

(2014) 09 AHC CK 0189

In the Allahabad High Court

Case No : Sales/Trade Tax Revision Nos. 441 to 445, 447, 448, 450, 451, 453, 455, 463 to 465, 467 and 507 to 509 of 2014

Commissioner, Commercial Tax

APPELLANT

Vs

Dabur India Ltd.

RESPONDENT

Date of Decision : 25-09-2014

Acts Referred:

Uttar Pradesh Value Added Tax Act, 2008 — Section 15, 17, 45, 48, 50

Citation : (2014) 76 VST 178

Hon'ble Judges : Surya Prakash Kesarwani, J

Bench : Single Bench

Advocate : B.K. Pandey, Standing Counsel, Advocate for the Appellant; M.M. Rai, Shubham Agarwal, Vishvajit, Ashok Kumar, Gaurav Mahajan and Suyash Agarwal, Advocate for the Respondent

Judgement

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Surya Prakash Kesarwani, J.—Heard Sri B.K. Pandey, leaned standing counsel for the applicant, Sri Suyash Agarwal, Sri Vishvajit, Sri Ashok Kumar, Sri M.M. Rai, Sri Shubham Agarwal and Sri Gaurav Mahajan, learned counsels for the respondents. All these revisions involve common question of law as under:

"Whether under the facts and circumstances of the case, the Commercial Tax Tribunal was legally justified in deleting the penalty levied under section 54(1) (14) of the Uttar Pradesh Value Added Tax Act, 2008?"

2. Before I proceed to discuss the facts involved in each cases, it would be appropriate to summarize the law with regard to penalty under section 54(1)(14) of the Act.

3. Legal provisions:

Section 50 of the Act provides for import of goods into the State by road against a declaration form. Section 51 of the Act provides for import of goods into the

State by rail, air, river or ropeway. The contravention of section 50 or 51 attracts penalty under section 54(1)(14) of the Act. Rule 54 of the Uttar Pradesh VAT Rules (for short, "the Rules") provides for establishment of check-post which was amended and a new of rule 54 was substituted by the Uttar Pradesh Value Added Tax (Second Amendment) Rules, 2010 published vide Notification No. K.A. NI-2-241/XI dated 4th February, 2010. Rule 55 of the Rules provides for inspection of goods in transit. Rule 56 provides for issue and submission to declaration forms and matters relating thereto. The relevant declaration form as referred in rule 54 is form No. 38.

4. Controversy involved in the present revisions are with regard to levy of penalty under section 54(1)(14) of the Act for contravention of the provisions of section 50 of the Act. Under the circumstances, it is necessary to reproduce the provisions of section 50, section 54(1)(14) of the Act and rule 54 of the Rules and form XXXVIII as under:

S. 50. Import of goods into the State by road against declaration.--

(1) Any person (hereinafter in this section referred to as the importer) who intends to bring, import or otherwise receive, into the State from any place outside the State any goods other than the goods named and described in Schedule-I in such quantity or measure or of such value, as may be notified by the State Government in this behalf, in connection with business, shall either obtain the prescribed form of declaration, in such manner as may be prescribed, from the assessing authority having jurisdiction over the area, where his principal place of business is situated or, in case there is no such place, where he ordinarily resides or shall download from official website of the department in such manner as may be prescribed:

Provided that where the importer intends to bring, import or otherwise receive such goods otherwise than in connection with business, he may, at his option, in the like manner obtain the prescribed form of certificate.

(2)(a) Where such goods are imported, brought or otherwise received into the State by registered dealer, he shall carry such declarations or documents as may be prescribed.

(b) Where the goods are imported, brought or otherwise received into the State by a person otherwise than in connection with business, he may likewise carry such certificates and documents as may be prescribed.

(3) The driver or other person in-charge of any vehicle carrying any goods referred to in the preceding sub-sections shall stop the vehicle when so required by an officer authorized under sub-section (1) of section 45 or sub-section (1) of section 48, and keep in stationary for so long as may be considered necessary by the officer authorized under sub-section (1) of section 45 or sub-section (1) of section 48, as the case may be, and allow him to search the vehicle and inspect the goods and all documents referred to in the preceding sub-sections and shall,

if so required, give his name and address and the names and addresses of the owner of the vehicle and of the consignor and the consignee of the goods.

S. 54. Penalties in certain cases.--(1) The assessing authority, if he is satisfied that any dealer or other person, as the case may, has committed the wrong described in column 2 of the table below, it may, after such inquiry, if any, as it may deem necessary and after giving dealer or person reasonable opportunity of being heard, direct that such dealer or person shall, in addition to the tax, if any, payable by him, pay by way of penalty, a sum as provided in column (3) against the same serial no. of the said table:

R. 54. Establishment of check-posts.--(1)(a) The owner, driver or any other person in-charge of the vehicle or vessel shall, in respect of such goods carried in the vehicle or the vessel as are notified under or referred to in sub-section (1) of section 50 and exceeding the quantity, measure or value specified in the notification therein, carry with him the following documents--

(i) form of declaration for import in form XXXVIII or certificate in form XXXIX hereinafter in these rules referred to as declaration or certificate, as the case may be, in duplicate, duly filled and signed by the purchaser and seller of the goods or where goods are transferred otherwise than by way of sale, by consignor and consignee of the goods with status and address;

(ii) Cash memo, bill, invoice or challan;

(b) The owner, driver or any other person in-charge of the vehicle or vessel shall in respect of all other goods carried in such vehicle or vessel carry such documents as may be prescribed by the Commissioner in duplicate.

(2)(a) A declaration or certificate--

(i) in respect of which a report has been made under sub-rule (9) of rule 56 or sub-rule (8) of rule 57, or

(ii) which is declared as obsolete and invalid by the Commissioner under sub-rule (13) of rule 56 or sub-rule (10) of rule 57, shall not be valid with effect from the date of the report or the date from which it is so declared, as the case may be, for the purpose of sub-rule (3).

(b) A certificate whose period of validity as specified in sub-rule (4) of rule 57 has expired shall not be valid for the purposes of sub-rule (3).

(3) The owner of the truck or vessel or the transport agency, forwarding agency or clearing agents, as the case may be, shall deliver to the consignee, while delivering the consigned goods, the duplicate copy of the declaration or certificate, as the case may be.

(4) The owner, driver or any other person in-charge of the vehicle or vessel shall carry the trip sheet in form XL in respect of goods referred to in clause (a) of sub-rule (1). Separate trip sheets shall be submitted for goods meant for different

destinations.

(5) The Commissioner may from time to time issue instructions with regard to the procedure to be followed regarding import of goods from out of State and submission of declaration or certificate before assessing authority.

Form XXXVIII

Department of Commercial Taxes, Government of Uttar Pradesh [See rule 54(3) (a) of UPVAT Rules/2008] Form of declaration for import

I,....., the authorised signatory of the above named dealer, do hereby declare that the goods noted above are being imported/received/brought by the aforesaid dealer.

Signature of authorised signatory

5. As per scheme of the Act any person, who intends to bring, import or otherwise receive, into the State from any place outside the State any goods other than goods named, and described in Schedule I in such quantity or measure or of such value, as may be notified by the State Government in this behalf, in connection with business, shall either obtain the prescribed form of declaration, in such manner as may be prescribed, from the assessing authority having jurisdiction over the area, where this principal place of business is situated or in case there is no such place, where he ordinarily resides or shall download front official website of the Department in the manner as may be prescribed by rule 58 or 59. The driver or other person in-charge of vehicle carrying goods referred to in sub-section (1) of section 50 is required to carry the declaration form along with other relevant documents and if on inspection he is found to transport or attempting or abetting to transport any goods to which this section applies without being covered by proper and genuine documents then for reasons to be recorded and after giving opportunity of being heard he may order for detention of such goods. The-declaration form for import may be obtained by registered dealer for import of goods either from his assessing authority or he may download it from the official website of the Department in the manner prescribed by the Commissioner. The aforesaid declaration form for import is form XXXVIII The form is required to be sent to the selling dealer or consignor of the other State in two copies.

