
(2008) 07 GAU CK 0018
In the Gauhati High Court

Dhanani Shoes Ltd.

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 02-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 114
Constitution of India, 1950 — Article 226

Citation : (2008) 3 GLT 361 : (2008) 16 VST 228

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Judgement

I.A. Ansari, J.—The petitioner No. 1, namely, M/s. Dhanani Shoes Ltd., is a company registered under the Companies Act, 1956. The petitioner-company is registered both under the Central Sales Tax Act, 1956, as well as under the Assam Value Added Tax Act, 2003 (in short, "the Act"). The petitioner-company deals in plastic and leather footwear, sports goods, readymade garments and allied business. The petitioner-company is distributor, in the entire North-Eastern India, of some classified products, namely, Liberty, Action, Hotshot, Woodland, Levis, Lakhani, etc. The petitioner No. 2 accounts officer of the petitioner-company, is the authorised signatory of the company. The petitioner-company is engaged in the business of stocking and selling, in wholesale as well as retail, of different varieties of shoes. On February 6, 2008, respondent No. 4, namely Inspector of Tax, Unit-B, Guwahati, came to inspect the petitioner-company's godown at Dhirenpara, Guwahati, and served, on the petitioner-company, a notice, dated February 6, 2008, issued u/s 74(1) of the Act, and demanded that the petitioner-company shall produce or cause to be produced all necessary documents related to the books of account, on February 6, 2008 itself, in order to ascertain the taxes payable by the petitioner-company. Respondent No. 4 also seized, vide two seizure lists, stock of goods, documents, stock register, other registers and books relating to the business of the petitioner-company. At the time of the said seizure, the petitioner-company had, in their stock, both plastic as well as leather goods. While the plastic goods are taxable at the rate of four

per cent of its value, the leather goods are taxable at the rate of 12 per cent.

2. By making a writ application, under Article 226 of the Constitution of India, which gave rise to W.P.(C). No. 1050 of 2008 Reported as Dhanani Shoes Ltd. v. State of Assam [2008] 14 VST 422 (Gauhati), the petitioners had impugned the said notice and also seizures of the books of account and goods by respondent No. 4 on the ground, inter alia, that the notice aforementioned as well as seizures of the goods and also of the books of account were without the authority of law and, hence, without jurisdiction.

3. When the writ petition was taken up for motion hearing, it was submitted, on behalf of the respondents, that the writ petition be taken up for final disposal at the motion stage itself. To the submissions so made, no objection was raised on behalf of the petitioners. The writ petition was accordingly heard for final disposal at the motion stage itself.

4. By judgment and order, dated April 11, 2008 Reported as Dhanani Shoes Ltd. v. State of Assam [2008] 14 VST 422 (Gauhati), this Court upheld, inter alia, the seizure of the goods as having been made by the respondents in terms of the provisions of Section 74(5)(a)(ii) of the Act. While so dismissing the writ petition, this Court directed that the respondents shall complete, if they have not already completed, the process of verification or enquiry within a period of one week and, upon completion of such verification or enquiry, respondents shall permit the petitioners to obtain release of the seized goods in terms of the provisions contained in Section 74(5) and other provisions relevant thereto or connected therewith.

5. Pursuant to the directions issued by this Court, as indicated above, a notice, dated April 16, 2008, was issued by respondent No. 2, namely, Inspector of Tax, Unit-B, Guwahati.

6. In the impugned notice, respondent No. 2 has observed to the effect that the verification, carried by the respondents, revealed that the goods were not properly accounted for in the regular books of account inasmuch as the books of account disclosed misclassification of goods in the sense that the goods, which are taxable at 12.5 per cent were shown taxable at four per cent for the year 2007-08 and that the petitioners had charged lower rate of tax, i.e., at four per cent on the goods, which were taxable at 12.5 per cent, and thereby they had evaded payment of tax. In view of such alleged evasion of tax, the petitioners were directed by the notice aforementioned to show-cause, in writing, as to why penalty at three times of the amount of tax evaded be not imposed, the penalty leviable being to the tune of Rs. 1,99,41,570.

7. By making the present review petition, the petitioners have sought for review of the judgment and order, dated April 11, 2008 Reported as Dhanani Shoes Ltd. v. State of Assam [2008] 14 VST 422 (Gauhati) to the extent that the same had upheld the seizure of the goods. The ground for seeking such a review can be, broadly speaking, divided into two parts, namely, (i) that the seizure was upheld

on a factually incorrect submission made on behalf of the respondents, such incorrect submissions, in the writ petition, having been made on, perhaps, incorrect instructions given to their counsel by the respondents inasmuch as the respondents sought to sustain, in the writ petition, seizure of the goods by contending that the seized goods did not tally with the invoices produced by the petitioners ; whereas the seizure was, in fact, made not because of alleged non-production of invoices, but because of the alleged misclassification of goods and (ii) that even otherwise, the conclusion, reached in the decision aforementioned, to the effect that the seizure, in question, was within the jurisdiction, is an error, which is apparent on the face of the record, inasmuch as the seizure of the goods, in question, in the light of the relevant provisions of the Act, were ex facie without jurisdiction and this becomes clearer, when the events, subsequent to the disposal of the writ petition, are taken into consideration inasmuch as the subsequent notice, dated April 16, 2008, clearly shows that the seizure of the goods had been made on the alleged ground of misclassification of goods and not due to the fact, as had been earlier alleged, that the seized goods did not tally with the invoices produced.

8. By a separate writ petition, made under Article 226, the petitioners have also challenged the notice to show-cause, dated April 16, 2008, aforementioned on the ground, inter alia, that this notice too is wholly without jurisdiction inasmuch as Section 74(5)(a)(ii), whereunder the notice has been issued, was not attracted to the facts of the case inasmuch as the goods were seized, as had been contended in the writ petition, on the ground that the seized goods did not tally with the invoices produced ; whereas the impugned notice to show-cause reflects that the respondents have abandoned this ground for making seizure and/or for imposing penalty and have, now, sought to impose penalty on the sole ground that the goods had been misclassified in the sense that the goods, which were taxable at four per cent, were allegedly shown, in the register/documents, as taxable at 12.5 per cent.

9. Both the review as well as the writ petition, being inseverable and closely connected with each other, were taken up together for hearing as had been sought for, and agreed to, by the learned Counsel for the parties, and are, now, being disposed of by this common judgment and order.

10. I have heard Dr. A.K. Saraf, learned Senior Counsel, for the petitioners, and Mr. N. Dutta, learned Senior Counsel, appearing on behalf of the respondents.

11. Let me, first, deal with the review petition, namely, review petition No. 47 of 2008.

Scope of High Court's power of review

12. Before I enter into the merit of the review petition, it needs to be noted that as regards the scope of the High Court's power to review its own orders and directions, both the parties have made, somewhat, conflicting submissions and I am, therefore, of the view that in order to appreciate the controversy, which the

review petition has raised, it is appropriate that the parameters of a High Court's power of review is settled before the merit of the grounds, on which the review is sought, are taken up for consideration.

13. As regards the High Court's power of review, Mr. Dutta has submitted that there is a difference between the power of review and the appellate power of a court. Under the guise of review, a review petitioner, according to Mr. Dutta, cannot seek review of the entire case on merit, for, the merit of an order or of a case can be decided in appeal and not by way of review petition. It is also submitted by Mr. Dutta that a review can be for an error on the face of the record, such error being an error of fact, and not for correction of an error of law inasmuch as an error of law, contends Mr. Dutta, can be corrected by a court of appeal and not by resorting to the power of review. A review, further contends Mr. Dutta, is possible under Order 47, Rule 1 of the Code of Civil Procedure, 1908 (in short, "the Code") on three specific grounds, namely, (i) discovery of new and important matter or evidence, which, after exercise of due diligence, was not within the knowledge of the person seeking the review or could not be produced by him, when the order, sought to be reviewed, was passed, (ii) mistake or error apparent on the face of the record and (iii) any other sufficient reason. The expression, "any other sufficient reason", submits Mr. Dutta, would mean such a reason, which is "analogous" to the other two reasons as specified hereinbefore. It is not possible, insists Mr. Dutta, to review an order for a reason, which is not "analogous" to the two reasons, which Order 47, Rule 1 lays down as the grounds for review. In support of his submissions, Mr. Dutta places reliance on Babboo alias Kalyandas and Others Vs. State of Madhya Pradesh, , Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhury, , Dr. Janak Raj Jai v. H.D. Deve Gowda, (1997) 10 SCC 462 and State of Kerala v. P.T. Thomas reported in [2005] 12 SCC 347 .

