(2005) 07 GUJ CK 0054

In the Gujarat High Court

Case No : Income Tax Reference No. 211 of 1993

Commissioner of Income Tax APPELLANT

Vs

Parmanand M. Patel RESPONDENT

Date of Decision : 07-07-2005

Acts Referred:

Constitution of India, 1950 — Article 141
Hindu Marriage Act, 1955 — Section 15(2)
Income Tax Act, 1922 — Section 12, 12(3), 12(4), 12B(4), 13
Income Tax Act, 1961 — Section 139(1), 139(2), 142(2A), 143(3), 148

Citation : (2005) 198 CTR 641 : (2005) 278 ITR 3

Hon'ble Judges : H.N. Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Manish R. Bhatt, No. 1, for the Appellant; S.N. Divetia, for N.R. Divetia, for the Respondent

Judgement

D.A. Mehta, J.—The following question has been referred by the Income Tax Appellate Tribunal, Ahmedabad Bench B"" u/s 256(1) of the

Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax.

Whether the Appellate Tribunal is right in law and on facts in setting aside the order made by the CIT invoking the provisions of section 263 of the

I.T. Act wherein he had directed the ITO to consider initiation of penalty proceedings Section 271(1)(a) of the Act ?

2. The Assessment Year is 1982-83 and the relevant accounting period is year ended on Aso Vad Amas S.Y. 2039. The assessee filed a return of

income on 13th August, 1984 and the assessment came to be completed on 26th November, 1984 u/s 143(3) of the Act.

3. The Commissioner of Income Tax (the Commissioner) initiated revisional

proceedings u/s 263 of the Act on the ground that scrutiny of the

assessment records showed that the Assessing Officer had failed to charge interest u/s 139(8) of the Act and had also not taken steps to initiate

penalty proceedings u/s 271(1)(a) of the Act, there being unexplained delay in filing the return by 25 months. The assessee objected to the show

cause notice, but after hearing the representative of the assessee the Commissioner passed an order on 17th March, 1987 holding that interest u/s

139(8) of the Act was not charged by way of penalty but was a compensation and part and parcel of the process of assessment as held by the

Hon''ble Supreme Court in the case of Central Provinces Manganese Ore Co. Ltd. Vs. Commissioner of Income Tax, and, therefore, the

Assessing Officer had committed an error in not charging interest u/s 139(8) of the Act.

3.1 The Commissioner also held that there was no evidence on record either to suggest that the assessee had any reasonable cause for delay in

filing the return or that the Assessing Officer had after application of mind recorded satisfaction about the same. The assessee""s contention that

extension had been asked for was dealt with by observing that even if the extension applications were taken into consideration a period of seven

months yet remained unexplained, and in any case, there was nothing on record to suggest that the assessee had made extension applications from

time to time and, therefore, ''non-initiation of penalty proceedings u/s 271(1)(a) was erroneous.

3.2 The Commissioner, therefore, after holding that in the circumstances the assessment order passed by the Assessing Officer was prejudicial to

interests of the revenue set aside the assessment order in terms of provisions of Section 263 of the Act. The following direction was issued to the

Assessing Officer :

ï¿½ITO is directed to pass a fresh order inter alia charging the interest u/s 139(8) and considering initiation of penalty proceedings u/s 271(1)(a).

The ITO should re-frame the order after giving opportunity to the assessee of being heard and producing evidence, if any in support of his

claim.ï¿½

4. The assessee carried the matter in appeal before the Tribunal. Vide order dated 12th April, 1990 the Tribunal held that the assessee was

justified in resisting the directions regarding levy of penalty u/s 271(1)(a) of the Act. The directions issued by the Commissioner were not in

accordance with the law as interpreted by the High Courts of Delhi and Rajasthan on which reliance had been placed by the assessee. The

contrary decisions rendered by Madhya Pradesh High Court were noted and it was observed by the Tribunal that in such a situation it is the view

which is in favour of the assessee that has to be adopted. Therefore, the order of Commissioner was partially struck down whereby the

Commissioner had directed initiation of penalty proceedings.

5. Mr. M.R. Bhatt, learned Senior Standing Counsel appearing on behalf of the applicant _ revenue, submitted that admittedly the return was filed

belatedly. As provided in Section 271(1) of the Act the Assessing Officer was required to initiate proceedings Sin the course of any proceedings

and this phrase would include assessment proceedings u/s 143(3) of the Act. He relied on a decision of the Apex Court in the case of D.M.

Manasvi Vs. Commissioner of Income Tax, Gujarat, II Ahmedabad, . That the Assessing Officer was required to apply his mind as to initiation of

penalty proceedings and in absence of any explanation, filing of a belated return was sufficient for the Assessing Officer to be satisfied for initiation

of penalty proceedings in the course of assessment proceedings. That non-application of mind by the Assessing Officer would make the

assessment order revisable u/s 263 of the Act. In this context the decision of Hon''ble Supreme Court in the case of Malabar Industrial Co. Ltd. v.

Commissioner of Income Tax, [2000] 243 ITR 83 , with special reference to observations at Page 87, was relied upon. Referring to various

decisions relied upon by the assessee before the Tribunal it was submitted that the said decisions rendered by different High Courts merely laid

down that assessment proceedings and penalty proceedings are separate but the point of distinction, according to learned counsel, was that

initiation and levy of penalty stand on different footing. That non-initiation of penalty proceedings was by itself erroneous within the meaning of

Section 263 of the Act and it was not necessary for the Commissioner to levy penalty. In other words, the direction to the Assessing Officer to

initiate penalty proceedings was sufficient compliance with requirements for assumption of jurisdiction u/s 263 of the Act. That in such a situation the Commissioner does not transpose the satisfaction of the Assessing Officer. He only holds that though the Assessing Officer was required to be

satisfied about initiation of penalty proceedings, the Assessing Officer having failed to do so, the order was erroneous and prejudicial to the

interests of revenue.

5.1 Last but not least, he placed reliance on the Apex Court''s decision in case of Sree Balaji Rice Mill, Bellary Vs. State of Karnataka, to contend

that as held by the Apex Court a revisional authority was entitled to set aside the assessment order because initiation of penalty proceedings was

part of the assessment proceedings, and u/s 263 of the Act it was open to the Commissioner to pass such order thereon as the circumstances of

the case justified. He placed reliance on the decisions of Madhya Pradesh High Court reported in - (i) Addl. Commissioner of Income Tax Vs.