6. In form XXXVIII the name and address of the dealer to whom form is to be issued, description of goods, weight/measure," quantity, value in figure, value in words, bill/cash memo/challan/tax invoice number and date, name and address of seller/consignor and certain particulars of transporters/carrier, namely, service provider number, truck number, name and address of driver and driving licence number are to be filled up. Column Nos. 1 to 6 may be filled up only with the help of bill/cash memo/challan/tax invoice. Recurring instances comes to light that column No. 6 is left blank due to which penalty under section 54(1)(14) of the Act is imposed by the assessing authority on the ground that non-filling of

this column facilitates tax evaders to evade tax by re-using the same form XXXVIII for import of unaccounted goods. It is the case of the Department that when entire informations in form XXXVIII are filled up with the help of the relevant bill/cash memo/challan/tax invoice then there is no reason not to fill up column No. 6, i.e., bill/cash memo/challan/tax invoice number and date. According to the Department this clearly indicates import of goods to evade payment of tax which attracts penalty under section 54(1)(14) of the Act unless it is shown that even if details in column No. 6 have not been filled up yet there was no intention to evade payment of tax.

7. The learned counsel for the assessee submit that not filing up details in column No. 6 of form XXXVIII cannot attract penalty under section 54(1)(14) of the Act, if the goods are accompanied with bill/cash memo/challan/tax invoice and other relevant documents.

8. From clause (i) and clause (ii) of rule 54(1)(a) of the Rules, it is evident that declaration form for import in form XXXVIII is to be duly filled and signed by the purchaser of the goods or where the goods are transferred otherwise than by way of sale, by consignor and consignee of the goods with status and address. The requirement as provided in rule 54 has been substituted in section 50 of the Act by section 16 of the U.P. Value Added Tax (Amendment) (Second) Ordinance/2014 (U.P. Ordinance No. 6 of 2014) dated July 28, 2014 by providing in sub-section (2) that where goods are imported or otherwise received into the State by registered dealer, he shall carry duly filled such declarations or documents as may be prescribed. Section 50 and section 54(1)(14)/ 15 of the Act has been substituted by section 17 of the amending Act as under:--

"Amendment of section 50:

16. (1) In section 50 of the principal Act,--

(a) in sub-section (2),--

(i) in clause (a) for the words "carry such declarations or documents as may be prescribed" the words "carry duly filled such declarations or documents as may be prescribed" shall be substituted;

(ii) in clause (b) for the words "likewise carry such certificates and documents as may be prescribed" the words "likewise carry duly filled such certificates and documents as may be prescribed" shall be substituted;

(b) in sub-section (4) for the word "detention" the word "seizure" shall be substituted.

Amendment of section 54:

17. In section 54 of the principal Act, in sub-section (1), in the table,--

(a) for entries at serial Nos. 5 and 6 the following entries shall column wise be substituted, namely:--

(b) for the entries at serial Nos. 14 and 15 the following entries shall column wise be substituted, namely:---

(c) for entries at serial No. 21B the following entries shall Column wise be substituted, namely:

9. In these revisions this court is not concerned with the amended provisions since all the revisions relates to penalty under the unamended provisions of section 54(1)(14) of the Act. Under the circumstances this court does not express any opinion with regard to the amended provisions.

10. In the case of Jain Shudh Vanaspati Ltd. Vs. State of U.P. and Others, , a Division Bench of this court considered the similar provisions of the U.P. Sales Tax Act, 1948 and held in paragraphs 23, 29 as under (pages 68 and 71 in 53 VST):

"23. The provision contained in section 28A as it stands after enactment of U.P. Act No. 33 of 1979 are materially different. It cannot be said that there is any assumption underlying therein that the goods to which the provision of section 28A applies have actually been sold inside the State and the section does not authorise the sales tax authorities either to seize the said goods or to penalise the importer thereof on any such assumption. Its present basis is the attempt to evade tax. The power to detain the goods and levy penalty in respect thereof cannot be exercised merely for the reason that the said goods were not accompanied by the requisite documents or that the documents accompanying them were false. This power can be exercised only if the goods detained are not accompanied by the requisite documents or that the documents accompanying them are false and if there is material before the detaining authority to indicate that the goods are being imported in an attempt to evade assessment or payment of tax due or likely to be due under the Act. The instant case, therefore, in our opinion, clearly falls outside the ratio of the case of The Check Post Officer and Others Vs. K.P. Abdulla and Bros., as decided by the Supreme Court.

29. The first question that arises for consideration is whether the expression "attempt to evade assessment or payment of tax due or likely to be due" can be said to be vague and whether the power conferred upon the Check-post Officer in this regard can be said to be arbitrary. In our opinion, the expression "attempt, to evade assessment or payment of tax due or likely to be due" cannot be said to be an expression conveying vague ideas. It is, in our opinion, an expression having a definite connotation. An attempt to evade assessment or payment of tax due or likely to be due can take place in so many different ways that it is not possible for any Legislature to specify all such methods of evasion in the Act. The expression does not become vague merely because all the circumstances in which such an attempt to evade assessment or payment of tax due or likely to be due have not been enumerated therein."

11. In the case of the Multitex Filtration Engineering Ltd., Noida v. Commissioner of Commercial Tax, U.P., Lucknow [2009] 40 NTN 389, this court exhaustively

examined the provision of section 50 and section 54(1)(14) of the Act and relevant Rules and held in paragraph Nos. 12, 18, 20, 23, 24, 26 and 30 as under:

"12. Section 50(1) provides that any person who intends to bring, import or otherwise receive, into the State from any place outside the State any goods other than the goods named and described in Schedule I, shall obtain the prescribed form of declaration. Section 50(2) provides that where such goods are imported, brought or otherwise received into the State by registered dealer, he shall carry such declarations or documents as may be prescribed. Section 50(3) provides that the driver or other person in-charge of the vehicle shall allow the authorized officer to search the vehicle and inspect the goods, and all documents referred to in section 50(1) of the Act. Section 50(4) provides that while making the search or inspection if the officer finds any person transporting or attempting or abetting to transport any goods to which this section applies without being covered by the proper and genuine documents referred to in section 50(1) and (2) of the Act if, for reason to be recorded, he is satisfied after giving such person an opportunity of being heard that such goods were being so transported in an attempt to evade assessment or payment of tax due or likely to be due under this Act, he may order detention of such goods. Section 50(5) provides that sub-sections (3), (7), (8), (9) and (10) of section 48 shall mutatis mutandis apply to goods detained under, sub-section (6), as they apply to goods seized under that section. Rule 54(3)(a) provides the owner, driver or any other person in-charge of the vehicle or vessel shall, in respect of such goods carried in the vehicle shall carry with him--(1) the declaration form for import in form XXXVIII or certificate in form XXXIX in duplicate duly filled and signed by the purchaser and seller of the goods or where goods are transferred otherwise than by way of sale, (2) cash memo, bill, invoice or challan and (3) authorization for transit of goods/goods challan in triplicate. Rule 55(3) provides that if on such examination, the officer finds or has reason to believe that any one or more consignment are not covered by one or more of the documents referred to in sub-rule (3) of rule 54; or any such documents in respect of any consignment is false, bogus, incorrect, incomplete or invalid, the officer shall issue a notice to the driver or person in-charge of the vehicle or vessel why the goods should not be seized. Rule 55(5) provides that if the officer is not satisfied with the explanation, he shall order the seizure of the goods. Thus, in brief, the aforesaid provisions show that the person who intends to import the goods in connection with the business any goods other than goods named and described in Schedule I should carry the declaration form, cash memo, invoices or challan and shall, produce the same to the officer concerned at the time of inspection. Such documents should be proper and genuine documents. The declaration form should be duly filled and signed by the purchaser and seller of the goods. In case of any discrepancy being found, the officer concerned shall issue a show-cause notice and under section 50(4) for the reason to be recorded after giving an opportunity of being heard that such goods were being so transported man-

attempt to evade the assessment or payment of tax due are likely to be due under this Act, he may order detention of such goods. Section 54(14) of the Act provides for levy of penalty for the contravention of provisions of section 50 or section 51 with the view to evade payment of tax or transports, attempts to transport any taxable goods.

18. In the case of Assistant Commercial Taxes Officer Vs. Bajaj Electricals Ltd., , the apex court following its earlier decision in the case of Guljag Industries Vs. Commercial Taxes Officer, held that in-case while importing the goods declaration form was found to be unfilled; it is a serious lapse and penalty is leviable

20. It would be appropriate to mention here that there is a difference in the provision under the Rajasthan Act and the VAT Act. Under the Rajasthan Act section 78(4) provides for the seizure of goods. It says where any goods in movement, other than exempted goods, are without documents, or are not-supported by documents are referred to in sub-section (2), or documents produced appear false or forged, the incharge of the check-post or the officer empowered under sub-section (3), may seize the goods the reasons to be recorded in writing and shall give a receipt of the goods to the person from whose possession or control they are seized. Sub-section (5) of section 78 further provided that after giving reasonable opportunity of being heard and after having held such enquiry as he may deem fit, shall impose on him 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, (a) penalty equal to thirty per cent, of the value of such goods. In the said provision neither for the seizure of the goods nor for the levy of penalty "an attempt to evade the tax or assessment or payment of tax due or likely to be due under this Act" is a condition precedent. While under section 50(4), for the purposes of seizure, the attempt to evade assessment or payment of tax is a condition precedent. The same requirement is also for the purposes of levy of penalty under section 54(14) of the Act. In this view of the matter the decision of the apex court in the case of Guljag Industries Vs. Commercial Taxes Officer, and Assistant Commercial Taxes Officer Vs. Bajaj Electricals Ltd., are to be read and understood with reference to the provisions of the Rajasthan Act.