14. At any rate, contends Mr. Dutta, there must be miscarriage of justice or there must be grave and palpable error in order to enable the High Court to review its own order, for, the High Court has the power of review, which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct a grave and palpable error committed by it. However, even if the High Court, in a given case, contends Mr. Dutta, is satisfied that there is miscarriage of justice and that there is grave and palpable error committed by it, review is not possible unless the court is further satisfied that there exists one of the three specified grounds, namely, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the order was passed, or (ii) mistake or error is apparent on the face of the record or (iii) for "any other sufficient reason", such "sufficient reason" being "analogous" to the earlier two grounds as indicated hereinbefore. In no case, submits Mr. Dutta, the power of review can be exercised to correct an erroneous decision on merit.

15. Explaining as to what an error apparent on the face of the record means, Mr.

Dutta, referring to the case of Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhury, and Shivdeo Singh v. State of Punjab reported in AIR 1963 SC 1909, submits that an error apparent on the face of the record would mean such an order, which would strike one on a mere looking at the record and would not require any long-drawn process of reasoning, where there may be conceivably two opinions.

16. While agreeing, broadly, with the above submissions, made on behalf of the respondents, as regards the scope of review jurisdiction of the High Court, Dr. Saraf points out that the three grounds, which, in the light of the provisions of Order 47, Rule 1 of the Code, were mentioned, in Moran Mar Basselios Cathlicos v. Most Rev. Mar Poulouse Athanasius AIR 1954 SC 526 , as the only grounds on which alone review was possible, is not a rule of universal application, for, it is, according to Dr. Saraf, permissible to review an order, which is found to have been suffering from mistake of fact or law and, if necessitated, an order can be reviewed by even invoking the doctrine of "actus curiae neminen gravabit". Hence, in a given case, the court may review its order, contends Dr. Saraf, on "any other sufficient reason", though such a "reason" may not necessarily be "analogous" to the two grounds specified in Order 47, Rule 1, namely, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the order was passed, or (ii) mistake or error, which is apparent on the face of the record. Support for this submission is sought to be derived by Dr. Saraf from the case of Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, .

17. Lily Thomas, Vs. Union of India and Others, , Dr. Saraf contends that in this decision, while acknowledging the fact that "review" is the creation of statute and the power of "review" cannot be exercised as an inherent power nor can an appellate power be exercised in the guise of the power of review, the Supreme Court has, nevertheless, clarified that correction of an order by a court cannot be denied if the court finds that the error, pointed out in the review petition, was under a mistake of fact or law and/or that the earlier judgment would not have been passed, but for erroneous assumption of a fact, which, in fact, did not exist and that perpetration of such an erroneous assumption of fact shall result in miscarriage of justice.

18. Lily Thomas, Vs. Union of India and Others, , Dr. Saraf points out that the decision, in Lily Thomas, Vs. Union of India and Others, , further shows that review by a court is possible if the court has taken a decision on the assumption of a fact, which did not really exist, and if the court finds that unless the decision, so taken on erroneous assumption of fact, is interfered with, the order would result into miscarriage of justice. Review is also possible, contends Dr. Saraf, by taking into account a subsequent relevant event. According to Dr. Saraf, even a misunderstanding by the court of the nature and purport of an undertaking or submission made by a counsel or the court's misunderstanding,

arising out of incorrect instruction given to a counsel, may become a ground for review. In support of this submission, Dr. Saraf places reliance on Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, and Rajesh D. Darbar and Others Vs. Narasingrao Krishnaji Kulkarni and Others, .

19. Contending that review of an order is possible even to correct interpretation of law, Municipal Board, Pratabgarh and Another Vs. Mahendra Singh Chawla and Others, , inasmuch as rule of law, points out Dr. Saraf, would stand defeated if a court refuses to review its order even when the court is convinced that its interpretation of law, on a point, was palpably incorrect and that the decision rendered, on the basis of such incorrect interpretation of law, is causing miscarriage of justice. In support of his submission that even an error of law or misinterpretation of law can become, in an appropriate case, a ground for review, Dr. Saraf relies, once again, on Board of Control for Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, .

20. Let me, now, deal with the correctness or otherwise of the submissions noted above and determine the scope and ambit of the power of review of the High Courts.

21. While considering the scope of the power of review, what needs to be noted is that u/s 114 of the Code, any person, considering himself aggrieved, by a decree or order of a court from which appeal is allowed, but no appeal is preferred, or where there is no provision for appeal against the order or decree, may apply for review of the decree or order, as the case may be, in the court, which made the order or passed the decree. Broadly speaking, thus, u/s 114 of the Code, review of a decree or order is possible if no appeal is provided against such a decree or order or where provisions for appeal exist, but no appeal has been preferred. This is really the substantive power of review. This substantive power of review u/s 114 has not laid down any condition as a condition precedent for exercise of the power of review nor has Section 114 imposed any fetters on the court's power to review its decision. No wonder, therefore, that the apex court, in Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, observed:

We are, furthermore, of the opinion that the jurisdiction of the High Court in entertaining a review application cannot be said to be ex facie bad in law. Section 114 of the Code empowers a court to review its order if the conditions precedents laid down therein are satisfied. The substantive provision of law does not prescribe any limitation on the power of the court except those which are expressly provided in Section 114 of the Code in terms whereof it is empowered to make such order as it thinks fit.

22. Lest the subtle but real distinction existing between the power of review, on the one hand, and the power of an appellate court, on the other, disappears completely, Order 47, Rule 1 circumscribes a court's power of review by specifying the three grounds on which review is possible, the specific grounds

being, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the decree or order was passed, (ii) mistake or error apparent on the face of the record and (iii) for "any other sufficient reason".

23. Having taken into account the said three grounds, which Order 47, Rule 1 embodies as the grounds for review, the Supreme Court, in *Moran Mar Basselios Cathlicos* AIR 1954 SC 526, held that power of review is circumscribed by the three grounds, which have been specified in Order 47, Rule 1. Explaining the scope of the third ground of review mentioned in Order 47, Rule 1, namely, "any other sufficient reason", the Supreme Court, in *Moran Mar Basselios Cathlicos* AIR 1954 SC 526, held that "any other sufficient reason" cannot be "any sufficient reason", but a reason, which is "sufficient" and, at the same time, at least, "analogous" to one of the two reasons as indicated hereinbefore, namely, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the decree or order was passed and (ii) mistake or error apparent on the face of the record. In short, thus, what *Moran Mar Basselios Cathlicos* AIR 1954 SC 526 laid down was that the expression, "any other sufficient reason", cannot be construed as "any sufficient reason" and that "any sufficient reason" cannot become a ground for review unless even such "sufficient reason" is "analogous" to one of the other two grounds mentioned in Order 47, Rule 1, namely, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the decree was passed or (ii) mistake or error apparent on the face of the record.

24. *Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others*, is one of those cases, which has elaborately dealt with the scope of the power of review, particularly, of the High Courts and, having considered the case of *Moran Mar Basselios Cathlicos* AIR 1954 SC 526, the Supreme Court has clarified, in no uncertain words, in *Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others*, , that the rule that "any other sufficient ground" must be "analogous" to the other two grounds, as mentioned in Order 47, Rule 1, is not a rule of universal application. The relevant observations, made, at para 91, in *Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others*, , in this regard, read:

91. It is true that in *Moran Mar Basselios Cathlicos and Another Vs. The Most Rev. Mar Poulouse Athanasius and Others*, this court made observations as regards limitations in the application of review of its order stating:

Before going into the merits of the case it is as well to bear in mind the scope of the application for review which has given rise to the present appeal. It is needles to emphasise that the scope of an application for review is much more restricted than that of an appeal. Under the provisions in the Travancore CPC

which is similar in terms of Order 47, Rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein. It may allow a review on three specified grounds, namely (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record, and (iii) for any other sufficient reason. It has been held by the Judicial Committee that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule".

but the said rule is not universal.