Indian Pharmaceuticals, ; (ii) Addl. Commissioner of Income Tax Vs. Kantilal Jain, ; and (iii) Addl. Commissioner of Wealth Tax Vs. Nathoolal

Balaram, as well as the dissenting opinion expressed by learned Judge of the Delhi High Court in case of P.C. Puri Vs. Commissioner of Income

Tax, Delhi-II, ; Commissioner of Income Tax Vs. Surendra Prasad Agrawal,

6. As against that Mr. S.N. Divetia, learned advocate appearing on behalf of the respondent assessee, submitted that Section 263 of the Act

empowered the Commissioner to exercise jurisdiction if the Commissioner considers that San order passed by the Assessing Officer is erroneous

and prejudicial. In absence of an order imposing penalty, the Commissioner was not permitted to invoke powers of suo motu revision. Reliance

was placed on the decisions of this Court and Bombay High Court in cases of (i) Bhavnagar Chemical Works (1946) Ltd. v. Commissioner of

Sales Tax, Ahmedabad [1991] 83 STC 409 (Guj.); and (ii) Tata Exports Ltd. v. State of Maharashtra [1995] 98 STC 314 (Bom). Secondly, it

was submitted that Section 275(1)(b) of the Act as applicable from 1st April, 1989 indicates that there has to be an assessment or other order

which could be revised; viz. in absence of any pre-existing other order the revisional authority cannot exercise jurisdiction. That mere failure of the

Assessing Officer to initiate penalty proceedings per se cannot be termed to be erroneous and prejudicial to the interests of revenue as initiation

would depend upon the facts and circumstances of each case. That it could not be stated in such circumstances that there was non-application of

mind.

6.1 The revisional authority could not invoke powers of revision u/s 263 of the Act on the ground that the order of assessment was erroneous and

prejudicial to the interests of revenue because the Assessing Officer had failed to initiate penalty proceedings, as the term ''assessment as defined

u/s 2(43) of the Act does not include penalty proceedings and penalty proceedings are independent and distinct from assessment proceedings. In

this connection reliance was placed on the following decisions:

(i) Addl Commissioner of Income Tax, Delhi-I Vs. J.K. D''costa, SLP rejected by SC Controller of Estate Duty Vs. Prakashchand,

(ii) The Additional Commissioner of Income Tax, New Delhi Vs. Achal Kumar Jain,

(iii) P.C. Puri Vs. Commissioner of Income Tax, Delhi-II,

(iv) Commissioner of Income Tax Vs. Keshrimal Parasmal,

(v) Surendra Prasad Singh and Others Vs. Commissioner of Income Tax,

(vi) Commissioner of Income Tax Vs. Linotype and Machinery Ltd.,

(vii) Addl. Commissioner of Income Tax Vs. Sudershan Talkies,

(viii) Commissioner of Income Tax Vs. C.R.K. Swamy,

(ix) Commissioner of Income Tax Vs. Nihal Chand Rekyan,

6.2 Section 271(1) of the Act requires that the Assessing Officer is satisfied in the course of any proceedings under the Act, but such satisfaction

has to be in relation to either clause (a), or clause (b) or clause (c) and such satisfaction is a condition precedent for exercise of jurisdiction to

initiate and levy penalty. Reliance was placed on the following two decisions in support of this proposition:

(i) Commissioner of Income Tax, Madras, and Another Vs. S.V. Angidi Chettiar, and

(ii) D.M. Manasvi Vs. Commissioner of Income Tax, Gujarat, II Ahmedabad,

That Section 271(1) denoted that levy of penalty was discretionary and, therefore, also the revisional authority was not empowered to initiate the

action. It was also submitted that legislative intent was not to set aside assessment every time when the revisional authority directs the Assessing

Officer to initiate penalty under various provisions like 271A, 271B, 272A(2) of the Act, etc.

6.3 Inviting attention to the amendment made to Section 271(1) of the Act by the Finance Act, 2002 it was submitted that the said provision as it

originally stood granted powers only to the Assessing Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals) to record

satisfaction and initiate penalty proceedings, but w.e.f. 01.06.2002 even the Commissioner viz. the Commissioner of Income Tax has been

empowered to initiate penalty proceedings. That this would suggest that till this point of time the Commissioner was not empowered to initiate and

levy penalty.

6.4 Lastly, it was submitted that the decision of the Apex Court in the case of Sree Balaji Rice Mill (Supra) was in context of provision of

Karnataka Sales Tax Act, 1957 and the Scheme of the said Act was different from the Income Tax Act and there the authority was not required

to record any satisfaction. That accordingly the said decision could not be applied to the facts of the case.

7. In the case of Malabar Industrial Co. Ltd. v. Commissioner of Income Tax [2002] 243 ITR 83 the Apex Court has laid down parameters on

the basis of which an order can be termed to be erroneous and prejudicial to the interests of the revenue. However, it is also laid down that before

the Commissioner can exercise jurisdiction of suo motu revision he has to be satisfied about fulfillment of twin conditions, namely, (i) the order of

the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. If one of them is absent, recourse

cannot be had to Section 263(1) of the Act. If the order is erroneous but is not prejudicial to the interests of the revenue, or if the order is not

erroneous but is prejudicial to the interests of the revenue, the Commissioner of Income Tax cannot exercise revisional powers. It is further held

that when an Assessing Officer has adopted one of the courses permissible in law and it has resulted in loss of revenue, it cannot be treated as

prejudicial to the interests of the revenue; or where two views are possible and the Assessing Officer has taken one view with which the

Commissioner does not agree, the order cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken

by the Assessing Officer is unsustainable in law. In the present case, the action of the Commissioner will have to be tested at the anvil of the

aforesaid principles.

8. Section 271 of the Act as it stood and was applicable to the Assessment Year reads as under:

Failure to furnish returns, comply with notices, concealment of income, etc.