23. Having regard to the aforesaid decisions, referred hereinabove, I am of the view that the Division Bench decision in the case of Jain Shudh Vanaspati Ltd. Vs. State of U.P. and Others, still holds the field and is relevant for the interpretation of section 50 of the VAT Act. The language of sections 28A(6) and 50(4) is synonymous. There is absolutely no difference in the language. Therefore, the interpretation of section 28A read with section 28A(6) given by the Division Bench of this court in the case of Jain Shudh Vanaspati Ltd. Vs. State of U.P. and Others, is applicable to the interpretation of section 50 read with section 50(4). Thus, for the detention/seizure of the goods under section 50 read with section 50(4) and 50(5), a case of an attempt to evade the tax and an attempt to evade assessment or payment of tax due or likely to be due under this Act has to be

made out as a condition precedent. In this view of the matter the observation of the learned single judge in the case of KMGS Road Signs Pvt. Ltd. is not correct in entirety and is to be read in the light of the observation made above.

24. Each case is to be examined on the fact of the case. Under section 50(1) and (2) read with rules 54, 53(a) it is obligatory on the part of the importer to import the goods against the declaration form, i.e., form XXXVIII accompanied by cash memo, bill, invoice or challan. The declaration form should be duly filled and signed by the purchaser and seller of the goods. Duly filled form is the requirement of rule 54(3)(a). Therefore, unfilled form may lead to a violation of section 50(1) and (2) and rule 54(3)(a) and rule 55(3). In case, if any discrepancy is being found, the officer is under obligation to issue show-cause notice as provided under rule 55(3) and in case the explanation is not found to be proper, he can pass the order seizing the goods under rule 55(5). Rule 55(5) is to be read with section 50(4) of the Act. It cannot be read in isolation. Therefore, for the seizure of the goods in case of any violation it is to be examined in each case that whether there was an attempt to evade assessment or payment of tax.

26. Let us examine the fact of the present case. In the present case, admittedly column No. 6 of the declaration form was found unfilled, namely, bill, invoice and challan numbers were not mentioned. According to me, mentioning of challan, bill and invoice numbers in the declaration form is very material. By filling column No. 6 and mentioning invoice, bill or challan numbers the declaration form can be correlated with the goods covered by invoices or challan. Photostat copy of form XXXVIII has been produced before the court during the course of hearing which is on record. Perusal of the said form reveals that; all the columns have been filled except column No. 6. When the applicant was filling all" the columns; there cannot be any plausible reason why he has left filling column No. 6. This act appears to be deliberate. Non-filling of column No. 6, i.e., non-mentioning of challan number or invoice number may lead to an inference that in case of non-checking of goods, the said declaration form may be used for any other consignment of a similar quantity, quality, weight and value. In the declaration form, some of the columns may not have that much importance, namely, that, in case if the invoice number or challan number is mentioned in column No. 6 and the column of weight, quantity or value is unfilled, then one can verify from the invoice or the challan wherein all these details are mentioned. The circular of the Commissioner is also to this effect. The circular dated February 3, 2009, issued by the Commissioner, Trade Tax, referred by the learned counsel for the applicant, says that in case out of column Nos. 2 and 3, if one of the columns is not filled, the same may be got filled and the goods may not be seized. The circular does not say that in case if column No. 6 is not filled, the goods cannot be seized. Therefore, the applicant cannot get any benefit of the circular, inasmuch as that circular is not applicable to the present case.

30. In view of the above, prima facie, I am of the view that a case of seizure of

goods has been made out. The seizure proceeding is only a summary proceeding. At this stage only the security has been demanded in respect of the penalty leviable in future for the release of the goods. It will be open to the applicant to take all the pleas during the course of penalty proceeding and it is expected from the authority concerned to consider such pleas without being prejudiced to the observations made in this order and the orders of the Tribunal and the authorities below and will conclude the penalty proceeding independently."

12. In the case of *Rama Pulses v. State of U.P.* [2009] 41 NTN 189, the Division Bench of this court considered in detail the relevant provisions and various judgements and held in paragraphs 10, 11, 12 and 13 as under:

10. In *Multitex Filtration Engineering Ltd.* [2009] 40 NTN 389, the court has clarified in paras 27 and 30, that incomplete form XXXVIII may be a ground of seizure, but that for imposing penalty a satisfaction has to be recorded under section 54 after giving an opportunity to the trader and on the material placed on record that there was an intention to evade the tax. The guilty mind is necessary to be established to impose penalty, which is a punishment to be given to a dealer over and above the tax assessed against him.

11. The penalty under section 54(14) of the VAT Act does not provide for statutory penalty for failure to make a complete declaration, as in the case of section 78(5) of the Rajasthan Sales Tax Act, 1954, which provides for penalty for breach of section 78(2) for movement of goods without form No. 18A/18C. Under section 54(14) of the VAT Act, the conditions necessary for imposing penalty is (i) import or attempt to import or to abet in the import of any goods, in contravention of the provisions under section 50, or section 51 with a view to intention of evading payment of tax on sale of--(a) such goods; or (b) goods manufactured, processed or packed by using such goods; or (ii) transport, attempt to transport any taxable goods, in contravention of any provisions of this Act.

12. On the above discussion, it cannot be said that the law laid down in *Jain Shudh Vanaspati Ltd. Vs. State of U.P. and Others*, has been diluted, and that the requirement of intention to evade the tax is no longer the requirement under the Act before imposing the penalty.

13. We are of the view that the law laid down in *Jain Shudh Vanaspati Ltd. Vs. State of U.P. and Others*, is still good law and holds the field even after enforcement of VAT Act and that before imposing penalty the authority has to give notice under section 54(1) and to record a finding either on the basis of material before it, or produced by the dealer, or any other person, or the Department and which may include incomplete form Ghaziabad (which may be a ground for seizure of the goods), that there was an intention to evade the payment of tax.

The writ petition is dismissed, relegating the petitioner to alternative remedy to

show the cause to the authority concerned, and thereafter, if it is still aggrieved, pursue the remedies available to it, under the Act."

13. In the case of Modi Tyre Company Pvt. Ltd. Vs. The Commissioner, as under (pages 138 to 144 in 74 VST):

"17. Mere contravention of section 50 or 51 but without any intention to evade tax, therefore, would not attract penalty. This is what has been held by this court in various authorities relied on by the learned Senior Counsel appearing for the assessee. A Division Bench of this court in Rama Pulses v. State of U.P. [2009] VSTI B-1034 : [2009] 41 NTN 189 has held that under the Act, 2008, before imposing penalty, authority concerned has to record a finding either on the basis of material before it or produced by the dealer or any other person or the Department, which may include incomplete form XXXVIII that there was an intention to evade payment of tax. This is what has been followed in subsequent decisions also.

18. The importance of column 6 of form XXXVIII has been examined in Multitex Filtration Engineering Ltd., Noida v. Commissioner of Commercial Tax U.P., Lucknow [2009] 40 NTN 389, where this court has observed, "According to me, mentioning of challan, bill and invoice numbers in the declaration form is very material. By filling column No. 6 and mentioning invoice, bill or challan numbers the declaration form can be correlated with the goods covered by invoice or challan.... Perusal of the said form reveals that all columns have been filled except column No. 6. When the applicant was filling all the columns, there cannot be any possible reason why he has left filling column No. 6. This appears to be deliberate.... Non-filling of column No. 6, i.e., non-mentioning of challan number or invoice number may lead to an inference that in case of non-checking of the goods, the said declaration form may be used for any other consignment of a similar quantity, quality, weight and value." It is in these facts and circumstances, the assessing officer has also found that form XXXVIII in question was not signed by consignor and it shows that it was not filled in by consignor, but by assessee itself, who left column 6 blank deliberately. The assessing authority from the discussion made in the impugned order, some of which are referred to hereinabove, formed an opinion that turnover of sale or purchase or both declared by dealer is not worthy of credence and thereby assumed jurisdiction for making provisional assessment and has passed the order appealed before first appellate authority. This decision has also been referred to and followed in J.S.W. Steel Ltd. Vs. Commissioner of Commercial Taxes, .

