

## IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 928 of 2013

*With*

TAX APPEAL No. 929 of 2013

*To*

TAX APPEAL No. 930 of 2013

STATE OF GUJARAT....Appellant(s)

*Versus*

NARENDRAKUMAR REVACHAND KOTAK...Opponent(s)

*Appearance:*

Mr. JAIMIN GANDHI AGP for the Appellant(s) No. 1

Mr. APURVA N MEHTA, Advocate for the Opponent(s) No. 1

**CORAM:** HONOURABLE Mr. JUSTICE AKIL KURESHI

and

HONOURABLE Ms. JUSTICE SONIA GOKANI9<sup>th</sup> January 2014COMMON ORDER (*PER : HONOURABLE Mr. JUSTICE AKIL KURESHI*)

State has preferred these Appeals challenging separate but similar orders passed by the Gujarat Value Added Tax Tribunal, Ahmedabad ["Tribunal" for short]. We may notice the facts from Tax Appeal No. 928 of 2013. In such appeal, the judgment of the Tribunal dated 2<sup>nd</sup> April 2013 is under challenge. Following question of law has been presented for our consideration :-

**"Whether on the facts and in the circumstances of the case, the Tribunal has rightly held that the provision of**

**penalty under section 43(3A) of the Gujarat Sales Tax Act, 1969 is not mandatory to levy penalty per default of filing declaration or late return ?”**

For the alleged breach of furnishing return by the prescribed date, as required under section 40 (1) of the Gujarat Sales Tax Act, 1969 {"Act" for short}, the competent authority imposed penalty under section 45 (3A) of the said Act. Such penalty was challenged before the Tribunal. Tribunal, by the *impugned* judgment, held that it was not mandatory to levy penalty at the rate of Rs. 200/= per month for the default of filing declaration or return beyond the prescribed date. The Tribunal relied on its earlier judgment in case of *Shree Rubber Industries Limited v. State of Gujarat* to come to the conclusion that combined reading of Section 45 (3A) with Section 45(9) of the Act would show that the provision for penalty was not mandatory and the word "shall" contained in sub-section (3A) of Section 45 should be read as "may" and resultantly, the penalty was not mandatory.

Having said so, considering the facts of the case, the Tribunal reduced the penalty from that imposed by the competent authority and confirmed by the appellate authority.

Learned AGP Mr. Jaimin Gandhi appearing for the State, however, relied on the decisions of the Supreme Court in case of *Union of India & Ors. v.*

*Dharamendra Textile Processors & Ors.*, reported in (2008) 13 SCC 369 and *Union of India v. Rajasthan Spinning & Weaving Mills*, reported in (2009) 13 SCC 448 to urge that such penalty is mandatory. However, we do not conclude this issue in the present Tax Appeals and therefore refrain from making any observations in this regard.

To our mind, whether certain penalty is mandatory or not is somewhat different context. On the question whether once the authority decides to impose penalty, it can reduce the same below the minimum prescribed under the statute. If a penalty is not mandatory, for variety of reasons, the authority may chose not to impose the penalty. However, whether mandatory or otherwise, the authority for valid reasons decides to impose penalty, the question would be could such penalty be reduced below the minimum prescribed under the law.

With the view of the Tribunal that the penalty under section 45(3A) of the Act is not mandatory, we are *prima facie* in agreement with. In this context, we refer to the decision of the Apex Court in case of *Hindustan Steel Limited v. The State of Orissa*, reported in 25 STC 211, wherein, it was held that 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.

The question, however, may still remain whether once the authority decides to impose penalty, can it reduce the same below the minimum prescribed. In this context, decision of the Tribunal may require a closer scrutiny. We would have certainly undertaken the said task but for the fact that we are informed that the total effect of reduction of penalty in all three appeals put-together is less than Rs. 35,000/= . Under the circumstances, keeping this question open to enable the State to urge the same in future in appropriate case, only on the ground of smallness of the claim amount in these appeals, such appeals are disposed of.

{Akil Kureshi, J.}

{Ms. Sonia Gokani, J.}

*Prakash\**

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