271. (1) If the Income Tax Officer or the Appellate Assistant Commissioner [or the Commissioner (Appeals)] in the course of any proceedings

under this Act, is satisfied that any person-

(a) has without reasonable cause failed to furnish the return of total income which he was required to furnish under sub-section (1) of section 139

or by notice given under sub-section (2) of section 139 or section 148 or has without reasonable cause failed to furnish it within the time allowed

and in the manner required by sub-section(1) of section 139 or by such notice as the case may be, or

(b) has without reasonable cause failed to comply with a notice under sub-section (1) of section 142 or sub-section (2) of section 143 [or fails to

comply with a direction issued under sub-section (2A) of section 142], or

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,--

Section 271(1) of the Act can broadly be divided into two sets, each set containing three clauses - clauses (a), (b) and (c) on the one hand and

clauses (i), (ii) and (iii) on the other hand. The first set of three clauses relates to three different types of defaults. Once it is found that an assessee

has committed any one of the three defaults, the assessee becomes liable to penalty. It is at this stage that the second set of three clauses comes

into play. Clauses (i), (ii) and (iii) prescribe the minimum and/or maximum penalty imposable for the respective default under Clauses (a), (b) and

(c) of the first set. The phrase She may direct that such person shall pay by way of penalty links the two sets of clauses. The use of the word may

in the earlier portion of the aforesaid phrase is relatable backwards to the existence or otherwise of the defaults mentioned in the clauses (a), (b)

and (c) of sub-section (1) of Section 271 of the Act; the said term may"" permits the Assessing Officer to exercise discretion as to whether penalty should be levied or not upon fulfillment of the pre-requisite conditions in either of the situations mentioned in clauses (a), (b) or (c). But thereafter,

the word shall"" appearing in the latter part of the aforesaid phrase comes into play and applies to clauses (i), (ii) and (iii), as the case may be. The

use of the word shall"" indicates that the Assessing Officer having made up his mind to levy penalty is left with no further discretion as regards the

quantum of the penalty to be imposed.

9. On a plain reading Section 271(1) of the Act stipulates that either the Assessing Authority or the Appellate Authority in the course of any

proceedings under the Act is satisfied that any person - (a) has without reasonable cause failed to furnish the return of income, or failed to furnish

the return of income within the time allowed or by the due date; or (b) has without reasonable cause failed to comply with various statutory notices

mentioned in the clause; or (c) has concealed the particulars of his income or furnished inaccurate particulars of such income, the Assessing

Authority or the Appellate Authority may direct that such person shall pay by way of penalty the sums specified in the clauses that follow

depending upon the respective defaults. Therefore, the satisfaction has to be that of either the Assessing Authority or the Appellate Authority; such

satisfaction has to be in the course of any proceedings under the Act. In other words, the Assessing Authority has to record satisfaction in the

course of any proceedings before the Assessing Authority, and similarly the Appellate Authority is required to record satisfaction in the course of

any proceedings before the Appellate Authority. As to what would be the satisfaction becomes clear from the sub-clauses (a), (b) and (c)

pertaining to different defaults, but the satisfaction that has to be recorded for clause (a) and clause (b) is that either of the defaults are without

reasonable cause and, thereafter, namely, after recording such satisfaction, the authority is given discretion to levy or not to levy penalty. But the

condition precedent is recording of satisfaction by the Assessing Authority or the Appellate Authority that the stipulated default is without

reasonable cause and this has to be recorded in the course of any proceedings under the Act.

10. As noticed earlier, the Assessing Officer or the Appellate Authority is required to be satisfied in the course of any proceedings before the

authority as to whether penalty is imposable or not. What is the meaning of the terms satisfied"" and satisfaction"". One may usefully refer to the legal

meaning given to the aforesaid expression.

(I) ï¿½SATISFIED : S....The phrase Sis satisfied means, in my view simply ''makes up its mind; the court on the evidence comes to a conclusion

which, in conjunction with other conclusions, will lead to the judicial decision....

New Zealand [The Marriage Act 1955, Section 15(2) provides (in relation to applications for leave to marry within the degrees of affinity) that the

court must be satisfied"" of certain circumstances.] The best opinion I can form is that on such an application as this the evidence must enable the

judge to feel what Dixon J [in Briginshaw v Briginshaw (1938) 60 CLR 336] defined as San actual persuasion. That means a mind not troubled by

doubt or, to adapt the language used by Smith J in Angland v Payne [1944] NZLR 610 , CA],a mind which has reached a clear conclusion. If a

formula has to be phrased, I would adopt one analogous to that expressed in Edwards v. Edwards [[1947] SASR 258], and would say that the

judge must be ''satisfied with the preponderance of probability arrived at by due caution in the light of the seriousness of the charge."" Re Woodock

[1957] NZLR 960, per Finaly ACJ.

...The mind of the court must be Satisfied - that is to say, it must arrive at the required affirmative conclusion - but the decision may rest on the

reasonable probabilities of the case, which may satisfy the court that the fact was as alleged, even though some reasonable doubt may remain.

[Source : Words & Phrases legally defined : Third edition : Volume 4:R-Z : Butterworths : Pg.131-132]

(II) SATISFIED - To be satisfied with a state of things means to be honestly satisfied in your own mind. The phrase Satisfied occurs in many

taxing statutes and is a familiar one for a great many years (see for example Sec. 271 of the Income Tax Act, 1961 and Section 56 of the Delhi

Sales-tax Act, 1975). The phrase Sis satisfied means simply makes up its mind [per Lord Pearson in Blyth v. Blyth (1966) 1 All ER 524]. Dixon,

J., defined it as actual persuasion. That means a mind not troubled by doubt or to adopt the language of Smith, J., a mind which has reached a

clear conclusion - Se Angland v. Payne (1944) NZLR 610 at p.(626); Messrs Jiten & Co. v. Sales Tax Officer (1977) Tax. L.R. 1921 at pp.

1923-24...."" [Source : Law Lexicon : Legal Dictionary with Legal Maxims : Second Edition in Four Volumes P. 2167].ï¿½

11. The provision does not empower any other authority under the Act to record satisfaction: the only authorities empowered are the Assessing

Officer, the Appellate Assistant Commissioner or the Commissioner (Appeals). Even if the Commissioner is superior to the aforesaid authorities in

the administrative hierarchy, when it comes to discharging the functions in a quasi-judicial capacity, one has to proceed strictly in accordance with

the requirement of the provision. The Commissioner is not empowered to record satisfaction by Section 271(1) of the Act, and if he is not entitled

to do so on his own he cannot do it by directing the Assessing Authority. In other words, what the Commissioner himself cannot do cannot be got

done through the Assessing Authority by exercising revisional powers. The Commissioner cannot substitute his satisfaction. The Commissioner

cannot make up mind or arrive at the required affirmative conclusion for the Assessing Officer; it is only that authority who is permitted by the

statute to do so -- to be satisfied i.e. reach a clear conclusion on the evidence before it.

12. There is one more reason why the Commissioner should not be permitted to invoke revisional powers for initiation of penalty proceedings.