....

20. This court enquired from learned counsel for the assessee that the goods, which have been imported, did not contain such identification so as to distinguish the goods of one lot from others. If one form XXXVIII is successfully used in respect to certain goods imported without checking, the same form XXXVIII cannot be used in respect to another lot of goods imported by the assessee since

column 6 was blank and whether such repeated use of form XXXVIII is possible or not, I did not get any satisfactory categorical reply at all.

22. I find no substance in the above explanation. In order to attract penalty under section 54 of the Act 2008, what required is, only, an intention on the part of importer to evade payment of tax and not actual evasion of tax. If there is non-compliance of any requirement of sections 50 and 51 read with rules framed thereunder, one ingredient to attract penal provision would stand satisfied and as soon as second ingredient is also satisfied, imposition of penalty would answer requirement of statute.

24. Now I come to the authorities cited at the bar, in favour of assessee. In (2013) 63 VST 483, the honourable Dr. Satish Chandra, J. considered the matter where mobile checking squad found a vehicle transporting certain goods carrying a declaration form pertaining to import of such goods but such form was blank. Assessing authority, on mere ground that declaration form was blank, imposed penalty, which was confirmed by the first appellate authority but the Tribunal reversed their decision imposing penalty. This court noticed that truck was intercepted on August 2, 2008. It commenced its journey from Andhra Pradesh to U.P. on July 27, 2008 but while in transit, and could reach U.P. border; with effect from August 1, 2008, the check-posts in U.P. were abolished. Till then, there was a practice that declaration form pertaining to import used to be carried by truck driver and at the check post, with the help of officer of tax Department, declaration form used to be filled in. The truck driver, in the case in hand, was carrying declaration form as per practice, as prevailed on the date, he commenced journey from Andhra Pradesh, i.e., on July 27, 2008, but being totally unaware that with effect from August 1, 2008 check-post in U.P. have been abolished, when he reached U.P. Border, finds no assistance from anyone to fill in declaration form; and in his own wisdom, he continued his journey towards destination. Immediately, on August 2, 2008 itself, the vehicle was intercepted by checking team of Trade Tax Department. In these peculiar facts and circumstances, the court found that except declaration form, all the documents were in order; and there was no concealment of sale of goods, the blank form was available with truck driver but due to interregnum change in the circumstances, which were beyond his control, the form could not be duly filled in for which he was not at all responsible. There was neither any mala fide intention nor any concealment on the part of assessee. In view of these very findings of fact recorded by Tribunal, it find imposition of penalty unjust and accordingly" set aside the same. This order was confirmed by this court by dismissing revision preferred by the Revenue. I do not find as to how this judgment would help the assessee in this case for the reason that, firstly, this judgment is founded on its own peculiar facts and secondly when the Tribunal found, as a matter of fact, that there was no intention to evade tax, penalty could not have been imposed. It was thus rightly set aside.

25. In Commissioner of Commercial Tax, Lucknow v. Jagrani Marketing Pvt. Ltd.,

Lucknow. [2013] 51 NTN 12, the flying-squad when intercepted a truck loaded with 194 pieces of carton found that amongst the documents available with the transporter, form XXXVIII had its column 6 blank and merely on that basis, the assessing authority levied penalty, which was upheld by the first appellate authority but cancelled by the Tribunal in Second appeal, hence, the Revenue came in revision. The court noted that penalty was imposed only for leaving column 6 of form XXXVIII blank and the close scrutiny shows that space in column 6 being insufficient, information required thereto was printed by a computer and pasted on the back side of form XXXVIII. On verification, the said information was found in order. In these circumstances, this court found that there was no justification for imposition of penalty and upheld the Tribunal's order.

26. Then comes another decision in *Sharda Exports v. Commissioner, Commercial Tax, U.P.* [2013] 18 VSTI B-1060 rendered by the honourable Pankaj Mithal J. Paras 5, 6 and 7 of judgment, if read together, show that there was import of seven bundles of leather in the State of U.P., without proper import declaration form, hence penalty was imposed by the assessing authority and it was confirmed by the first and second appellate authorities. The assessee-revisionist brought to the notice of this court that penalty was imposed only for the reason that proper entries in relation to invoice/bill number and its date were not made in import declaration form, though these documents were accompanying goods. The court said that in absence of any finding about intention on the part of assessee to evade payment of tax, imposition of penalty was not justified. It is in fact requirement of section 54(1)(14) of the Act, 2008. However, while doing so, the court observed that entries required to be made in the declaration form could have been ascertained from the accompanying documents. There was no finding recorded by authorities below that there was any intention on the part of assessee to evade tax, therefore, imposition of penalty was found unjustified. Same is the view taken in *Commissioner of Commercial Tax v. Dabur India Ltd.* [2013] 18 VSTI B-1011, wherein also only on account of column 6 of form XXXVIII having been found blank, penalty was imposed. In this case the first appellate authority itself found that imposition of tax was not justified and that was concurred by the Tribunal. This court declined to interfere with the said view taken by the two appellate authorities observing that mere omission/keeping column 6 of form XXXVIII blank was nothing but it was in the nature of clerical mistake for which penalty as such would not be attracted unless a further finding is recorded that there is an intention to evade payment of tax. In *Commissioner, Commercial Tax v. Manglam Cement Ltd.* [2013] 51 NTN 18, penalty was imposed by assessing authority, since column 6 of form XXXVIII lacked date of bill/invoice. The first appellate authority itself deleted penalty holding that mere fact that column was blank would not justify imposition of penalty unless there is an intention to evade tax on the part of the importer.

27. In *Commissioner, Commercial Tax v. Shipra Engineering Works Pvt. Ltd.* [2013] 51 NTN 171, the Tribunal itself deleted penalty and this court declined to

interfere therewith.

28. Similarly in Commissioner, Commercial Tax v. Sudarshan Spare Parts and Service Centre [2013] 51 NTN 156, the Tribunal while deleting penalty, recorded a finding that there was no intention on the part of assessee to evade tax and hence this court did not interfere.

29. In Meerut Food Industries v. Commissioner, Commercial Tax [2014] 2 VST-OL 239 (All.) : [2013] 52 NTN 161, the court clearly recorded the stand of the Revenue itself that there was no intention to evade tax on the part of dealer and it was not their case at all as is evident from the following (page 241 in 2 VST-OL):

"It is not the case of the Revenue that there was intention to evade tax on the entire consignment or that apart from the above 33 bags of yellow peas the remaining consignment suffered from any discrepancy which may entail imposition of penalty. . ."

30. In Commissioner, Commercial Tax v. G.K. Binding Wires Ltd. [2013] 52 NTN, 236, again the Tribunal while deleting penalty, recorded a finding that there was no intention to evade tax, hence, this court dismissed revision preferred by the Revenue.

31. To the same effect are the decisions in Commissioner of Commercial Tax, Lucknow v. Sai Construction and Builders [2013] 18 VSTI B-952, Commissioner, Commercial Tax v. U.P. Food Company [2013] 52 NTN 42, Commissioner, Trader Tax, U.P. Lucknow v. Nehru Steel, [2012] 49 NTN 144, Commissioner, Commercial Tax v. S.R.G. Mercantile Pvt. Ltd. [2012] 50 NTN 353 and Pepsico India Holdings Ltd. Vs. Commissioner of Trade Tax, .

32. In fact all the decisions cited at the bar in support of the assessee are where the fact-finding authorities, i.e., appellate authorities themselves found no justification for imposing tax since there was no finding about intention of evasion of tax on the part of importer and thus orders were upheld by this court.

33. In the present case, declaration form was not "duly filled", in, as required specifically in sections 50 and 51 as also rule 56(1) and, therefore, there was contravention of provision of section 50(1) of Act, 2008. The assessing authority has recorded a finding that by keeping column 6 of form XXXVIII blank, such declaration form can be repeatedly used for successive import so as to evade payment of tax. This finding has been reiterated and confirmed by the first appellate authority as also second appellate authority. These are all concurrent findings of fact and satisfy requirement of section 54(1)(14) of the Act, 2008 so as to justify imposition of penalty. It is not a case where merely on the basis that column 6 of form XXXVIII was blank, penalty was imposed. Therefore, I do not find any error on the part of authorities concerned in imposing penalty upon the assessee."