(emphasis Here italicised is added)

25. I may pause here to point out that when a judgment of the Supreme Court is explained by a subsequent Bench of the Supreme Court, such an explanation of its own judgment by the Supreme Court carries the same authority as does the decision, which has been explained by it. Hence, in the face of the decision, rendered in Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, , it cannot, now, be contended (as has been sought to be done by the respondents) that no ground, other than the grounds mentioned in Moran Mar Basselios Cathlicos AIR 1954 SC 526, can ever become a ground for review of an order or decision by a High Court. In fact, there is plethora of judicial pronouncements of the Supreme Court, which show that there can be exceptional cases, where a deviation from the grounds of review, as propounded in Moran Mar Basselios Cathlicos AIR 1954 SC 526 , is possible and one of such cases is the case of Lily Thomas, Vs. Union of India and Others, , wherein, having taken into account the facts that (a) the power of review is a creation of statute and not an inherent power, that (b) no power of review can be exercised if not given to a court or Tribunal either specifically or by necessary implication; and that (c) under the guise of review jurisdiction, merit of a decision cannot really be examined, the Supreme Court has, in unequivocal terms, pointed out that justice is, after all, a virtue, which must prevail over all barriers and that the rules, procedures or technicalities of law must, if necessary, bend before justice and that such a situation may arise, when a court finds that it has rendered a decision, which it would not have rendered, but for an assumption of fact, which, in fact, did not exist and its adherence to such a faulty decision would result in miscarriage of justice. In such cases, rules Lily Thomas, Vs. Union of India and Others, , nothing can prevent a court from rectifying its own error, because the doctrine of "actus curiae neminem gravabit", (i.e., an act of court shall prejudice none), can be invoked, in such a case, for correcting the error committed by the court.

26. The real theme of the Supreme Court's decision, in Lily Thomas, Vs. Union of India and Others, , is that though the power of review cannot be exercised by a court unless the statute confers such a power and that a statutory power of

review can be exercised subject to such limitations as the statute may impose, yet a court is not powerless, in an appropriate and exceptional case, to rectify its error, because "an act of court shall prejudice none" and, hence, in exceptional cases, a court can invoke the doctrine of "actus curiae neminem gravabit" for correcting an error committed by it. The case of Lily Thomas, Vs. Union of India and Others, shows that when a court discovers that a decision, rendered by it, was actually based on assumption of a fact, which was non-existent, and that the court's adherence to such a decision, which was based on non-existent fact, would result in miscarriage of justice, the court cannot be prevented from rectifying its own error, because an act of court, it is trite, shall prejudice none. The decision, so rendered and the law so laid down in Lily Thomas, Vs. Union of India and Others, , have been agreed to in Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, . I may quote, on this aspect, the observations of the apex court, in Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, , which read as under:

92. Yet again in Lily Thomas, Vs. Union of India and Others, this Court has laid down the law in the following terms:

52. The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correction or improvement". It cannot be denied that the review is the creation of a statute. This court in The District Collector of Hyderabad and Others Vs. Ibrahim and Co., etc., , held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice nothing would preclude the court from rectifying the error?.

(emphasis supplied)

27. While pointing out, in Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, , that in exercising the power of review, the court can take into account any subsequent event, the Supreme Court has pointed out that when a court, in the light of the subsequent event, finds that it had committed a mistake in understanding the nature and purport of an undertaking given by a counsel appearing on behalf of a party, the court may rectify its own mistake. One can profitably refer, in this regard, to the following observations made, at paras 87, 89, 90 and 93, in Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, .

87. Indisputably, an undertaking had been given by a learned Senior Counsel appearing on behalf of the Board. In the impugned order, the Division Bench

before whom such undertaking had been given was of the opinion that it was misled. This court having regard to the understanding of such undertaking by the Division Bench does not intend to deal with the effect and purport thereof and as we are of the opinion that the Division Bench of the Madras High Court itself is competent therefor. If para 14 of the order of the learned single judge is to be taken into consideration, it is possible to contend that the learned judges of the High Court were correct.

89. Order 47, Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason.

90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in Order 47, Rule 1 of the Code is wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine "*actus curiae neminem gravabit*".

93. It is also not correct to contend that the court while exercising its review jurisdiction in any situation whatsoever cannot take into consideration a subsequent event. In a case of this nature when the court accepts its own mistake in understanding the nature and purport of the undertaking given by the learned Senior Counsel appearing on behalf of the Board and its correlation with as to what transpired in the AGM of the Board held on September 29, 2004, the subsequent event may be taken into consideration by the court for the purpose of rectifying its own mistake.

28. In Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, , the apex court has laid down that an application for review would be maintainable if "sufficient reasons" exist therefor. What, in a given case, shall constitute "sufficient reason" would be a question of fact and would, therefore, depend on the facts and circumstances of a given case. What the Supreme Court has pointed out, very clearly, in Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, , is that the words "sufficient reason", which appear in Order 47, Rule 1, are wide enough to include misconception of fact or law by a court and that even when a mistake of fact or law has crept into a judicial decision due to court's misunderstanding of the nature of an undertaking given by an advocate, an application for review may be necessary and by invoking the doctrine of "*actus curiae neminem gravabit*", the court can correct such an error. This, in turn, shows that if, as a result of misunderstanding of fact or law by a court, a mistake has crept in, which the court finds would cause or has caused miscarriage of justice, such an error can, and must, be corrected by

exercising the power of review and, for this purpose, the doctrine of "actus curiae neminem gravabit" can also be invoked. A mistake, on the part of the court, would include, according to the decision in Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, , a mistake in the nature of the undertaking, which may have been given by a counsel meaning thereby that when a counsel, on a mistaken belief or on an erroneous or incorrect instruction, makes a statement and the court acts on such a statement, but, on a review application having been subsequently filed, the court finds that it had misunderstood the counsel's submission or had got misled by a counsel's submission or when the court finds that it (court), had proceeded on an assumption of fact, which did not really exist, or when it (court) finds that it had misinterpreted a provision of law or had acted on a misconception of law and that the error, so crept in, was, as a result of subsequent event or otherwise, apparent on the face of the record, and that such error had caused, or would cause, miscarriage of justice, such a reason would be a "sufficient reason" calling for exercise of the power of review.

29. In the light of the decision in Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, , it can no longer be in doubt that it is possible for a court to review its order if it discovers that it had passed an order by misunderstanding the nature of an undertaking given by an advocate or when it finds that a mistake, in the order, has crept in due to incorrect undertaking given by an advocate appearing in a case or when it discovers that its order suffers from misinterpretation of law or from misconception of fact, which may arise due to an incorrect submission made by a counsel as a result of wrong or incorrect instructions received by him from his client or otherwise. In short, in order to do complete justice, it is possible for a court to review its order by invoking the doctrine of "actus curiae neminem gravabit" and thereby rectify the mistake, which the court might have committed, while interpreting a fact or interpreting a position of law, particularly, when it finds that its judgment has caused, or would cause, miscarriage of justice.

30. In Rajesh D. Darbar and Others Vs. Narasingrao Krishnaji Kulkarni and Others, , the Supreme Court has pointed out that while exercising the power of review, subsequent events can be taken note of and that in exceptional cases, the court may have to rectify the error committed by it by invoking the doctrine of "actus curiae neminem gravabit", for, an act of a court shall prejudice none. The Supreme Court has, however, pointed out, in Rajesh D. Darbar and Others Vs. Narasingrao Krishnaji Kulkarni and Others, , that invoking of the doctrine of "actus curiae neminem gravabit" can be in exceptional cases and that every error cannot be rectified on the basis of the principle that an act of the court shall prejudice none.

31. In fact from the decision in Municipal Board, Pratabgarh and Another Vs. Mahendra Singh Chawla and Others, , what clearly emerges is that when a High Court acknowledges its error and rectifies its error, which has crept in, what the

High Court really does is restore the rule of law and not defeat it. Points out the apex court, in *Municipal Board, Pratabgarh and Another Vs. Mahendra Singh Chawla and Others*, , that laws cannot be interpreted and enforced divorced from their effect on human beings for whom the laws are meant. Further observed the Supreme Court, in *Municipal Board, Pratabgarh and Another Vs. Mahendra Singh Chawla and Others*, , on this aspect of law, thus, "... Undoubtedly, rule of law must prevail but as is often said, "rule of law must run akin to rule of life. And life of law is not logic but experience". By pointing out the error which according to us crept into the High Court's judgment the legal position is restored and the rule of law has been ensured its pristine glory...".

32. From the decisions in *Municipal Board, Pratabgarh and Another Vs. Mahendra Singh Chawla and Others*, , *Rajesh D. Darbar and Others Vs. Narasingrao Krishnaji Kulkarni and Others*, , *Lily Thomas, Vs. Union of India and Others*, and *Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others*, , what clearly transpires is that whenever a mistake is committed by a court, because of wrong interpretation of law or because of incorrect assumption of fact or because of misrepresentation of fact by the counsel or when a decision is based on a submission, which might have been made by a counsel on a wrong or incorrect instruction, or when a decision is based on a wrong understanding of a counsel's submissions or on assumption of existence of a fact, which was actually non-existent, the court shall, if the error is such, which would cause, or has caused, grave miscarriage of justice, review its own order.