Section 271(1) of the Act specifically empowers the Assessing Officer or the Appellate Authority to record satisfaction. It is well-settled that once

an appeal has been preferred against an order of assessment the entire assessment is open before the Appellate Authority. The Appellate Authority

is entitled to do all that the Assessing Officer could have done. The powers of the Appellate Authority are co-extensive and co-terminus with the

powers of the Assessing Authority. It is equally well-settled that the Commissioner cannot exercise revisional jurisdiction qua proceedings before

an Appellate Authority. The order of assessment does not have any independent existence and stands merged with the order of the Appellate

Authority. Hence, to read Section 263 as being applicable only in case of an Assessing Officer for the purposes of initiation and levy of penalty and

not being applicable to the Appellate Authority cannot be the legislative intent. To the contrary, the inherent indication u/s 271(1) of the Act makes

it clear that the Commissioner does not have any powers to direct either of the authorities, the Assessing Officer or the Appellate Authority, to initiate and levy penalty. The section requires the Assessing Officer or the Appellate Authority to be satisfied in the course of any proceedings"".

This means, any proceedings before either of the specified authority. The Commissioner cannot create proceedings. If he is not permitted to direct

the Appellate Authority (and this is an accepted position) he cannot be permitted to substitute jurisdiction/powers of only the Assessing Officer by

his satisfaction by creating proceedings where none exist - assessment having already been completed.

13. Considering the matter from a slightly different angle. Section 275 of the Act as it then stood imposes bar of limitation for imposing penalty and

under clause (b) the period prescribed is expiration of two years from the end of the financial year in which the proceedings, in the course of which

action for imposition of penalty has been initiated, are completed. In other words, as and when either the Assessing Officer or the specified

Appellate Authority, in the course of any proceedings, records satisfaction and initiates penalty proceedings, from the end of the financial year in

which such initiation takes place, penalty proceedings are required to be completed within a period of two years. It is not necessary for the present

to take into consideration the extended period in case of appeal proceedings. At the same time u/s 263(2)(b) of the Act the Commissioner can

exercise revisional powers within a period of two years from the date of the order sought to be revised. The question that would arise for

consideration is whether the limitation prescribed u/s 275 of the Act can be by-passed or indirectly extended by exercise of revisional powers. The

answer has to be in the negative. On expiration of the prescribed period of limitation a right comes to be vested in the interested person viz. the

assessee, and such right cannot be taken away by exercise of revisional powers unless and until there is a clearly discernible legislative intent on a

plain reading of the provision. In light of the fact that the satisfaction u/s 271(1) of the Act is required to be recorded by the Assessing Authority or

the Appellate Authority only, they cannot be compelled to act beyond the prescribed period of limitation by extending such limitation on exercise of

revisional powers.

14. What is contemplated by Sections 271 and 274 (Procedure) is that there should be, prima facie, satisfaction of the Assessing Officer or the

Appellate Authority in support of either of the defaults mentioned in sub-clauses (a), (b) or (c) of sub-section (1) before the assessee is heard or an

opportunity of hearing is given. The final conclusion on the point as to whether requirements of either of the sub-clauses has been fulfilled or not can

be arrived at only after an assessee has been heard or has been given a reasonable opportunity of being heard. As already noticed hereinbefore,

sub-section (1) of Section 271 of the Act shows that occasion for taking proceedings for initiation of penalty arises if the Assessing Officer or the

Appellate Authority is satisfied that any person has committed any of the specified defaults. It has further to be shown that the Assessing Officer or

the Appellate Authority was so satisfied in the course of any proceedings under the Act.

15. Dealing with almost a similar situation, namely, the stage at which the authority is required to record satisfaction, the Apex Court in the case of

D.M. Manasvi (supra) has stated thus:

The fact that notices were issued subsequent to the making of the assessment orders would not, in our opinion, show that there was no satisfaction

of the Income Tax Officer during the assessment proceedings that the assessee had concealed the particulars of his income or had furnished

incorrect particulars of such income. What is contemplated by clause (1) of section 271 is that the Income Tax Officer or the Appellate Assistant

Commissioner should have been satisfied in the course of proceedings under the Act regarding matters mentioned in the clauses of that sub-

section. It is not, however, essential that notice to the person proceeded against should have also been issued during the course of the assessment

proceedings. Satisfaction in the very nature of things precedes the issue of notice and it would not be correct to equate the satisfaction of the

Income Tax Officer or Appellate Assistant Commissioner with the actual issue of notice. The issue of notice is a consequence of the satisfaction of

the Income Tax Officer or the Appellate Assistant Commissioner and it would, in our opinion, be sufficient compliance with the provisions of the

statute if the Income Tax Officer or the Appellate Assistant Commissioner is satisfied about the matters referred to in clauses (a) to (c) of sub-

section (1) of section 271 during the course of proceedings under the Act even though notice to the person proceeded against in pursuance of that satisfaction is issued subsequently. We may in this context refer to a decision of five judges Bench of this Court in the case of Commissioner of

Income Tax, Madras, and Another Vs. S.V. Angidi Chettiar, Shah J., speaking for the Court, while dealing with section 28 of the Indian Income

Tax Act, 1922 observed:

The power to impose penalty u/s 28 depends upon the satisfaction of the Income Tax Officer in the course of proceedings under the Act; it

cannot be exercised if he is not satisfied about the existence of conditions specified in clause (a), (b) or (c) before the proceedings are concluded.

The proceeding to levy penalty has, however, not to be commenced by the Income Tax Officer before the completion of the assessment

proceedings by the Income Tax Officer. Satisfaction before conclusion of the proceeding under the Act, and not the issue of a notice or initiation of

any step for imposing penalty is a condition for the exercise of the jurisdiction.

Therefore, the stage of recording satisfaction is before concluding the proceedings under the Act viz. assessment proceedings and it is not

necessary that the notice or any step for initiation should be taken before concluding the assessment proceedings. It would be sufficient compliance

with the statutory requirement if the Assessing Officer or the Appellate Authority records his satisfaction before completion of assessment

proceedings. Applying the ratio of the aforesaid decision it can safely be stated that the Commissioner cannot exercise revisional powers to direct

the Assessing Officer to initiate penalty proceedings once the assessment proceedings are complete, even if the Commissioner, for the sake of

argument, could claim to have such powers.

16. Section 271(1) of the Act confers a discretion on the authority as regards levy of penalty. The contention on behalf of the revenue that the

discretion is only qua levy and not as to initiation is an incorrect reading of the provision. The requirement of the provision as to satisfaction to be

recorded by the Assessing Officer or the Appellate Authority has to be in context of the discretion vested in the said authority. The Assessing

Officer or the Appellate Authority has to record satisfaction as to existence or otherwise of reasonable cause and as held in case of D.M. Manasvi

(supra) the occasion to levy penalty would arise at a subsequent stage. In other words, the authority is called upon to exercise discretion in the first instance at the time of initiation, and in the second instance at the time of levy after granting hearing as required u/s 274 of the Act to an assessee.

In this context support may be drawn from what is stated by the Apex Court in the case of Hindustan Steel Ltd. Vs. State of Orissa,

... An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not

ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or

acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be

imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all

the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to

impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide relief that the

offender is not liable to act in the manner prescribed by the statute.