14. In the case of Commissioner, Commercial Tax v. Vind Enclave, Trade Tax

Revision No. 152 of 2014 decided on August 5, 2014, this court upheld the findings recorded by the Tribunal that there was no intention to evade the payment of tax, in the circumstances that even though column No. 6 of form XXXVIII was left blank but as per accompanying invoice the dealer who was a manufacturer was entitled to CENVAT credit of 14 per cent which was much higher than the commercial tax under the Act; penalty was not leviable.

15. Non-filling up of column No. 6, i.e., not mentioning of bill/cash memo/challan/invoice number may lead to an inference that in case of non-checking of goods the declaration form may be reused for importing goods of same quantity, weight and value to evade payment of tax but it cannot be the sole ground to impose penalty under section 54(1)(14) of the Act. Satisfaction has to be recorded after giving opportunity to the dealer/person and after considering all the relevant materials/evidences on record that there was an intention to evade payment of tax. The guilty mind is necessary to be established to impose penalty under section 54(1)(14) of the Act. If the last fact finding authority, i.e., the Tribunal has recorded a finding of fact that there was no intention, to evade payment of tax, same cannot be interfered with in revision under section 58 of the Act provided the finding is perverse or it is based on consideration of irrelevant material or non-consideration of relevant material.

16. Having summarized the legal position as mentioned above, now I proceed to examine each case on its own facts:

17. T.T.R. No. 441 of 2014:--A branch transfer was made by the assessee from its unit Ballabgarh Haryana to Ghaziabad which was intercepted by Assistant Commissioner Mobile Squad second unit, Gautam Budh Nagar on July 27, 2009. The goods were accompanied with all the relevant documents. The only lacuna found was that column No. 6 of form XXXVIII was not filled up. For this reason a penalty of Rs. 1,12,000 was imposed under section 54(1)(14) of the Act. The first appeal filed by the assessee was allowed by the first appellate authority who recorded a finding of fact that there was no intention to evade payment of tax. In second appeal, by the impugned order the Tribunal held that the goods in question were duly accounted for in the books of account, it was accompanied with branch transfer documents as well as form VAT D-3 of Haryana Government and there was no intention to evade payment of tax. The findings recorded by the Tribunal are findings of fact. In the absence of any intention to evade payment of tax penalty was not imposable. The revision is wholly misconceived and is, therefore, dismissed.

18. T.T.R. No. 442 of 2014:--The facts were that certain herbs were being imported by the assessee from Rampur (Chhatisgarh) through Truck No. SR-38-0917 accompanied with bill, bilty, transit pass of forest Department, Jhansi, Uttar Pradesh and form XXXVIII. However, column No. 6 of form XXXVIII was found blank. On this basis the goods were seized and thereafter released on deposit of security. Subsequently, penalty proceeding was initiated under section 54(1)(14) of the Act. Penalty of Rs. 1,18,400 was imposed. First appeal filed by

the assessee was allowed by the appellate authority and the penalty was set aside. The applicant filed second appeal which was also rejected by the impugned order of the Tribunal dated February 17, 2014. The Tribunal and first appellate authority recorded a finding of fact based on consideration of relevant material that there was no intention to evade payment of-tax. The findings recorded by the Tribunal are findings of fact. The revision has no force and is, therefore, dismissed.

19. T.T.R. No. 443 of 2014:--The facts were that the assessee was found importing polymag from M/s. India Glycose Ltd., Uttarakhand, when the goods were intercepted by the authorities on November 17, 2009. The goods were found accompanied with bill, bilty and form XXXVIII. However, column No. 6 of form XXXVIII was found blank. The concerned authority seized the goods which were released on deposit of security of Rs. 2,00,000. The first appeal filed by the respondent was allowed and a finding of fact was recorded that there was no intention to evade payment of tax. The applicant filed second appeal which was rejected by the Tribunal. The Tribunal recorded a finding of fact that there was no intention to evade payment of tax. The goods in question were excisable goods being brought by the assessee for use as raw material. On these facts the Tribunal and first appellate authority recorded the findings of fact that there was no intention to evade payment of tax. The findings recorded by the Tribunal are findings of fact. The revision is misconceived and is, therefore, dismissed.

20. T.T.R. No. 455 of 2014:--The facts were that the assessee was found importing toothpaste, chyavanprash, glucose, etc., accompanied with bilty, challan dated 4th July, 2009 and form XXXVIII of which column No. 6 was left blank. Consequently, goods were seized and the same were released on deposit of the security. Penalty proceeding under section 54(1)(14) of the Act was initiated and the same was imposed. The first appeal filed by the assessee was allowed by the Additional Commissioner Grade-1 (Appeal)-III Commercial Tax, Ghaziabad vide order dated August 29, 2012. The second appeal filed by the Department was dismissed by the impugned order of the Tribunal. The first appellate authority as well as the Tribunal have recorded the findings of fact that there was no intention to evade payment of tax. The Tribunal also recorded the findings of fact that there was no question to reuse of form XXXVIII as the goods in question were not unaccounted. Nothing has been brought on record that the goods were not duly entered into the books of account. The finding recorded by the Tribunal that there was no intention to evade payment of tax is the finding of fact based on consideration of relevant material. The revision is wholly misconceived and is, therefore, dismissed.

21. T.T.R. No. 467 of 2014:--The facts were that 600 tin pure Deshi ghee was found being imported by the assessee from M/s. Chambal Deshi Product, Gwalior accompanied with their invoice No. 345 dated December 22, 2008, bilty of the transporter of even date and form XXXVIII was also accompanied with the goods but the bill number and date was not written in column No. 6 of the

duplicate copy of the form No. XXXVIII. On this ground alone the goods were seized and the same were released on deposit of security. Subsequently, penalty proceeding was initiated under section 54(1)(14) of the Act and penalty of Rs. 6,00,000 was imposed vide order dated June 30, 2011. The first appeal filed by the assessee was allowed by the appellate authority. The applicant filed second appeal which was dismissed by the impugned order. In the impugned order the Tribunal recorded findings of fact that the goods in question were accompanied with all genuine documents. In the original copy of form XXXVIII bill number and date was not filled up in column No. 6 due to mistake of the selling dealer. There was no intention to evade payment of tax. There was no question of possibility of reuse of form XXXVIII in question. Thus, findings recorded by the Tribunal in the impugned order are findings of fact based on consideration of relevant material. The revision is wholly misconceived and is, therefore, dismissed.

22. T.T.R. No. 465 of 2014:--The facts were that on February 25, 2011 truck No. HR 55M/5175 loaded with the goods was intercepted by the Mobile Squad unit 8, Ghaziabad. The goods were found accompanied with form XXXVIII in which column No. 6 was left totally blank and there was overwriting in G.R. On these facts the goods were seized and the same were released on deposit of security. Subsequently, penalty proceeding was initiated and the penalty of Rs. 6,50,000 was imposed under section 54(1)(14) of the Act. The explanation of the assessee was that the mistake was because of human error and further that the goods were not for sale but for use as raw material. The first appellate authority dismissed the appeal of the assessee and upheld the levy of penalty. Second appeal filed by the applicant before the Commercial Tax Tribunal, Ghaziabad, was allowed by the Tribunal vide the impugned order dated March 4, 2014 and the penalty under section 54(1)(14) of the Act was set aside. The Tribunal recorded the findings that the assessee purchased goods against purchase order. The purchase was made against form C which was issued, goods were accompanied with test report dated February 18, 2012 bill No. 001541 dated February 19, 2012 and form XXXVII. Not mentioning the date in column No. 6 of form XXXVII was due to human error. On the basis of the aforesaid excise invoice, Cenvat credit was taken. The goods in question and payment were duly recorded in the books of account. The Tribunal held that there was no intention to evade payment of tax. The findings recorded by the Tribunal cannot be sustained on the facts and circumstances of the present case. The assessing authority has recorded clear finding that cash memo or bill number and date was not filled up in the column No. 6 in form XXXVIII. There was overwriting in the G.R.A. tax invoice No. 947 dated February 19, 2012 was issued by M/s. Unicorn Petroleum , Industries Pvt. Ltd., Mumbai in which on tax invoice number and date fluid, was applied and the overwriting was done and the date was changed. These three discrepancies collectively indicated that it was not because of human error or clerical mistake. The assessing authority held that these three discrepancies considered collectively clearly established the intention to evade payment of tax. The Tribunal has merely observed that non-filling of column No. 6 was a human

error. Under the circumstances the findings of the Tribunal that there was no intention to evade payment of tax cannot be sustained. In result, the, revision succeeds and is hereby allowed. The impugned order of the Tribunal is set aside and the matter is remitted back to the Tribunal to consider the entire facts and circumstances of the case and the findings recorded by the assessing authority and the first appellate authority in the light of the evidences available on record and thereafter pass a fresh order in accordance with law without being influenced by any of the observations made above.