33. Coupled with the above, it is equally important to bear in mind that in a given case, when a court finds, on a review application made or otherwise, that its order has been misunderstood and has misled the parties or needs a clarification, it may, and, in an appropriate case, must, clarify its order even if it chooses not to allow the review application. One of such cases is the case of *Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi*, , wherein, while holding that when there can be two views of a given situation of fact or law and the court, in its original judgment, has taken the view, which is a possible one, it is not possible to treat such a view as an error apparent on the face of the record. Nevertheless, the Supreme Court took the pain, in *Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi*, , to clarify and restate the position of law by saying that where food is supplied in an eating-house or restaurant and it is established, upon the facts, that the substance of the transaction, evidenced by its dominant object, is a sale of food and rendering of service is merely incidental, the transaction would be exigible to sales tax. [see paras 9 See at page 217 of [1980] 45 STC and 12 See at page 218 of [1980] 45 STC of *Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi*, .

34. I may, now, turn to *Lakshmi Kant Pandey v. Union of India and Anr.*, (2001) 9 SCC 379 . The background of the case of *Lakshmi Kant Pandey v. Union of India and Anr.*, (2001) 9 SCC 379 is that a writ petition was taken up by the apex court on the basis of a letter addressed by a person complaining of malpractices

indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. As the apex court found that there was no legislation laying down the principles and norms, which must be adhered to, in giving an Indian child in adoption to foreign parents, the apex court passed certain directions. However, subsequent to the issuance of the directions by the apex court on this subject, some social and child welfare agencies, engaged in the placement of children in inter-country adoption, felt that there were certain difficulties in implementing the principles and norms laid down by the apex court and accordingly, applications were made by some of such agencies seeking clarification as well as alteration in the principle and norms, which had been laid down by the apex court in this regard. The apex court, in *Lakshmi Kant Pandey v. Union of India and Anr.*, (2001) 9 SCC 379, clarified the norms and procedures, which it had laid down earlier on the subject-matter of inter-country adoption. From the decision in *Lakshmi Kant Pandey v. Union of India and Anr.*, (2001) 9 SCC 379 too, one can easily gather that in a given case, when a court's decision or direction has been misunderstood by the parties or have created difficulties in carrying out or implementing the directions, the court owes a duty to clarify its decision or order, as the case may be.

35. *M.C. Mehta and another (II) Vs. Union of India and others*, , is yet another case, wherein the Supreme Court had, while declining to modify the conditions, which it had imposed by its earlier directions, had, nevertheless, clarified as to how the directions given by it earlier shall be carried out. The relevant observations, made in this regard, read:

...We do not therefore propose to modify this part of the condition imposed by us. We may, however, make it clear that at least two out of the three representatives who are appointed on the committee of workmen by each union should be workmen who have experience of working in the caustic chlorine plant. We must also clarify, in agreement with the management, that the workmen who are members of the committee of workmen should not leave their duty for going on inspection without giving prior intimation to the officer in-charge and they should give at least half an hour's notice to the officer in-charge so that the essential functions which they are discharging are not disturbed....

36. Indeed, *Jharieswar Prasad Paul and Another Vs. Tarak Nath Ganguly and Others*, , in one such case, wherein the Supreme Court has pointed out that when a judgment or order does not contain any specific direction regarding a particular matter or if there is any ambiguity in the directions issued in a case by a court, appropriate it is for the parties to approach the court, which had disposed of the matter, for clarification of the order. The observations, made in this regard, which appear at para 11, read:

...If the judgment or order does not contain any specific direction regarding a matter or if there is any ambiguity in the directions issued therein then it will be better to direct the parties to approach the court which disposed of the matter for clarification of the order instead of the court exercising contempt jurisdiction

taking upon itself the power to decide the original proceeding in a manner not dealt with by the court passing the judgment or order....

37 The law, on the subject of review, can, in the light of the discussions held, as a whole, may be summarised thus : Ordinarily, a court or a Tribunal cannot review its order or decision if the statute does not confer on the court or the Tribunal, as the case may be, the power to review its own order. This apart, whatever limitations are imposed by a statute, while conferring the power of review on a court or a Tribunal, the court or the Tribunal, as the case may be, must adhere to the limitations, which the relevant statute may impose on the exercise of such power. Section 114 CPC, which embodies the substantive power of review of a civil court does not impose any limitations on the court's power to review its order or decision, yet the power of review even by a civil court cannot be unguided and uncanalised, for, Order 47, Rule 1 circumscribes the court's power of review. Though, at one point of time, it was considered to be a rule of universal application that review by a court of its order is not possible except on two prescribed grounds, namely, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the decree or order was passed and (ii) mistake or error apparent on the face of the record or any such sufficient ground, which is analogous to the two grounds aforementioned, the subsequent development of law, on the subject of review, has shown that this rule is no longer a rule of universal application. One of the cases, which has helped in the expansion of the court's power to review its order is the case of Lily Thomas, Vs. Union of India and Others, inasmuch as Lily Thomas, Vs. Union of India and Others, ruled that ordinarily, the power of review, being a creature of statute, cannot be exercised as an inherent power, yet such technicalities of law may have to be bent, in an appropriate cases, for the purpose of correcting an order committed by the court if such an error arises out of a presumption of fact, which was nonexistent, and when the court finds that its refusal to review its own error would cause, or has caused, grave miscarriage of justice. It is essentially the principle behind the doctrine of "actus curiae neminem gravabit", which has made the court hold, in Municipal Board, Pratabgarh and Another Vs. Mahendra Singh Chawla and Others, , that when a court corrects and rectifies an error, it restores the rule of law and not defeat it. Even Rajesh D. Darbar and Others Vs. Narasingrao Krishnaji Kulkarni and Others, recognises that in an exceptional case, a court may have to review its order by invoking the doctrine of "actus curiae neminem gravabit". It is in the backdrop of these developments of law that Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, has laid down various circumstances in which the power of review can be exercised by the High Court as a court of plenary jurisdiction. In the light of the decision, in Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, , an application for review would be maintainable if "sufficient reasons" exist therefor. What, in a given case, shall constitute "sufficient reason" would be a question of fact and would, therefore,

depend on the facts and circumstances of a given case. The words "sufficient reason", which appear in Order 47, Rule 1, are wide enough to include misconception of fact or law by a court and that even when a mistake of fact or law has crept into a judicial decision due to court's misunderstanding of the nature of an undertaking given by an advocate, an application for review may be necessary and by invoking the doctrine of "*actus curiae neminem gravabit*", the court can, indeed, correct such an error. Hence, when, as a result of misunderstanding of fact or law by a court, a mistake has crept in a decision and the court finds that the error is apparent on the face of the record and/or that the error has caused miscarriage of justice or would cause, unless corrected, miscarriage of justice, such an error can, and must, be corrected by exercising the power of review and, for this purpose, the doctrine of "*actus curiae neminem gravabit*" can also be invoked. A mistake, on the part of the court, would include, according to the decision in Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, , a mistake in the nature of the undertaking, which may have been given by a counsel meaning thereby that when a counsel, on a mistaken belief or on an erroneous or incorrect instruction, makes a statement and the court acts on such a statement, but, on a review application having been subsequently filed, the court finds that it had misunderstood the counsel's submission or had got misled by a counsel's submission or when the court finds that it (court) had proceeded on an assumption of fact, which did not really exist, or when it (court) finds that it had misinterpreted a provision of law or had acted on a misconception of law and that the error, so crept in, was, as a result of subsequent event or otherwise, apparent on the face of the record, and that such error had caused, or would cause, miscarriage of justice, such a reason would be a "sufficient reason" calling for exercise of the power of review.

38. Coupled with the above, when a court finds that its decision or order has confounded the parties concerned and has been causing, or has caused, impediments in effective execution or implementation of its directions or in understanding the directions correctly, it is within the ambit of the powers of the court to clarify its order even if the court chooses not to review the order, which it has passed. To put it a little differently, even when a court declines to review its decision or order, it can, nevertheless, clarify its order so as to remove ambiguity with which its order may have been suffering from or with a view to removing doubt or confusion, which the order may have created in the minds of the parties concerned.

39. Bearing in mind the parameters of the High Court's power of review jurisdiction, let me, now, determine as to what rectification, in the present case, the review petitioners are really seeking and what are the grounds on which review has been sought for.

40. The above questions, naturally, take me to the review petitioners' earlier writ petition, namely, W.P. (C) No. 1050 of 2008 Reported as Dhanani Shoes Ltd. v. State of Assam AIR[2008] VST 422 (Gauhati), wherein the review petitioners (as

writ petitioners) had challenged, inter alia, seizure of the goods on the ground that the seizure was without the authority of law and, hence, without jurisdiction.

