 01/04/2013 by insertion of a new sub section (7A) in Section 11?

(iv) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in confirming the penalty levied under Section 34(12) of the Act by the assessing authority and partly confirmed by the first appellate authority even though the assessing authority had never proposed to impose any penalty under the said section in the statutory notice in Form No.309 issued for this purposes and even though the said notice was served on to the appellant after the date of passing assessment order?"

4. At the outset, it is required to be noted that Shri A.N.Mehta, learned advocate appearing on behalf of the appellant does not press the present appeal *qua* question No.

(iii). Hence, present tax appeal is dismissed as not pressed so far as question No. (iii) is concerned.

5. Now, so far as question Nos. (i) and (ii), which are interrelated, are concerned, there is a broad consensus between the learned advocates appearing on behalf of the respective parties that the matter be remitted to the learned Appellate Tribunal to consider the said issues afresh in accordance with law and on merits and the learned advocates appearing on behalf of the respective parties do not invite any further reasoned order while remanding the matter to the learned Tribunal to consider the issue/question Nos. (i) and (ii) afresh in accordance with law and on merits.

6. Now, so far as question No.(iv) i.e. whether on the facts and circumstances of the case the Appellate Tribunal was right in law in confirming the penalty levied u/s 34(12) of the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as the Act) is concerned, Shri Mehta, learned advocate appearing on behalf of the appellant has vehemently submitted that, as such, before levying the penalty u/s 34(12) of the Act no show cause notice has been issued upon the appellant calling the appellant to show cause as to why the penalty u/s 34(12) of the Act may not be imposed. It is submitted that as such while issuing the statutory notice in form No.309 the appellant was called upon to show cause why the penalty u/s 34(7) and u/s. 12(7) of the Act may not be imposed.

7. It is submitted that however there was no reference of levying the penalty u/s. 34(12) of the Act. It is submitted that

the order passed by the First Authority imposing penalty u/s. 34(12) of the Act, partly confirmed by the First Appellate Authority and even confirmed by the learned Appellate Tribunal, deserves to be quashed and set aside.

8. Shri Jaimin Gandhi, learned AGP appearing on behalf of the respondent, as such, is not in a position to satisfy the Court that before imposing the penalty u/s 34(12) of the Act, any show cause notice was issued upon the appellant.

9. We have perused the statutory notice issued in Form No.309 and considering the same it appears that there is a reference to the penalty u/s 34(7) and u/s 12(7) of the Act only. However, there is no reference of penalty u/s 34(12) of the Act. Thus, before imposing the penalty u/s 34(12) of the Act neither any statutory notice has been served upon the appellant nor the appellant has been called upon to show cause as to why the penalty u/s 34(12) of the Act may not be levied/imposed. Under the circumstances, the order passed by the First Adjudicating Authority, partly confirmed by the First Appellate Authority and confirmed by the Appellate Tribunal imposing the penalty u/s 34(12) of the Act cannot be sustained and the same deserves to be quashed and set aside as the same is in breach of principle of natural justice. Consequently, the order passed by the First Adjudicating Authority imposing penalty u/s 34(12) of the Act, partly confirmed by the First Appellate Authority and further confirmed by the Appellate Tribunal, is hereby quashed and set aside.

10. Consequently, the present appeal succeeds in part. So far as challenge to levying/imposing the penalty u/s 34(12) of

the Act is concerned, the order passed by the First Adjudicating Authority levying/imposing the penalty u/s 34(12) of the Act is hereby quashed and set aside.

10.1. So far as questions No. (i) and (ii) are concerned, the impugned judgment and order passed by the learned Appellate Tribunal is hereby quashed and set aside *qua* the said issues and the matter is remitted to the learned Tribunal to consider the said issues afresh in accordance with law and on merits after giving opportunity of hearing to all concerned.

10.2. So far as question No. (iii) is concerned, as stated hereinabove, the present appeal is dismissed as not pressed.

No costs.

**(M.R.SHAH, J.)**

**(R.D.KOTHARI, J.)**

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THE HIGH COURT  
OF GUJARAT

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