23. T.T.R. No. 453 of 2014:--Penalty under section 54(1)(14) of the Act was imposed on the ground that 12,630 kgs. iron and steel found being imported from Faridabad to Haryana through Truck No. HR 38/P 0739 was intercepted by the officers of Mobile Squad Unit, Ghaziabad, which was found accompanied with invoice Nos. 646, 648 and 649 of dated January 5, 2010 of M/s. Agrawal Steels, Faridabad, but without any form No. XXXVIII/XXXIX. Thus, there was clear breach of the provisions of section 50 of the Act. The explanation submitted by the assessee that form XXXVIII was sent to the selling dealer but inadvertently the driver of the truck left it. All the documents, namely, bill, bilty, etc., were found accompanied with goods. Penalty of Rs. 1,94,000 was imposed. The first appeal filed by the assessee was dismissed by the Additional Commissioner, Grade-2 (Appeal) 4th, Ghaziabad on the ground that there was clear breach of section 50(1) of the Act and as such penalty was rightly imposed. Second Appeal No. 670 of 2012 filed by the assessee before the Member, Commercial Tax Bench 2nd, Ghaziabad, was allowed. The Tribunal recorded a finding of fact that duly filled up form XXXVIII was produced subsequently. The transaction in question was found duly recorded in the books of account of the assessee. The goods were accompanied with excise invoice, bilty and form VAT D-3 of the Haryana Government and as such there was no intention to evade payment of tax. The Department has completely failed to establish import of the goods in question with intent to evade payment of tax. The assessing authority imposed the penalty only on the ground that form XXXVIII was not available at the time when goods were intercepted. This may be a default on the part of assessee but this alone cannot be made sole basis to hold that there was intention to evade payment of tax. The assessee submitted proper explanation of non-availability of form XXXVIII, when the goods were intercepted. Tribunal has lawfully accepted the explanation. No discrepancy was found or pointed out by the assessing authority or the first appellate authority in the invoice and other documents. The fact that transaction in question were duly recorded in the books of account has not been disputed. Under the circumstances I do not find any infirmity in the impugned order of the Tribunal. In result, the revision fails and is hereby dismissed.

24. T.T.R. No. 451 of 2014:--Penalty of Rs. 1,84,000 was imposed on the assessee merely on the ground that column No. 6 of form XXXVIII was not filled up. It is not in dispute that" when the goods were intercepted, the same were found accompanied with bilty of M/s. Ambey Patiyala Carriers and invoice 737

dated 1st January, 2009 of Bajaj, Welsan Steel, Motiyakhan, Govindgarh, Punjab and tax invoice 737"dated July 1, 2009. The first appellate authority allowed the appeal of the assessee after recording the finding of fact that there was no intention to evade payment of tax. The Second Appeal No. 487 of 2012 filed by the applicant before the Member, Commercial Tax Tribunal (Bench 1), Ghaziabad was dismissed. The Tribunal found no illegality or perversity in the findings recorded by the first appellate authority. In view of these facts the impugned order of the Tribunal is wholly justified. The revision is wholly misconceived and therefore, deserves to be dismissed.

25. T.T.R. No. 450 of 2014:

Vehicle No. HP67/2700 was checked on May 6, 2010 by the Officers of Mobile Squad Unit-I, Ghaziabad, in which medicine powder loaded in the vehicle accompanied with delivery Memo No. 410030005 of M/s. Arti Industries Ltd., Gujarat, Tax Invoice No. 0000000199 dated May 3, 2010, Bilty No. 396 dated May 3, 2010 of M/s. Dilesh Roadlines Ltd. and Vat form 402 No. 100 of Gujarat State was found. No form XXXVIII was found accompanied with the goods. For this reason a show-cause notice was issued along with reply, the assessee produced form XXXVIII No. 0808593. The explanation submitted was not found satisfactory and as such the goods were seized and the same were released on deposit of security of Rs. 5,68,000. Subsequently, penalty proceeding under section 54(1)(14) of the Act, was initiated and penalty of Rs. 5,68,000 was imposed by the assessing authority. The assessee preferred first appeal No. 245 of 2011, which was rejected by the first appellate authority vide order dated November 25, 2011 holding that since goods were not accompanied with form XXXVIII and as such there was intention to evade payment of tax.

Aggrieved with this order, the assessee filed Second Appeal No. 269 of 2012 before the Member, Commercial tax Tribunal, Bench-II, Ghaziabad, who allowed the appeal by the impugned order dated February 20, 2014. The Tribunal has recorded a finding, of fact that goods were accompanied with all relevant, documents except form XXXVIII. The assessee explained that it was handed over to the transporter, but by mistake he left it. The Tribunal recorded a finding of fact that there, was no intention to evade payment of tax and the assessing authority, also has failed to prove otherwise. The goods were well recorded in the regular books of accounts.

It is not in dispute that the, goods in question were being imported from Gujarat, which were accompanied with proper and genuine delivery memo, tax invoice, bilty and VAT form of Gujarat Government Neither the assessing authority nor the first appellate authority has found any infirmity or illegality in the transaction except that form XXXVIII was not found accompanying the goods. The transaction is well recorded in the regular books of accounts of the assessee. It is not in dispute that form XXXVIII was submitted, while replying the notice for seizure of goods. An explanation was submitted that form XXXVIII was sent to the transporter, but it was inadvertently left by the driver. The said statement/

stand taken by the assessee has been accepted by the Tribunal. The Tribunal has recorded a finding of fact that on the facts of the present case there was no intention to evade payment of tax. The findings recorded by the Tribunal under the facts and circumstances of the present case are findings of fact. I do not find any infirmity in the order of the Tribunal.

The revision is dismissed.

26. TTR No. 463 of 2014

Briefly stated the facts of the present case are that the respondent-assessee deals in pipe, PVC and duplex board. On June 23, 2009 a vehicle No. HR-38K/4691 was intercepted by the Assistant Commissioner, Commercial Tax, Mobile Squad VIIth Unit-Ghaziabad and on inspection it was found that the assessee is importing colour machine as a capital goods for use in manufacture. The said machine was imported from M/s. Print & Pack, Surat (Gujarat). It was accompanied with proper and genuine bill of M/s. Print & Pack, Surat (Gujarat), bilty and a form XXXVIII No. 5479608. However, column No. 6 of form XXXVIII was found unfilled. Only for this reason the goods were seized and the same were released on deposit of security. Subsequently, penalty proceeding was initiated and vide order dated March 31, 2011, penalty of Rs. 2,40,000 was imposed by the assessing authority under section 54(1)(14) of the Act. First Appeal No. 158 of 2012 filed by the assessee was allowed by the Additional Commissioner Grade-II (Appeal)-I, Commercial Tax, Meerut. Aggrieved with this order the applicant filed Second Appeal No. 66 of 2013 before the Member, Commercial Tax Tribunal, Meerut-I, which was dismissed vide order dated March 11, 2014.

Aggrieved with this order, the applicant has filed the present revision.

Perusal of the order of the first appellate authority clearly reveals that the goods in question were imported by the assessee as a capital goods for use in manufacture. The payment was made through cheque. Purchase was made against form C No. 2286371. The transaction in question was found duly recorded in the regular books of accounts. The penalty was levied merely on the apprehension that form XXXVII may be reused as column No. 6 was not filled up. The penalty order was passed ex parte. The first appellate authority also recorded a finding that the goods were being brought from Gujarat and as such there appears to be no possibility of the form to be reused. On these facts the first appellate authority as well as the Tribunal have recorded a finding of fact that there was no intention to evade payment of tax.

The assessing authority has not disputed that the goods in question were capital goods and the same were for use in the manufacture. It was not for sale. The first appellate authority and the Tribunal have recorded a finding of fact that the goods in question were capital goods and the same was for use in manufacture and not for sale.

On these facts, I do not find any infirmity in the findings of the first appellate authority and the Tribunal that there was no intention to evade payment of tax. The penalty has been lawfully set aside by the appellate authority. The revision is wholly misconceived and, therefore, deserves to be dismissed.

In the result the revision fails and is hereby dismissed.