41. For the purpose of resolving the controversy, it is necessary to take note of the seizure list, in question, so far as the same relates to the "grounds of seizure" and the "list of seized goods". The seizure list is, therefore, reproduced hereinbelow:

Seizure List

In exercise of power conferred upon me u/s 74(5)(a) of the AVAT Act, 2003, I Sri D. Khersa, Inspector of Taxes, Guwahati Unit-B, do hereby seize the following goods found at the godown of Dhanani Shoes Ltd., at Amtola Dhirenpara, Guwahati, from the possession of Sri Abdul Kuddus, S/o. Lt. Sher Ali, Godown in-charge of Dhanani Shoes Ltd., on today the February 6, 2008 at 4 p. m. on the grounds stated below in presence of witnesses:

Grounds of seizure.?Stock of goods was found not matching with the invoices produced. Goods taxable at the higher rate are found shown as taxable at the lower rate of taxes and thereby causing evasion of taxes payable under the AVAT Act of 2003.

List of goods seized.?Stock of goods found in the stock register which are shown as four per cent taxable.

Instead of, now, considering a new as to what the rival submissions of 42 the parties on the question of seizure of the goods, in the said writ petition, were, it would be more appropriate to reproduce the relevant parts of the decision (rendered on April 11, 2008, in W.P.(C). No. 1050 of 2008 Reported as Dhanani Shoes Ltd. and Another Vs. State of Assam and Others, which deal with the rival submissions made on behalf of the parties concerned, how this Court had dealt with the questions raised and why this Court had, eventually, reached the conclusion that the seizure of the goods, in question, was not in violation of the relevant provisions of law. With these objectives in view, let me, first, point out as to what the rival submissions, on the question of the seizure of goods, were. The relevant submissions, on this aspect of the writ petitioner's case, as appear at para 8 of the decision, under review, are reproduced hereinbelow:

8. Assailing the seizure of the goods, Mr. Goswami has contended that under Sub-section (5)(a)(ii) of Section 74, the power of seizure is exercisable only when the authority concerned has reason to believe that though the goods belong to the dealer, the same have not been accounted for by the dealer in his accounts or registers or other documents maintained in the ordinary course of his business. In the present case, submits Mr. Goswami, a careful reading of the relevant seizure list does not show that the goods, found lying in the godown of the petitioners, had not been accounted for. Thus, the condition precedent, according to Mr. Goswami, for invoking the provisions of Sub-section (5)(a)(ii) of Section 74 did not exist in the present case and, hence, in such circumstances, the

exercise of power of seizure of the goods, in question, was without the authority of law and needs to be regarded as arbitrary and without jurisdiction.

43. Responding to the above aspect of the writ petitioners' case, the submissions made, on behalf of the respondents, as regards the seizure of the goods, were recorded at para 11 of the decision, which read as follows:

11. Regarding the seizure of the books of account, registers, etc., and the seizure of goods, Mr. Saikia submits that the petitioner-company has been deliberately misclassifying the leather goods as plastic goods and thereby making payment of sales tax at the rate of four per cent, whereas the tax liable to be paid, in the case of leather goods, is as much as 12 per cent. Thus, on the basis of reliable information received by respondent No. 4 that the petitioner had been evading payment of value added tax by resorting to misclassification of goods, when respondent No. 4 inspected the petitioner-company's business premises, goods and also documents as well as registers lying there, he cannot be said to have committed any wrong and, on noticing anomalies, when he made the seizure of the books of account, etc., he may be held to be wholly justified. As far as seizure of the goods is concerned, Mr. Saikia submits that the seizure list, made in this regard, clearly shows that the reason for seizure was that the stock of goods did not tally with the invoices; hence, in such circumstances, contends Mr. Saikia, the goods, in question, cannot be said to have been accounted for. In a case of the present nature, exercise of power u/s 74(5) was, according to Mr. Saikia, justified and may not, therefore, be interfered with.

44. Reacting to the submissions made on behalf of the respondents that the seizure had been made, because of the fact that the stock of goods did not tally with the invoices produced, Mr. Goswami's submission, as noted in para 12, reads as under:

12. Repelling the above submissions made on behalf of the respondents, Mr. Goswami has contended that if the petitioner-company has sold any goods and has not paid requisite tax, the remedy lies not in making seizure u/s 74 of the Act; rather, the remedy, in such a case, according to Mr. Goswami, lies in taking resort to Section 40 of the Act, which makes provisions for realisation of escaped assessment. As far as the goods, in the present case, are concerned, Mr. Goswami submits that there is nothing, in the seizure list, to show that the goods had not been accounted for; rather, seizure has taken place, according to Mr. Goswami, on account of the fact that the goods were misclassified. It is further pointed out by Mr. Goswami that the seizure list clearly shows that the goods, found lying in the godown of the petitioner-company, were duly accounted for in the stock register and, hence, in such circumstances, if the stock register has been maintained by misclassifying the goods, i.e., the goods, which were of leather, have been shown as plastic goods, it would become a case of escaped assessment. Consequently, the power of seizure, u/s 74(5), in such a case, according to Mr. Goswami, could not have been exercised, for, the condition precedent for exercise of such power, u/s 74(5), is that the goods have not been

accounted for.

45. From a careful reading of what have been reproduced above, it becomes more than transparent that it was the specific case of the review petitioners, in their earlier writ petition, that the goods had not been seized on the ground that the seized goods "had not been accounted for" inasmuch as according to the petitioners, entries, with regard to the goods, were, even according to the seizure list, did exist in the stock register, though the entries were allegedly made by misclassifying the goods in the sense that the goods, which are taxable at a higher rate, were shown taxable at a lower rate in the stock register. The further case of the writ petitioners was that contrary to the requirements of Section 74(5)(a)(ii), the seizure of the goods, in question, had been made not because of non-existence of any entries in the books of account, stock register or any register or documents, but due to the fact that the stock register reflected that the petitioners had been maintaining the stock register by misclassifying the goods, i.e., the goods, which were of leather, had been shown as plastic goods. In these circumstances, according to Mr. Goswami, as contended in the writ petition, the case against the writ petitioners was, at best, a case of "escaped assessment" and, hence, in such circumstances, the seizure of the goods, in exercise of powers u/s 74(5)(a)(ii), was illegal, for, seizure of the goods was possible only when the goods had not been accounted for; whereas, the seizure list shows, according to Mr. Goswami, that entries with regard to the goods did exist in the stock register though such entries suffered, according to the respondents, from misclassification of goods. How the respondents dealt with the submissions so made by the petitioners, in the writ petition, is quite interesting to note and is of great importance.

46. From the submissions as noted at para 11 of the decision, under review, it becomes clear that the respondents sought to sustain the seizure of the goods on the ground that "stock of goods did not tally with the invoices produced" and since the goods were found to have not been tallying with the invoices, the goods, in question, could not have been regarded as having been accounted for and that in such circumstances, exercise of power u/s 74(5)(a)(ii) was justified. Notwithstanding the fact the grounds of seizure reflected that seizure was also due to the alleged misclassification of goods, this was not a ground, which was ever pressed into service by the respondents in the writ petition ; rather, they abandoned or, at least, avoided seeking to assert that the seizure of the goods was on account of misclassification of goods ; significantly, if I may reiterate, what the respondents sought to contend, for the purpose of sustaining the seizure of the goods, was that seizure had taken place due to the fact that the goods did not tally with the invoices produced meaning thereby that since the goods were not found to have been tallying with the invoices produced, there was no entry in existence with regard to those goods, which were seized, and, hence, the goods, so seized, cannot be said to have been accounted for.

47. Thus, the submissions, noted above, clearly reflect that the specific case of

the respondents, as set up in the writ petition, was that the goods had been seized, because of the fact that the "seized goods did not tally with the invoices produced". It was never, I may repeat, never the case of the respondents, in the writ petition, that the goods had been seized on both the grounds, namely, that (i) the stock of the goods did not tally with the invoices produced and also that (ii) the goods were misclassified ; rather, the sole and lone ground for seeking to sustain the seizure (as had been submitted, before this Court, on behalf of the respondents), was that the goods had been seized, because of the fact that "the seized goods did not tally with the invoices produced".

48. With regard to the above aspect of the case, a deeper look into the written submissions, which had been filed on behalf of the State of Assam in the earlier writ petition, would be extremely helpful. The written submissions, on the aspect of the seizure of the goods, read as under:

(ii) The impugned order dated December 6, 2008 for seizing the goods is also absolutely legal and valid as it was given in exercise of power u/s 74(5)(a). Although the writ petitioner has been trying to make out the case for seizure was not valid and no goods were seized which was not accounted in its account, however, from the ground of seizure it clearly mentions inter alia that (i) the stock of goods have found not matching with the invoice provided.