Therefore, even if it is lawful to impose penalty, that by itself would not be sufficient to hold that the Commissioner is entitled to exercise revisional

powers by treating the assessment order as erroneous and prejudicial to the interests of revenue.

17. u/s 271(1) of the Act, the provision as it then stood i.e. applicable for assessment year in question, empowers only an Assessing Officer,

Appellate Assistant Commissioner or Commissioner (Appeals) to record his satisfaction. The Commissioner is not empowered. This becomes

clear when one takes into consideration the amendment brought about to the provision by the Finance Act, 2002 wherein w.e.f. 01.06.2002 the

words or the Commissioner have been inserted. The revenue contends on basis of the said amendment that the same is clarificatory in nature, while

on behalf of the assessee this position is disputed. The contention raised on behalf of the assessee merits acceptance in as much as, in the event, the

Commissioner was entitled to record his satisfaction under the unamended provision, there was no necessity for the Commissioner to direct the

Assessing Officer to initiate the proceedings as done by him in the present case. In fact being aware of this position, the direction only states to consider initiation of penalty proceedings. Examining the issue from a slightly different angle. If the Commissioner was entitled to record satisfaction

u/s 271(1) of the Act it was not necessary for the Commissioner to invoke revisional powers as such and even if he invokes he can himself levy the

penalty. This he could not have done under the unamended provision. This becomes clear by the aforesaid amendment : the Commissioner is not

an authority empowered to record satisfaction - to initiate penalty proceedings; and hence the insertion by amendment.

18. Even if for the sake of argument, it may be conceded that the Commissioner is entitled to exercise revisional powers in such circumstances, a

further question that will have to be raised and answered is as to whether the entire assessment order is required to be set aside considering the

fact that there is no error found in the assessment per se. The total income at which the assessee is assessed and the tax payable by the assessee

do not undergo any change. In these circumstances, can the provision be interpreted so as to permit quashing and setting aside the assessment for

the limited purpose of initiation of penalty proceedings. When this query was put to Mr. Bhatt it was submitted that the assessment had to be set

aside because, according to him, levy of penalty was also a part of the assessment. In this connection he placed reliance on the decision rendered

by Madhya Pradesh High Court in the case of Addl. Commissioner of Income Tax, M.P. v. Indian Pharmaceuticals (supra). On going through the

said decision it becomes clear that the Madhya Pradesh High Court, speaking through Indore Bench has primarily read the term ''assessment to

mean as having widest connotation in Chapter-IV in the Indian Income Tax Act, 1922 by referring to the Apex Court decision in case of C.A.

Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, of the report note is taken of the fact that in subsequent

Supreme Court decisions though it has been held that tax and penalty are distinct and different concepts the Court was only concerned with the

meaning of the word ''assessment and hence, Madhya Pradesh High Court has proceeded to follow decision under old Act.

19. The position in law is well-settled and there is no dissenting opinion. That under the Act assessment and penalty proceedings are distinct and

separate. It is possible for an assessee to lead evidence which is independent of the evidence led in one or the other proceeding i.e. the assessee is entitled to lead further evidence in penalty proceedings over and above the evidence placed in assessment proceedings. Even if the term

ï¿½assessment is read to mean as encompassing the entire procedure of assessment, levy and collection of Income Tax, yet the term cannot take

within its fold, penalty proceedings whatever may have been the position under the Indian Income Tax Act, 1922. The scheme of the Act specifies

the ''Basis of Charge'' under Chapter-II and ''Computation of Total Income'' under Chapter IV with subsequent Chapters pertaining to various

other procedures prescribed for the purpose of assessment. As against that Chapter XXI deals with ''Penalties Imposable'' and Chapter-XXII with

''Offences and Prosecutions''.

20. Though the Scheme of the Act with special reference to the distinction between Chapter XIV prescribing the Procedure for Assessment and

Chapter XXI dealing with PENALTIES IMPOSABLE has not yet come up for consideration directly before the Supreme Court in the following

three decisions the Supreme Court has categorically stated that both penalty proceedings and assessment proceedings are separate:

(i) In the case of Jain Bros. and Others Vs. The Union of India (UOI) and Others, the Apex Court has observed :

... Although penalty has been regarded as an additional tax in a certain sense and for certain purposes it is not possible to hold that penalty

proceedings are essentially a continuation of the proceedings relating to assessment where a return has been filed.

(ii) Similarly, in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, it has been laid down :

The first point which falls for determination is whether the imposition of penalty is in the nature of a penal provision. The determination of the

question of burden of proof will depend largely on the penalty proceedings being penal in nature or being merely meant for imposition of an

additional tax, the liability to pay such tax having been designated as penalty u/s 28. One line of argument which has prevailed particularly with the

Allahabad High Court in Lal Chand Gopal Das case is that there was no essential difference between tax and penalty because the liability for

payment of both was imposed as a part of the machinery of assessment and the penalty was merely an additional tax imposed in certain circumstances on account of the assessee""s conduct. The justification of this view was founded on certain observations in C.A. Abraham v.

Income Tax Officer, Kottayam. It is true that penalty proceedings u/s 28 are included in the expression Sassessment and the true nature of penalty

has been held to be additional tax. But one of the principal objects in enacting section 28 is to provide a deterrent against recurrence of default on

the part of the assessee. The section is penal in the sense that its consequences are intended to be an effective deterrent which will put a stop to

practices which the legislature considers to be against the public interest. It is significant that in C.A. Abraham''s case this court was not called upon

to determine whether penalty proceedings were penal or of quasi-penal nature and the observations made with regard to penalty being an

additional tax were made in a different context and for a different purpose. It appears to have been taken as settled by now in the sales tax law that

an order imposing penalty is the result of quasi-criminal proceedings (Hindustan Steel Ltd. v. State of Orissa). In England also it has never been

doubted that such proceedings are penal in character : Fattorini (Thomas) (Lancashire) Ltd. v. Inland Revenue Commissioners.

(iii) Harshad Shantilal Mehta Vs. Custodian and Ors, the Apex Court reiterated :

...Tax, penalty and interest are different concepts under the Income Tax Act. The definition of ''tax u/s 2(43) does not include penalty or interest.

Similarly, u/s 156, it is provided that when any tax, interest, penalty, fine or any of other sum is payable in consequence of any order passed under

this Act, the Assessing Officer shall serve upon the assessee a notice of demand as prescribed. The provisions for imposition of penalty and

interest are distinct from the provisions for imposition of tax...