27. T.T.R. No. 464 of 2014

Briefly state the facts of the present case are that on November 5, 2012, the Assistant Commissioner, Commercial Tax, Mobile Squad Unit HI, Raksa, Jhansi, intercepted a vehicle No. UP-78 CN-2676. The driver of the truck produced GR. Na. 587 of M/s. Patil Transport, dated November 3, 2012, invoice No. 116 dated November 3, 2011 of M/s. V.K. Awadh & Company, Trimbak Road Nasik and form XXXVIII No. CC-2576335. The date of invoice was written in form XXXVIII but invoice number was not written. The goods were seized and the, same were released on deposit of the security of Rs. 1,04,000. The penalty proceeding was initiated under section, 54(1)(14) of the Act and penalty of Rs. 1,04,000 was imposed vide order dated May 4, 2013 passed by the assessing authority.

Against the penalty order the assessee preferred First Appeal No. 230 of 2013 which was allowed by the appellate authority vide order dated June 26, 2013.

Aggrieved with this order the applicant preferred Second Appeal No. 32 of 2014, which was rejected by the Tribunal by the impugned order dated March 15, 2014, Against this order, the applicant has filed the present revision.

It is not in dispute that when the goods in question were intercepted, the same were found accompanied with proper and genuine invoice of the selling dealer and bill of the transporter. Form XXXVIII was also found accompanied with the goods in which in column No. 6 the date of invoice was written, but invoice number was not mentioned. The goods were being imported from Nasik which is far away from Unnao (U.P.). The explanation of the assessee that it was because of mistake on the part of the clerk of the seller that he did not mention invoice number in column No. 6 was accepted by the appellate authority. The assessee is a manufacturer of writing paper and news print papers. He was importing waste papers for use in manufacture of news print which is an exempt commodity.

Before the first appellate authority, the assessee produced all relevant documents. The assessing authority has not doubted the explanation of the assessee that waste paper is used by them in manufacture of news print which is an exempt item. The first appellate authority and the Tribunal have recorded a finding of fact that there was no intention to evade payment of tax by the assessee. On the facts of the present case, I do not find any infirmity in the order of the Tribunal.

The revision is wholly misconceived and is, therefore, dismissed.

28. T.T.R. No. 447 of 2014

In a sudden checking of the vehicle No. UP-85-P/9960 at the National Highway No. 24 on February 19, 2009, the second mobile unit of the Commercial Tax Department at Ghaziabad had found it carrying the goods (Bitumen) from Jam Nagar (Gujarat) to inside the State of Uttar Pradesh on an import declaration form but with no details as to the number and dates of the invoice noted in its column No. 06. The respondent was the consignee of the goods. The goods were then detained and seized and later on released in favour of the respondent on furnishing cash security of Rs. 1,31,250, equivalent to 37.5 per cent, of Rs. 3,50,000. Subsequent to the release of the goods the Deputy Commissioner initiated penalty proceedings against the respondent under section 54(1)(14) of the U.P. Value Added Tax Act, 2008 and concluded with the imposition of the penalty of Rs. 1,40,000. The first appeal filed by the respondent was allowed.

Against the order of the first appellate authority, the applicant preferred Second Appeal No. 174 of 2012, which was dismissed by the Tribunal by the impugned order dated February 4, 2014. The Tribunal upheld the findings recorded by the first appellate authority.

The facts of the present case clearly reveal that when the vehicle in question was intercepted, the same was found accompanied with proper invoice, bilty and other documents. Form XXXVIII was also found accompanied with the goods. However, column No. 6 of form XXXVIII was found unfilled. The assessing authority has not referred to any material to come to the conclusion that non-mentioning of invoice number and date in column No. 6 of form XXXVIII would result in intention to evade payment of tax by the assessee. The first appellate authority and the Tribunal have recorded findings of fact that there was no intention to evade payment of tax.

It is not the case of the applicant that the findings recorded by the first appellate authority and the Tribunal are perverse. The whole case of the applicant is that since column No. 6 of form XXXVIII was found blank and as such penalty is leviable under section 54(1)(14) of the Act. The applicant could not prove that there was intention to evade payment of tax by the respondent.

I do not find any infirmity in the impugned order of the Tribunal. The matter is concluded by findings of fact. The revision is misconceived and is, therefore, dismissed.

29. Revision No. 448/2012

Briefly stated the facts of the present case are that on 26th March, 2009 a vehicle No. DL/1LD-5816 was intercepted by Mobile Squad Officer, Unit V, Commercial Tax, Ghaziabad at NH-24. The goods loaded in the truck were found accompanied with form XXXVIII No. AA-4247533, GR No. 9, dated March 25, 2009 of Pal Transport Carrier, Delhi, and Invoice Nos. 134, 135 and 136, dated March 25, 2009 of M/s. Bright Engineer and Scientific Technology. In column No. 6 of form XXXVIII, bill number and date was not mentioned. For this reason, the goods were seized and the same were released on deposit of security of Rs.

47,400. The penalty proceeding under section 54(1)(14) of the Act, was initiated and vide order dated 25th August, 2010, penalty of Rs. 1,58,000 was imposed. Aggrieved with this order, the assessee filed first appeal which was allowed vide order dated December 7, 2011. Aggrieved with the order of the first appellate authority the applicant filed Second Appeal No. 175/2012, which was dismissed by the Tribunal vide impugned order dated February 4, 2014.

I find that the first appellate authority and the Tribunal have recorded finding of facts-that, on physical verification, the goods were found as per details given in the invoice all the relevant documents were available with the goods, when the vehicle was intercepted; The goods, i.e., scientific materials were being imported by the assessee who is a civil contractor for execution of contract work and not for any sale.

Considering the entire facts and circumstances of the case and evidence on record the first appellate authority and the Tribunal have recorded a finding of fact that there was no intention to evade payment of tax by the assessee. Genuineness of documents found accompanied with the goods as well as the fact that the same were not for sale but for use in execution of contract has not been disputed to the Department.

Under these circumstances, I do not find any infirmity in the impugned order of the Tribunal. Revision is misconceived and is therefore dismissed.

30. T.T.R. No. 444 of 2014

In a sudden checking of the vehicle No. GJ-12-Y/6285 on DND Crossing at NOIDA in the night intervening 25/26th March, 2010 the Assistant Commissioner, IInd Mobile Unit Commercial Tax Department, Noida had found it carrying industrial cable from Baroda (Gujarat). On scrutiny of the papers column No. 06 of the import declaration form was found blank. The goods (industrial cable) was detained and seized and later on released in favour of the respondent furnishing cash security of Rs. 8,60,000, equivalent to 40 per cent, of Rs. 21,50,000. Subsequently, the Deputy Commissioner initiated penalty proceedings against the respondent under section 54(1)(14) of the Act, imposed penalty of Rs. 8,60,000. The assessee preferred first appeal which was allowed.

Against the order of the first appellate authority, the applicant preferred Second Appeal No. 178 of 2012, which was dismissed by the Tribunal by the impugned order dated February 6, 2014. The Tribunal upheld the findings recorded by the first appellate authority.

The facts of the present case clearly reveal that when the vehicle in question was intercepted, the same was found accompanied with proper invoice, bill and other documents. Form XXXVIII was also found accompanied with the goods. However, column No. 6 of form XXXVIII was found unfilled. The assessee is a civil contractor. No infirmity was found in the invoice and bill, etc. The assessing authority has not referred to any material to come to the conclusion that non-

mentioning of invoice number and date in column No. 6 of form XXXVIII would result in intention to evade payment of tax by the assessee. The first appellate authority and the Tribunal have recorded findings of fact that there was no intention to evade payment of tax.

I do not find any infirmity in the impugned order of the Tribunal. The matter is concluded by findings of fact. The revision is misconceived and, is, therefore, dismissed.

31. T.T.R. No. 445 of 2014

Briefly stated the facts of the present case are that the assessee is a registered civil contractor registered under the Act. It has a site at Karnal and also at Varanasi. It transferred old shuttering plates from its Karnal site to Varanasi site. The said plates were 11515 kgs. in weight of value of Rs. 4,60,000. The aforesaid goods while being transported through truck No. HR 38G/8264 from Karnal to Varanasi were intercepted on June 9, 2010 by the Assistant Commissioner, Commercial Tax, Mobile Squad, Shamli, Muzaffarnagar. Along with the goods bilty No. 16256 dated June 8, 2010 of M/s. Chahat Road Career, Karnal and a letter pad of the assessee containing details of materials along with form XXXVIII No. BB-0625476 were found. The goods were seized on the ground that in column No. 6 bill number and date has not been mentioned. The goods were released on deposit of Rs. 1,93,240. Subsequently, penalty proceeding was initiated and vide order dated November 10, 2010, penalty of Rs. 1,93,240 was imposed by the Deputy Commissioner, Commercial Tax, Sector X, Ghaziabad. The assessee filed First Appeal No. 407 of 2011, which was allowed vide order dated May 28, 2012. The applicant filed Second Appeal No. 482 of 2012 was dismissed by the Member, Commercial Tax, Tribunal (Bench-I), Ghaziabad by the impugned order dated February 4, 2014.