This sole ground of seizure itself makes it a sufficient ground under the section for seizure of goods as it is very clearly reflected that the goods were not properly accounted vis-a-vis the invoice produced.

49. Thus, what the respondents' written submissions too reflect is that at no stage of hearing of the writ petition, it had been contended, on behalf of the respondents, that misclassification of goods was one of the grounds on which the seizure of the goods was sustainable. Far from this, the respondents had sought to sustain the seizure by contending that the grounds of seizure clearly mention, inter alia, that the stock of goods did not match with the invoices produced and that this sole ground of seizure is sufficient to sustain the seizure. It was not even faintly indicated or alleged, at any point of time, during the course of hearing of the writ petition, on behalf of the respondents, either orally or in their written statement, that the seizure of the goods was sustainable, or must be sustained, on the ground that there was misclassification of goods in the sense that the goods, which are taxable at higher rate, were shown taxable at a lower rate.

50. In the light of the rival submissions, made before this Court, as the same appear in the court's earlier decision Reported as Dhanani Shoes Ltd. and Another Vs. State of Assam and Others, under review, at paras 8, 11 and 12, regarding how this Court and why this Court had come to take the view that the seizure of goods cannot be interfered with, this Court's observations, made at paras 15, 16, 39, 40 and 41, are relevant and, therefore, reproduced hereinbelow:

15. A conjoint reading of Section 40 and Section 74, particularly, Sub-section (3) thereof, makes it clear that seizure of the accounts, registers, etc., is permissible if the prescribed authority has reasons to believe that the dealer has evaded or is attempting to evade payment of any tax due from him and/or he is keeping or has kept his accounts in such a manner as is likely to cause evasion of tax payable under the Act. What Section 40 does is that it empowers the prescribed authority to make assessment of the tax, which has escaped assessment or has been under-assessed or has been assessed at a rate lower than the rate at which it is assessable or a deduction has been wrongly allowed or any credit has been wrongly permitted. For the purpose of making the assessment of the income, which has escaped assessment, the prescribed authority may, after giving the dealer a reasonable opportunity of being heard and after making such enquiries as he may consider necessary, proceed to assess, to the best of his judgment, the amount of tax due from the dealer in respect of such turnover. The power vested in an authority, u/s 74(3)(a), is really an enabling provision for the prescribed authority to collect materials for the purpose of determining if any income of the dealer has escaped assessment in any manner whatsoever. It cannot, therefore, be said that exercise of power of seizure of the accounts, registers, etc., is not possible for the purpose of ascertaining the income, which has escaped assessment.

16. However, Sub-section (5)(a)(ii) of Section 74, which relates to seizure of goods, is quite different in nature and scope, because under Sub-section (5)(a)(ii), seizure of goods is permissible only when the authority concerned has reason to believe that the goods, found lying in the place of business, belong to the dealer, but have not been accounted for by the dealer in his accounts or registers or other documents maintained in the ordinary course of his business. If this condition precedent is not satisfied, seizure of goods would be wholly without authority. Thus, the jurisdiction to make seizure of goods is acquired only when the goods have not been accounted for....

39. Turning to the seizure of goods, it needs to be noted that the grounds of seizure, as regard the goods, read as under:

Stock of goods were found not matching with the invoice produced. Goods taxable at the higher rate are found shown as taxable at the lower rate of taxes and thereby causing evasion of taxes payable under the AVAT Act, 2003.

40. From a bare reading of the grounds of seizure of goods, as mentioned above, it becomes transparent that the stocks of goods were allegedly found to be not matching with the invoices produced. The allegations, so made against the petitioner-company, may or may not be true, but this Court, in the present proceeding, has to proceed on the assumption that the allegations are true and, upon such assumption, examine and test if the grounds, assigned for the seizure of the stock, are sustainable in law. Viewed in this light, it becomes clear that when the goods, lying in the godown of the petitioner-company, were allegedly found not tallying with the invoices produced by the petitioners' representative,

it cannot be said that "the goods had been accounted for by the petitioner-company" in their books of account, registers, etc. In such circumstances, if I may reiterate, the goods, in question, cannot be said to have been accounted for in terms of Section 74(5)(a)(ii).

41. Thus, the conditions precedent for exercise of power u/s 74(5)(a)(ii) did exist in the present case and, in such circumstances, such seizure, in question, cannot be said to be without jurisdiction or without the authority of law. I may also point out that the grounds of seizure, as far as goods are concerned, are divided into two parts. While the first part reads, "stock of goods was found not matching with the invoice produced", the second part states, "goods taxable at the higher rate are found shown as taxable at the lower rate of taxes and thereby causing evasion of taxes payable under the AVAT Act, 2003". In short, the grounds of seizure of the goods, in question, show that according to what respondent No. 4 had found, the goods did not tally with the invoices produced. In such circumstances, the goods, in question, cannot be said to be accounted for by the petitioner-company. The exercise of power, u/s 74(5)(a)(ii) by respondent No. 4, in such a case, cannot be said to be illegal or without foundation.

51. There can be no doubt from the emphasised portions of the observations made in paras 15, 16, 39, 40 and 41 of this Court's decision, which is under review, that the sole basis for this Court upholding the seizure of the goods was that the goods were found to have not been tallying with the invoices produced, for, the legal inference, in such a situation, was, according to this Court, that no entry had existed with regard to the seized goods in any of the books of account, registers or documents and, consequently, such absence of entry would be construed, within the meaning of Section 74(5)(a)(ii), as a case of the goods having not been accounted for. The seizure of the goods, in question, I must hasten to add, was not sustained in the decision, under review, because of the alleged misclassification of the goods, for, this was not a ground, which was pressed into service by the respondents.

52. Bearing in mind what is indicated above, let me, now, come to the ultimate directions, which were passed by this Court in its decision, under review, and the reasons therefor. On this aspect of the case, the relevant observations made, and the directions issued, appearing at paras 45 and 46 of the decision, under review, are reproduced hereinbelow:

45. In the present case, the seizure was, admittedly, made on February 6, 2008. A period of more than two months has already elapsed since then. It is also the respondents' case that they have been carrying on a process of verification for the purpose of determining as to what, if any, income of the petitioner-company has escaped assessment due to either incorrect accounting of the goods or due to incorrect maintenance of the account books. In either case, therefore, verification process or the enquiry, which was initiated, needs to be brought to an expeditious end, for, this process of verification or enquiry cannot be kept indefinitely pending. Ends of justice, therefore, demand that appropriate

directions be issued to the respondents to deal with the matter in such a manner as would uphold the legislative intent embodied in Section 74(5).

46. With the above object in view, the respondents are hereby directed to complete, if they have not already completed, the process of verification or enquiry, within a period of one week from today, and, upon completion of such verification or enquiry, respondents shall permit the petitioner to obtain release of the seized goods in terms of the provisions contained in Section 74(5) and other provisions relevant thereto or connected therewith.

53. Following the directions, given in the decision, dated April 11, 2008¹, the presently impugned notice, dated April 16, 2008, was issued by the Inspector of Taxes, Unit-B, Guwahati. This notice reads as under:

Government of Assam Office of The Assistant Commissioner of Taxes: Unit-B :
Guwahati To, M/s. Dhanani Shoes Ltd., Amtola, Dhirenpara Guwahati-25

Sub : Notice of show-cause u/s 74(5)(b) of the Assam Value Added Tax Act, 2003.

Ref : 1. Seizure list dated February 6, 2008.

2. Honourable Guwahati High Court judgment and order dated April 11, 2008 passed in Writ Petition (Civil) No. 1050 of 2008 Dhanani Shoes Ltd. and Another Vs. State of Assam and Others,

Whereas consequent upon an enquiry in your godown-cum-business premises on February 6, 2008 some consignment of taxable goods were seized vide seizure list dated February 6, 2008 due to failure on your part to show evidence in respect of proper accounting of goods.

Whereas subsequent verification of the documents produced by you in support of the seized goods revealed that they were not properly accounted for in your regular books of account. Showing misclassification of goods, which is taxable at 12.5 per cent, as taxable at four per cent for the year 2007-08, and further verification revealed that you have charged lower rate of tax four per cent on goods which are actually taxable at 12.5 per cent and thereby evaded tax calculated as under:

Whereas on verification, value of the goods so seized which amounted to Rs. 78,02,241 found taxable at 12.5 per cent, tax involvement thereof is Rs. 97,75,280.

Whereas you have shown the seized goods taxable at four per cent which involved tax of Rs. 31,28,090.