21. This Court in the case of Bhavnagar Chemical Works (1946) Ltd. v. Commissioner of Sales Tax, Ahmedabad, [1991] 83 STC 409 (Guj)

while dealing with almost an identical fact situation has enunciated the law in the following terms:

What would be the position when the original authority does not initiate penalty proceedings whatsoever? It even does not expressly or impliedly

exercise its jurisdiction of imposing penalty. In such an eventuality, Sis it open to the revisional authority to impose penalty in the exercise of its

revisional jurisdiction? is the question which we are required to answer. We are of the opinion that when the original authority, namely, the Sales

Tax Officer, had not commenced the proceedings for penalty and when it was not alive to its penalty jurisdiction it could not be said that it has

exercised its original jurisdiction of imposition of penalty. Therefore, if the original authority has not passed any penalty order either expressly or

impliedly by invoking its penalty jurisdiction, the revisional authority could not pass such an order of penalty in exercise of its revisional jurisdiction.

This position of law emerges from the clear distinction that exists between the assessment jurisdiction and the penalty jurisdiction. The distinction

between the two is now accepted by the judicial pronouncement. In the case of Dhanvantrai Ratilal Shah v. Sales Tax Officer, in Spl. C.A. No.

4650 of 1984 decided on 5th March, 1987 by the Division Bench of this Court, to which one of us (G.T. Nanavati, J.) was a party, the Division

Bench referred to decisions reported in C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, (

Commissioner of Income Tax, Andhra Pradesh Vs. Bhikaji Dadabhai and Co., (Jain Bros. and Others Vs. The Union of India (UOI) and Others,

and found that imposition of penalty can take place only after the assessment has been completed. Though penalty has been regarded as additional

tax in certain sense and for certain purposes penalty proceedings are not essentially continuation of proceedings relating to assessment. The

assessment proceedings and the penalty proceedings are quite distinct and different.

The Commissioner, therefore, cannot set-aside the assessment order for the sole purpose of initiation of penalty proceedings in exercise of

revisional jurisdiction. It would be a colourable exercise of jurisdiction.

22. As there was a dichotomy between the views expressed by the High Court of Delhi on the one hand and High Court of Madhya Pradesh on

the other, in the case of P.C. Puri Vs. Commissioner of Income Tax, Delhi-II, , the learned Judges constituting the Division Bench expressed a

difference of opinion and the matter was referred to a third Judge in terms of Section 251 of the Act. The majority view has approved and

confirmed, the earlier view expressed by High Court of Delhi in the case of Addl. Commissioner of Income Tax, Delhi- I v. J.K. D''costa (supra).

The learned Third Judge while recording the majority opinion has distinguished the reasoning of Madhya Pradesh High Court in the following

manner :-

The fundamental fallacy in the reasoning of the learned judges of the M.P. High Court, with very great respect, is that the wide meaning that they

attribute to the word ''assessment is not borne out by the context. Take a simple illustration. The ITO frames the assessment. But he does not

initiate penalty proceedings. The Commissioner thinks that the order is erroneous and prejudicial to the Revenue. He cancels the assessment and

directs a fresh assessment even though with the assessment as such there is nothing wrong. Income has been correctly computed and the tax has

been calculated at the correct rate. But, since in the course of the proceedings, the ITO has not issued notice of penalty proceedings, the entire

assessment has to go. The Commissioner himself cannot initiate the penalty proceedings because they have to be commenced Sin the course of any

proceedings, in connection with the regular assessment by the ITO, if he is satisfied that any assessee has furnished u/s 212 an estimate of the

advance tax payable by him which he knew or had reason to believe to be untrue under s.273(a). Section 275 enacts a bar of limitation for

imposing penalty. Penalty proceedings can be commenced only on the completion of the assessment proceedings. They must be concluded within

two years from commencement. This shows that the legislature attaches the greatest importance to the time-limit of two years after which no order

for penalty can be passed. But the Commissioner by cancelling the assessment and directing a fresh assessment will open the door to the ITO to

start everything de novo. Even then the ITO may say: SI find no case for the imposition of penalty. With this the Commissioner may disagree. He

will again cancel the assessment and direct a fresh assessment. Every time the assessment will have to be cancelled. Because, without a regular

assessment, penalty proceedings cannot be commenced.

Is assessment more important or penalty proceedings ? Of central importance is the assessment. That is the cornerstone of the Act. Cancelling an

assessment wholesale has far-reaching consequences, as was pointed out in Dï¿½Costa: ''Such a wholesale cancellation of the assessment with a

direction to make a fresh assessment is called for only in cases where there is something totally or basically wrong with the assessment which is not capable of being remedied by amendments to the assessment order itself. (Dï¿½Costa at page 12 of 133 ITR).

The view contended for would require much to be written into the section which is not there, would complicate its operation and would lead to

practical difficulties. The consequences of accepting the interpretation put by the Revenue will lead to harsh results [The Commissioner of Income

Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd., This may well lead to tax laws capable, if unchecked, of great oppression. It will be

an ''intolerable inquisition, to use an expressive phrase of H.H. Monroe, if penalty proceedings can be continued even after the expiry of the

original limit of two years (Intolerable Inquisition ? Reflections on the Law of Tax, Hamlyn Lectures, 33 series).

The object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was

intended. If, therefore, a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then

such an interpretation may be adopted (Owen Thomas Mangin v. IRC [1971] AC 739, 746 (PC) per Lord Donovan).

23. On the one side there is an opinion expressed by the High Courts of Madhya Pradesh, Allahabad and the minority opinion expressed by the

learned Judge of the Delhi High Court on which revenue places reliance, while on the other hand the High Courts of Delhi, Rajasthan, Gauhati,

Calcutta and Madras have taken a view canvassed by the assessee, namely, that it is not open to the Commissioner to exercise revisional powers

to either initiate penalty proceedings or direct initiation of penalty proceedings. This Court is in respectful agreement for the reasons stated

hereinbefore with the view expressed by majority of High Courts and records its respectful disagreement with the view expressed by High Court of

Madhya Pradesh. It is necessary to note that ''If the court finds that the language of a taxing provision is ambiguous or capable of more meanings

than one, then the court has to adopt that interpretation which favours the assessee, more particularly so where the provision relates to the

imposition of a penalty [The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd.,

24. The alternative contention raised on behalf of the revenue based on the Apex Court decision in the case of Sree Balaji Rice Mill (supra) may

be taken up for consideration. The learned counsel has laid great emphasis on Paragraph No. 17 of the said judgment in support of the submission

that the use of the word thereon in Section 263 of the Act enables the authority to pass all such orders as the circumstances of the case justify; and

that the same phrase has been interpreted by the Apex Court in the aforesaid decision, therefore, the ratio of the decision would squarely apply to

the present case.