Aggrieved with this order, the applicant has filed this revision.

It is not in dispute that the assessee, who is a civil contractor, was sending old shuttering plates of 11515 Kg. from Karnal site to Varanasi site. The goods were accompanied with bilty loading slip and a letter pad containing the description of the goods and a form XXXVII of which claim No. 6 was left blank. The penalty was imposed only on the ground that column No. 6 was not filled up. The explanation of the assessee regarding no liability to tax was not disbelieved. The assessee submitted that it was merely by mistake that the transporter has not mentioned the date in column 6. On these facts the first appellate authority has found that there was no intention to evade payment of tax.

Once it is not in dispute that the goods were not for sale and thus not liable to tax, there cannot be any intention to evade payment of tax. In the absence of intention to evade payment of tax penalty under section 54(1)(14) of the Act, was not leviable. The findings recorded by the first appellate authority and the Tribunal are findings of fact.

The revision is misconceived and is, therefore, dismissed.

In result, the revision fails and is hereby dismissed.

32. T.T.R. No. 507 of 2014

Briefly stated the facts of the present case are that on October 4, 2009 truck No. HR-62/1688 was intercepted by the Assistant Commissioner, Mobile Squad-VI, Ghaziabad and black synthetic paint was found loaded. It was accompanied with the bill of the seller, bilty of the transporter and form XXXVIII. In column 6 of form XXXVIII Invoice number and date was not filled up. For this reason goods were seized and the same were released on deposit of security of Rs. 56,000. Subsequently, penalty proceeding under section 54(1)(14) of the Act, was initiated and the penalty of Rs. 56,000 was imposed on the ground that column No. 6 of form XXXVIII was not filled up and as such there was intention to evade payment of tax. Penalty of Rs. 56,000 was imposed by the assessing authority vide order dated December 17, 2009.

Aggrieved with this order, the assessee filed First Appeal No. 246 of 2010, which was allowed vide order dated October 18, 2010.

Against this order, the applicant filed second appeal before the Member, Commercial Tax Tribunal, Bench-II, Ghaziabad, which was dismissed by the impugned common order dated April 26, 2013.

Aggrieved with this order, the applicant has filed the present revision. The first appellate authority has recorded a finding that along with the goods bill and bilty were found. A photostat copy of VAT Form D-3 No. A-4558422 of Haryana Government was produced. The goods were purchased against form C, a photostat copy of which was also produced. The first appellate authority has also recorded a finding that in the second copy of form XXXVIII in question, bill number and date is mentioned, but in the original copy it was left inadvertently. A finding was also recorded to the effect that the goods in question have been properly accounted for in the books of account of the assessee. On theses facts the penalty order was set aside. The Tribunal also considered the facts of the case and evidences on record and upheld the order of the first appellate authority.

On the totality of the facts and circumstances, the findings of fact recorded by the first appellate authority and the Tribunal cannot be said to suffer from any infirmity. Penalty was rightly set aside by the first appellate authority, which has been upheld by the Tribunal.

The revision is misconceived. It is, therefore, dismissed.

33. TTR No. 508 of 2014

Briefly stated the facts of the present case, are that on October 4, 2009, truck No. RJ-11GA/2332 was intercepted by the Assistant Commissioner, Commercial Tax, Mobile Squad-V, Ghaziabad and MS flat was found loaded in the truck accompanied with excise invoice-cum-challan dated, December 15, 2008 of M/s.

Sunvijay Rolling, and Engineering Ltd., Hingna Road, Nagpur and Test Certificate No. PIU/QC/1137 dated December 15, 2008, G.R. No. 416 dated December 15, 2008 of M/s. Bhagwati Roadlines and a declaration form for import No. AA-1293052. It was found that in column No. 6 of form XXXVIII bill number and date was not mentioned. For this reason, the goods were seized and the same were released on deposit of security of Rs. 1,07,400. Subsequently, penalty proceeding was initiated under section 54(1)(14) of the Act, and penalty of Rs. 3,58,000 was imposed by the assessing authority vide order dated September 22, 2009.

The First Appeal No. 514 of 2009 filed by the assessee was allowed by the appellate authority vide order dated June 22, 2010. The second appeal filed by the applicant before the Member, Commercial Tax Tribunal, Ghaziabad Bench-II, Ghaziabad, was dismissed by the impugned order dated April 26, 2013.

Aggrieved with this order, the applicant has filed the present revision.

I find that the only ground on which the penalty was imposed, was that bill number and date was not mentioned in column No. 6 of form XXXVIII. It is not in dispute that excise invoice-cum-challan of the selling dealer, test certificate and GR were also accompanied with the goods in question. The goods were being imported from Nagarpur, which is situate at a very long distance from Ghaziabad. The assessing authority has imposed penalty merely on the basis of apprehension that Sahibabad Industrial Area is near to Delhi and as such the tax evaders used to reuse the same form for import of goods. This observation of the assessing authority was not based on any evidence or material on record, but was made totally on the, basis of surmises and conjectures. The explanation of the assessee that declaration form for import was sent to the selling dealer, who mistakenly did not fill up column No. 6, was not considered by the assessing authority. The first appellate authority considered the entire facts and circumstances of the case and evidences on record. The assessee also produced photostat copy of GR-23 Part I, copy of ledger account and purchase register as well form 3. The goods were found properly accounted for in the books of account. The goods were purchased by the assessee against form C.

Neither the genuineness of documents accompanying the goods was doubted by the assessing officer nor any infirmity in the books of accounts and the documents was found. The Tribunal considered the entire facts and circumstances of the case and evidences on record and came to the conclusion that there was no intention to evade payment of tax and that non-mentioning of bill number and date in column 6 of form XXXVIII was because of mistake committed by the selling dealer to whom the assessee had sent form XXXVIII for which the assessee cannot be penalised.

The findings recorded by the Tribunal that there was no intention to evade payment of tax does not suffer from any infirmity in view of the facts and evidences of the present case.

The revision is wholly misconceived and is, hereby, dismissed.

T.T.R. No. 509 of 2014

Briefly stated the facts of the present case are that on January 17, 2009 truck No. HR-55G-6988 was intercepted by the Assistant Commissioner, Commercial Tax-VIIth Unit, Agra. M.S. angle were found loaded in the truck accompanied with Invoice No. 5714 dated January 14, 2009 of M/s. Sunvijay Rolling and Engineering Ltd., a bilty of M/s. Abhay Roadways, Nagpur and form XXXVIII. It was found that in column No. 6 of form XXXVIII bill number and date was not mentioned. For this reason goods were seized and the same were released on deposit of security of Rs. 1,68,000. Subsequently, penalty proceeding was initiated and vide order dated September 24, 2009, penalty of Rs. 5,60,000 was imposed. The asses-see filed First Appeal No. 534 of 2009 which was allowed vide order dated May 7, 2010. Aggrieved with this order, the applicant filed second appeal before the Member, Commercial Tax Tribunal, Ghaziabad 2, Ghaziabad, which has been dismissed by the impugned order dated April 26, 2013. It is not in dispute that the goods were accompanied with invoice of the seller and a bilty of the transporter. Neither the genuineness of these documents was doubted by the assessing authority nor any infirmity was found therein nor they were found to be unaccounted. The first appellate authority has recorded a finding of fact that the invoice accompanied with the goods in question was an excise invoice and in form XXXVIII date of bill was mentioned but bill number was not written. He accepted the explanation of the assessee. On these facts the first appellate authority as well as the Tribunal have recorded a finding of fact that there was no intention to evade payment of tax, the assessee is a bona fide dealer and the goods are duly recorded in the regular books of account.

I do not find any infirmity in the findings recorded by the first appellate authority and the Tribunal. Revision is wholly misconceived and is, therefore, dismissed.

In result, Revision No. 465 of 2014 is allowed. The matter is remanded to the Tribunal as directed above.

Remaining all the revisions are dismissed. Question of law is answered accordingly.