Thus you have knowingly prepared and produced incorrect accounts, registers and documents and knowingly furnished incorrect information. Also wilfully evaded and attempted to evade tax leviable under this Act of tax to the tune of Rs. 66,47,190 which is arrived at by deducting Rs. 31,28,090 from Rs. 97,75,280.

The acts of contravention of the provision of the Act are as such quite intentional, and deserved penal action as per law.

I, therefore, propose to impose penalty at the rate of three times on the tax evaded of Rs. 66,47,190 which comes to Rs. 1,99,41,570. Before passing final order in this regard you are, therefore, called upon to show satisfactory cause in writing as to why action contemplated above should not be taken against you.

Your reply to the notice should reach undersigned within May 15, 2008.

In issuing this notice judgment and order dated April 11, 2008 of the honourable Gauhati High Court in Writ Petition (Civil) No. 1050 of 2008 Dhanani Shoes Ltd. and Another Vs. State of Assam and Others, was taken into consideration.

Sd/- Inspector of Taxes, Unit-B, Guwahati.

54. Having been served with the impugned notice dated April 16, 2008, aforementioned, the present review petitioners, as already pointed out above, have sought for review of the conclusion reached by this Court, particularly, in para 41 of the decision, to the effect that the exercise of power of seizure of the goods, u/s 74(5)(a)(ii), by respondent No. 2, cannot be said to be illegal or without foundation. What is being pointed out, in order to seek review of the conclusion so reached, is that this conclusion has been reached on a specific submission, which had been made, orally as well as in writing, on behalf of the respondents, by Mr. Saikia, learned Counsel, appearing on behalf of the respondents, during the course of hearing of the writ petition, that the seizure, in question, had been made, because of the reason that the goods, which stood seized, were found to have not tallied with the invoices produced by or on behalf of the petitioners ; whereas the submissions, which had been so made on behalf of the respondents, particularly, in their written submission, in the writ petition, have, now, proved to be completely hollow and wholly untrue and incorrect inasmuch as the respondents, in the presently impugned notice, dated April 16, 2008, have dropped the ground of the goods having not tallied with the invoices produced as the ground for seizure of the goods and, instead thereof, what the respondents, now, contend, in the impugned notice, dated April 16, 2008, is that the verification, which they had conducted, before and that after the directions given by this Court, in the writ petition, reveal that the seized goods had not been properly accounted for in the regular books of account inasmuch as the books of account allegedly show misclassification of goods, for, the goods, which are taxable at 12.5 per cent, were shown as taxable at four per cent for the year 2007-08 and that the petitioners had accordingly charged lower rate of tax on goods, which were actually taxable at 12.5 per cent, and thereby evaded tax. On these considerations, the respondents, according to the impugned notice, seek to impose penalty at the rate of three times the tax, which the writ petitioners have allegedly evaded to pay.

55. In other words, review of the decision, in question, is sought on the ground that in the writ proceeding, when the attention of this Court was specifically

drawn, by the writ petitioners, to the seizure list, in question, to show that seizure of the goods had been made due to the alleged misclassification of goods, which could not have been a valid reason for making the seizure u/s 74(5) (a)(ii) of the Act, the respondents sought to sustain the seizure, in the writ petition, by contending that since the seized goods were not tallying with the invoices produced, implication was that no entry had been made, with regard to the seized goods, in any of the registers, documents, etc., however, the ground that "the seized goods were found to have not been tallying with the invoices produced" has, now, been abandoned as is reflected by the impugned notice, dated April 16, 2008, for, the impugned show-cause notice, nowhere, states that entries in respect of the seized goods had not been made in the books of account, registers or documents maintained by the petitioners and/or that the seized goods had not tallied with the invoices produced. This subsequent event, according to the review petitioners, proves correctness of the case, which the writ petitioners had, originally, set up, in their writ petition, by contending that the seizure of the goods was illegal, because the same had been made due to misclassification of goods and not due to the omission to make any entry in any books of account, register or documents.

56. Thus, it is, now, contended, on behalf of the review petitioners, that this Court's conclusion (reached at para 41 of its decision, which is under review), that the seizure of the goods was legal, has been proved to be factually incorrect in the light of the subsequent development, i.e., the impugned notice, dated April 16, 2008, and this incorrect conclusion is apparent on the face of the record, such incorrect conclusion having been reached due to an incorrect submission made by Mr. Saikia, learned Counsel, appearing on behalf of the respondents, and such incorrect submissions had, perhaps, been made due to false assertions made in the seizure list, in question, that the seized goods were found to have not been tallying with the invoices produced. Even otherwise also, points out the review petitioners, the seizure list clearly showed that the goods, which came to be seized, were found to have been entered, in the stock register, as goods taxable at four per cent; hence, when the stock of goods was found to have been entered in the stock register, the question of the goods having not been entered into in any register or documents, etc., and thereby the goods not having been accounted for did not arise at all; but this aspect of the matter, according to the review petitioners, had escaped notice of this Court, when it pronounced its decision, in the writ petition, on April 11, 2008 Reported as Dhanani Shoes Ltd. and Another Vs. State of Assam and Others,

57. It is, now, time to note that the impugned notice, dated April 16, 2008, is indeed, silent and gives not even the faintest of indication that penalty is sought to be realised from the petitioners on the ground that the seized goods were found to have not been tallying with the invoices produced ; there is, in fact, not even an iota of assertion or material, in the impugned notice, dated April 16, 2008, which can reflect that the seizure is sought to be sustained on the ground that the seized goods were found to have not been tallying with the invoices

produced. Far from this, the lone ground, on the basis of which penalty is sought to be realised, is that the petitioners have allegedly shown, in their books of account, the seized goods as taxable at four per cent and not at 12.5 per cent.

58. Thus, the very foundation of the decision, which this Court had reached in the writ proceeding, on April 11, 2008 Reported as Dhanani Shoes Ltd. and Another Vs. State of Assam and Others, stands not only vigorously shaken, but completely withdrawn. As a result of the removal of the basis of the decision reached on April 11, 2008 Reported as Dhanani Shoes Ltd. and Another Vs. State of Assam and Others, it becomes crystal clear that unless this Court can point out anything else, the earlier decision rendered by this Court, on April 11, 2008 Reported as Dhanani Shoes Ltd. and Another Vs. State of Assam and Others, with regard to the seizure of goods, must, now, be held, by this Court itself, to be incorrect, this incorrectness being apparent on the face of the record. Hence, even if the review petition is not allowed, it is within the ambit of the powers of this Court and is, indeed, its duty, in the facts and circumstances of the present case, that it (this court), in the interest of justice, clarifies that the seizure, in question, had been upheld, in its earlier decision, in W.P. (C) No. 1050 of 2008 Reported as Dhanani Shoes Ltd. and Another Vs. State of Assam and Others, on the sole ground that seizure was shown to have been made, because the stock of goods were found to have not been matching with the invoices produced. This court also owes a duty to the parties concerned to clarify that the seizure of the goods had definitely not been sought to be sustained by the respondents, during the course of hearing of the said writ petition, on the ground that the goods, which are taxable at a higher rate, had been shown taxable at a lower rate and, furthermore, this Court, ought to have clarified and must, now, clarify, and, indeed, clarifies that this Court had never upheld the seizure, in question, on the ground of alleged misclassification of the goods by the petitioners in the sense that the goods, which are taxable at a higher rate, had been allegedly shown taxable, at a lower rate, by the writ petitioners.

59. Having realised that the basis of the conclusion reached, in the writ petition, as regards the validity of the seizure of the goods, has disappeared, it is, now, sought to be contended, on behalf of the respondents, that the seizure of the goods were made not merely because of the fact that the seized goods did not tally with the invoices produced, but also on the ground that the books of account and the other relevant documents reflected that the leather goods, which are taxable at 12.5 per cent, were shown as plastic goods taxable at four per cent and that this misclassification of the goods was one of the grounds for sustaining the seizure of the goods. In order to strengthen this submission, it is, now, argued, on behalf of the respondents, that since Section 74(5)(a)(ii) states that seizure can be made, when the goods are not accounted for, what this provision really means is that the goods have not been "duly" accounted for inasmuch as a mere entry, in the stock register or in any other register or document, would, according to the respondents, not be enough unless and until it is also shown that the entries so made, are factually and legally valid. It is the

correctness of this submission, which is, now, required to be tested and determined.