25. Considering the fact that, at first blush, the Apex Court decision appears to be laying down a legal proposition as contended by the revenue it

is necessary to examine the decision closely. For doing so it is necessary to recapitulate the legal position as to how a decision has to be

understood and read. Supreme Court has time and again laid down the guidelines for reading and applying its own decisions.

[a] In the case of Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd., the Apex Court has cautioned against reading its own

judgment in a truncated manner in these words :

It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question

under consideration and treat it to be the complete ''law'' declared by this Court. The judgment must be read as a whole and the observations from

the judgment have to be considered in the light of the questions which were before this Court. A decision of this court takes its colour from the

questions involved in the case in which it is rendered and, while applying the decision to a later case, the courts must carefully try to ascertain the

true principle laid down by the decision of this court and not to pick out words or sentences from the judgment, divorced from the context of the

questions under consideration by this Court, to support their reasonings. In H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of

Gwalior and Others Vs. Union of India and Another,

It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a

full exposition of the law on a question when the question did not even fall to be answered in that judgment.

[b] In another decision in case of Director of Settlements, A.P. and Ors v. M.R. Apparao and Anr. AIR 2002 SCW 1504, the Apex Court once

again enunciated the law in these words:

xxx xxx Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all Courts within

the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to

interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not

be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a

whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision

has ''declared law'' it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a

decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was

delivered. An ''obiter dictum'' as distinguished from a ratio decidendi is an observation by Court on a legal question suggested in a case before it

but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for

the decision pronounced, but even though an obiter may not have a bind effect as a precedent, but it cannot be denied that it is of considerable

weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a

given case. So far as constitutional matters are concerned, it is a practice of the Court not to make any pronouncement on points not directly raised

for its decision. The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the

relevant provisions were not brought to the notice of the Court (See Ballabhadas Mathurdas Lakhani and Others Vs. Municipal Committee,

Malkapur, . When Supreme Court decides a principle it would be the duty of the High Court or a subordinate Court to follow the decision of the

Supreme Court. A judgment of the High Court which refuses to follow the decision and directions of the Supreme Court or seeks to revive a

decision of the High Court which had been set aside by the Supreme Court is a nullity. (See Narinder Singh Vs. Surjit Singh, . xxx xxx

26. Thus, it is necessary to ascertain as to what was the question involved in the case before the Supreme Court in context of which the decision

has been rendered.

27. In the case before the Apex Court the Additional Commissioner of Commercial Taxes took up revisional proceedings u/s 22A of the

Karnataka Sales Tax Act, 1957 (the Karnataka Act) for default of the appellant therein u/s 18 of the Karnataka Act and levy of consequential

penalty u/s 18A of the Karnataka Act. It is necessary to note that when the matter was carried before the High Court of Karnataka, the High

Court took the view that the determination of tax contemplated u/s 12(3) of the Karnataka Act took within its ambit the levy of penalty u/s 18A of

the Act and it was in the backdrop of that finding that revisional action u/s 22A of the Act was upheld holding that the order u/s 12(3) of the

Karnataka Act was amenable to revisional jurisdiction. In Paragraph No. 11 of the decision, the following questions have been stated to arise for

consideration :

(a) What is the scope and effect of Section 22A of the Karnataka Sales Tax Act, 1957 ?

(b) Whether a penalty order u/s 18A of the Act forms a part of an assessment order ?

(c) While purporting to revise an order u/s 12A which neither expressly nor impliedly refers to any proceeding u/s 18A and was thus not within the

contemplation of the assessing authority while passing the order u/s 12(3), is it open for the Commissioner, while purporting to act u/s 22A in

respect of the order u/s 12(3) to pass an order u/s 18A either as a part of the order u/s 22A or separately as such u/s 18A?

(d) On the facts and in the circumstances of the appellant''s case, whether the revisional authority was right in levying penalty u/s 18A of the Act for

the first time when the language employed in Section 18A of the Act did not confer any power on him for doing the same ?

27.1 u/s 18(1)(a) of the Karnataka Act it is provided that a person who is not a registered dealer is not entitled to collect any amount by way of

tax even if such a person is liable to tax; while a registered dealer is not entitled to collect tax at a rate or rates exceeding the prescribed rate or

rates of tax. Similarly, under clause (b) no person is entitled to collect any amount by way of tax in respect of any sales or transaction on which no

tax is payable under the provision of the Karnataka Act. In case of any contravention of this provision i.e. Section 18, Section 18A provides for

penalty for collection in contravention and the said provision reads as under :

18-A Penalty for collection in contravention of Section 18. -- If any person contravenes any of the provisions of Section 18, the assessing

authority may, after giving such person reasonable opportunity of being heard, by order in writing, impose upon him by way of penalty a sum not

less than one-half but not exceeding an amount equivalent to:

Provided further that no prosecution for an offence u/s 29 shall be instituted in respect of the same facts on which a penalty has been imposed

under this section.

27.2 The Scheme of the Karnataka Act is entirely different from the one which is found in the Income Tax Act, 1961. u/s 2(f) ''the assessing

authority has been defined to mean a Commercial Tax Officer or Assistant Commissioner of Commercial Taxes or any other officer of the

Commercial Taxes Department authorized to make any assessment by or under the Karnataka Act. Commissioner is defined u/s 2(g) and

Additional Commissioner is defined u/s 2(m2) to mean respectively any person appointed u/s 3 of the Karnataka Act. Section 3(1) empowers the

State Government to appoint a Commissioner, Additional Commissioner, Joint Commissioner, Dy. Commissioner, Assistant Commissioner, State

Representative and Commercial Tax Officers as the government thinks fit for the purpose of performing functions, respectively conferred on it by

or under the Act. The charge of levy is u/s 5 of the Karnataka Act. The liability to taxation under the Karnataka Act in respect of transaction is

provided by Section 7 of the Karnataka Act. Section 10 provides for Registration of Dealer, Commission Agents, etc. Section 12 of the

Karnataka Act deals with Returns and Assessment. u/s 12(1A) every dealer is enjoined to pay in advance full amount of tax payable before any

return is submitted u/s 12(1) of the Act. u/s 12(3) it is provided that in absence of return submitted by dealer before the prescribed date or if the

return submitted is found to be incorrect or incomplete the Assessing Authority is required to assess the dealer to the best of his judgment after

recording reasons. Under sub-section (4) of Section 12 the Assessing Authority is entitled to direct the dealer to pay in addition to the tax assessed

a penalty at the rates prescribed in sub-clauses (a), (b) and (c).

27.3 Section 12B provides for ''Payment of Tax in Advance'' and under sub-section (2) it is laid down that in case of a default beyond the

prescribed period the dealer shall pay by way of penalty the prescribed sums at the prescribed rate. Similarly, under sub-section (4) of Section

12B it is provided that where there is a shortfall in tax paid in advance, a dealer is liable to pay penalty at the prescribed rates. Section 13 of the

Karnataka Act deals with ''Payment and Recovery of Taxes''.

28. Thus, in light of the scheme of the Karnataka Act which unfolds on a plain reading of the aforesaid conspectus of provisions, it becomes

apparent that what is termed as penalty for various defaults is in effect not penalty, but what is provided is levy of an additional tax during the

course of assessment, levy, collection and recovery of tax. As already noticed Section 12 which deals with Returns and Assessment permits an

Assessing Authority to complete the best judgment assessment if the pre-requisite conditions stipulated by sub-section (3) of Section 12 of the

Karnataka Act are satisfied and in addition thereto a dealer is liable to pay in addition to the tax assessed a penalty at the prescribed rate under

sub-section (4) which is thus a part and parcel of assessment. Similarly, Section 12B which provides for Payment of Tax in Advance also takes

within its ambit levy of penalty for the defaults stated in the provision.

29. In these circumstances, to read provision of Section 18A of the Karnataka Act to mean levy of penalty simplicitor is not warranted. This

becomes clear when one reads the requirement of Section 18 of the Karnataka Act which permits collection of tax by dealers in a given set of

circumstances and prohibits otherwise. Paragraph No. 17 of the judgment on which the learned counsel for the revenue has placed great emphasis

itself indicates that there is a difference between exercise of revisional power over orders passed by lower authority and exercise of revisional

powers in the assessment proceedings itself. In Paragraph No. 22 of the reported judgment while repelling the contention on behalf of the appellant

it is observed that, it could not be stated that the revisional authority or the appellate authority superior to the Assessing Authority is not competent

to levy a penalty for the first time when no penalty has been levied by the

Assessing Authority; the contention is thus found to be without any

statutory basis and unreasonable from any point of view. The non-levy of penalty u/s 18A of the Karnataka Act has been itself treated as an

illegality caused by a failure to exercise jurisdiction by the Assessing Authority.

30. Applying the aforesaid principles to the facts of the case it is not possible to accept the contention that the aforesaid decision rendered by the

Apex Court concludes the issue against the assessee in the present case. In the first instance, as noticed hereinbefore, the entire Scheme of the

Karnataka Act is distinct and different, both in content and legislative intent. In the circumstances, applying the well-settled legal position the

correct ratio of the Apex Court decision as applicable in context of the Karnataka Act cannot be applied to the present controversy under the

Income Tax Act. It is equally well-settled that a decision rendered under one statute cannot be applied straightway while interpreting a provision

under another statute.

31. There is one more reason. As can be seen from a plain reading of Section 18A of the Karnataka Act the Assessing Authority is not required to

record any satisfaction which is a pre-requisite condition u/s 271(1) of the Act. The purpose underlying Section 18 is very simple : a person who is

not entitled to collect tax under the Karnataka Act cannot be permitted to get away after making such collection. The Scheme of the Sales Tax Act

is primarily based on a concept of agency. It is an indirect tax on transaction of purchase and/or sale of goods. The tax collected by the dealer is

for and on behalf, or as an agent of the State Government. An assessee under the Act does not act as an agent of Central Government. The object

and purpose of the Act is to levy and collect tax in respect of an income earned by the assessee. The said income in fact belongs to the assessee

and it is only by virtue of the provisions of the Act that the income is brought to tax and a portion thereof collected as tax by the government.

Therefore, considering the distinction and difference between the two statutes, from any view point, the aforesaid decision in case of Sree Balaji

Rice Mill(supra) cannot carry the case of the revenue any further.

32. Paragraph No. 21 of the Apex Court decision makes it abundantly clear that no procedural or substantive error in making of revisional order

had been pointed out and the requirements of law relating to passing of an order u/s 18A read with Section 22A of the Karnataka Act were shown

to have been admittedly complied with. In the present case the requirement, which is a pre-requisite condition, of recording satisfaction by the

Assessing Officer or the Appellate Authority is not shown to have been complied with while exercising revisional jurisdiction.

33. To summarize:

(a) u/s 271(1) of the Act only the Assessing Officer or the Appellate Authority is required to be satisfied"" in the course of any proceedings"" before

either of those two authorities;

(b) The term satisfied"" means make up mind not troubled by doubt, or reach a clear conclusion on the evidence before the authority;

(c) The Commissioner is not empowered by section 271(1) of the Act to record satisfaction, if he cannot do so on his own he cannot direct the

Assessing Officer;

(d) The Commissioner cannot substitute his satisfaction in exercise of revisional powers;

(e) The Commissioner cannot exercise revisional jurisdiction qua proceedings before an Appellate Authority;

(f) Limitation prescribed by Section 275 of the Act cannot be by-passed or indirectly extended by invoking powers u/s 263 of the Act;

(g) The stage of recording satisfaction is before concluding the assessment proceedings, hence the Commissioner cannot direct the Assessing

Officer to initiate penalty proceedings once assessment proceedings are complete;

(h) Even if it is lawful to impose penalty, that by itself would not be sufficient to entitle the Commissioner to treat the assessment order as erroneous

and prejudicial to the interests of revenue;

(i) Amendment of Section 271(1) of the Act by the Finance Act, 2002 w.e.f. 01.06.2002 is not clarificatory;

(j) Under the Act assessment and penalty proceedings are distinct and separate;

(k) Due to dichotomy of views between High Courts of Madhya Pradesh & Allahabad favouring Revenue and High Courts of Delhi, Rajasthan,

Gauhati, Calcutta and Madras favouring assessee, Section 271(1) read with Section 263 of the Act capable of two views, the court has to adopt the interpretation which favours the assessee;

(l) The judgement of the Apex Court in the case of Sree Balaji Rice Mill (supra) cannot be applied as the scheme of Karnataka Sales Tax Act,

1957 and the Income Tax Act, 1961 are different in content and legislative intent.

34. In the result, this Court does not find any infirmity in the order of the Tribunal and the Tribunal was justified in setting aside the order made by

the Commissioner u/s 263 of the Act wherein a direction had been issued to the Assessing Officer to consider initiation of penalty proceedings u/s

271(1)(a) of the Act. The question referred is, therefore, answered in the affirmative i.e. in favour of the assessee and against the revenue.

35. The reference stands disposed of accordingly. There shall be no order as to costs.