60. In view of the above submissions, made on behalf of the respondents, that the expression, "not accounted for", appearing in Section 74(5)(a)(ii) of the Act, implies "duly accounted for", "properly accounted for", or "validly accounted for", the question, which one is really required to determine is as to what, in reality and in law, the expression, "not accounted for", appearing in Section 74(5)(a)(ii) means and conveys. There can be no doubt, as rightly contended by Dr. Saraf, that Section 74(5)(a)(ii) cannot be read wholly independent of, or completely divorced from, Section 74(5)(b) and also, if necessary, Section 74(5)(c). In order to, therefore, correctly understand the meaning and import of the provisions, contained in Clauses (a), (b) and (c) of Sub-section (5) of Section 74, the contents of the provisions, embodied therein, need to be carefully taken note of. Section 74(5)(a), (b) and (c) read as under:

Section 74(5)(a). The authority referred to in Sub-section (1), shall have the power to seize any goods,--

(i) which are found in a dealer's place of business or vehicle ; or

(ii) which, such authority has reason to believe to belong to the dealer and which are found in any place of business or vehicle or any other building or place ;

but are not accounted for by the dealer in his accounts or registers or other documents maintained in the ordinary course of his business:

Provided that a list of all the goods seized under this sub-section shall be prepared by such officer and be signed by the officer and not less than two witnesses.

(b) The authority referred to in Clause (a) shall, as soon as possible, after seizure of the goods under Clause (a), serve upon the dealer, a notice to show-cause within a period of thirty days of service of such notice as to why a penalty equal to three times of the amount of tax as may be calculated on the price which such goods would have fetched on their assumed sale in the State, on the date of seizure, be not imposed on him for the dealer's default in not making entries in respect of such goods in his books of account or registers or other documents, as the case may be, maintained by him in the course of his business.

(c) The authority seizing the goods shall record the statement, if any, given by the owner of the goods or his representative. If the authority referred to in Clause (a), after taking into consideration the explanation of the dealer and after giving him a reasonable opportunity of being heard, is satisfied that the entries relating to the said goods were not made in the books of account, registers or other documents of the dealer without any proper justification, such authority shall, pass an order imposing penalty mentioned in Clause (b) and direct him to deposit, in addition to the penalty, advance tax calculated on the deemed sale value of the goods at applicable rate of tax on sales of such goods which shall be

adjustable with the liability to tax incurred on the purchase or the sale of such goods or the sale of goods manufactured therefrom and in case he finds otherwise, he shall order release of the goods.

61. Clause (a) of Sub-section (5) of Section 74 empowers the authority to seize any goods found in possession of a dealer, which "are not accounted for" by the dealer in his books of account or registers or other documents maintained in the ordinary course of business.

62. Clause (b) of Sub-section (5) of Section 74 empowers the seizing authority to issue a notice to the dealer to show-cause as to why penalty (equal to three times of the amount of tax as may be calculated on the price, which such goods would have fetched on their assumed sale in the State), shall not be imposed on the dealer "for his default in not making the entries in respect of such goods in his books of account or registers or other documents, as the case may be, maintained by him in the ordinary course of business".

63. Clause (c) of Sub-section (5) of Section 74 empowers the seizing authority to record statement, if any, which the owner of the goods or his representative may offer to make, and, then, if the seizing authority, on taking into account the explanation of the dealer and after giving him a reasonable opportunity of being heard, is satisfied that "the entries, relating to the said goods, were not made in the books of account, registers or other documents of the dealer without any proper justification", such authority shall pass an order imposing penalty mentioned in Clause (b) of Sub-section (5) of Section 74. If, however, the authority finds that the explanation of the dealer, for not making entry relating to the goods in the books of account, registers or other documents, is satisfactory, appropriate order, releasing the goods, shall be passed by the seizing authority.

64. What a combined, but cautious reading of Clauses (a), (b) and (c) of Sub-section (5) of Section 74 shows is that a notice, as envisaged in Clause (b), would require a dealer to show-cause as to why penalty shall not be imposed for his default in not making entries, in respect of the goods seized, in his books of account or registers or other documents maintained by him in the ordinary course of his business. Clause (c) shows that if the dealer fails to give any justification for his default in not making entries, he would be penalised. The provisions, so contained in Clauses (b) and (c), when read together, clearly convey that penalty is imposable only when no entry has been made in respect of the seized goods in the books of account, register or other documents maintained by the dealer in the ordinary course of his business, and his failure to offer any proper justification for not making the entries.

65. It is, thus, seen that it is not making of any entry whatsoever, as envisaged in Clauses (b) and (c), which would warrant imposition of penalty. This, in turn, shows that when Clause (a) uses expression "not accounted for", it would mean "complete absence of entry in the books of account or register or documents maintained by the dealer in his ordinary course of his business", and not

"proper", due or valid entry in the books of account or register or documents maintained by the dealer in his ordinary course of his business. The effect of such construction of Clauses (a), (b) and (c) is that if entry can be related to seized goods, seizure of the goods is impermissible. Hence, when a dealer reflects, in his books of account, register or documents, a particular item as taxable, at a rate lower than what is ought to be, seizure of such goods is not possible, for, the goods can be traced with the help of the entries so made. It is only when the goods are not traceable to any of the entries, which may have been made in the books of account, register or documents that seizure of such a goods is possible. Thus, it is complete absence of any entry in respect of the goods, sought to be seized, which can become the foundation for seizure of goods.

66. Since the words "books of account, registers or other documents" have been mentioned in Section 74(5), the alternative by use of the word "or", it implies that entries made in any one of the three documents, i.e., the books of account or registers or other documents, maintained in the ordinary course of business, would be sufficient compliance of the provisions of Section 74(5). I am guided to adopt the view from the decision in *Surat Kumar v. State of Haryana*, AIR 1996 SC 1047, wherein, while dealing with a situation, where the documents were mentioned, in the alternative, in the relevant statute, the apex court held as under:

It is obvious from a reading of the sub-section that the sub-section refers to two sets of documents. The first set of documents are goods-carrier record, trip sheet and log book. They are mentioned in the alternatives which means that production of any one of these three documents would be enough. The sub-section proceeds further and says that any of the said three documents should be produced "along with a challan as may be prescribed or cash memorandum or bill as the case may be". These three documents, viz., challan, cash memorandum and bill may be called second set of documents. These three documents are again mentioned in the alternative, which means that any one of these three documents can be produced. In short, one of the documents from the first set and one of the documents from the second set have to be produced and that would be a sufficient compliance with the requirements of Sub-section (2)....

67. What logically follows from the above discussion is that if the entries are found to have been made (in respect of the seized goods) by the dealer in his books of account, registers or other documents (as the case may be), maintained by him in the ordinary course of business, the seizing authority shall release the goods by making appropriate order. It is, thus, complete omission to make entry, which can become the ground for seizure of the goods. In other words, only those goods can be seized in respect whereof, no entry has been made. Thus, it is non-existence of entry in the books of account, registers or other documents, which can become the ground for seizure of the goods and it is this absence of

entries, which is covered by the expression "not accounted for". The "non-existence of entry" cannot be equated to the expression "non-existence of proper or due or valid entries" nor can the expression "not accounted for" be equated to the expression "absence of proper or due or valid entries".

68. The impression that it is the complete absence of entry and not mere absence of proper or due or valid entry, which can become the foundation for seizure of goods, gets strengthened, when one comes to Clause (b) of Sub-section (5) of Section 74, for Clause (b) requires the seizing authority to give a notice to show cause as to why penalty, as perceived in Clause (b), shall not be imposed on the dealer "for the dealer"s default in not making entries" in respect of such goods in his books of account, registers or any other documents. The expression, "for his default in not making entries in respect of such goods" cannot be equated to "for the dealer"s default in not making proper entries or due or valid entries in respect of such goods in his books of account or registers or other documents, maintained by him in the course of his business". In other words, Clause (b) reinforces the inference that it is the absence of entry and not the deficiency or absence of proper entry or due entry or valid entry in respect of the goods, sought to be seized, which can become the foundation for taking action u/s 74(5)(a).

69. Any veil of doubt, which one may entertain in this regard, gets ruptured and, in fact, wholly removed, if one takes a cautious note of the contents of Clause (c), for, Clause (c) reveals, once again, that the seizing authority, if, after taking into consideration the explanation of the dealer and after giving him a reasonable opportunity of being heard, is satisfied that the entries, relating to the said goods, were not made in the books of account, registers or other documents of the dealer without any proper justification, such authority shall, pass an order imposing penalty mentioned in Clause (b) and direct him to deposit, in addition to the penalty, advance tax calculated on the deemed sale value of the goods at applicable rate of tax on sales of such goods, which shall be adjustable with the liability to tax incurred on the purchase or the sale of such goods or the sale of goods manufactured therefrom. Thus, it is only in the event when "the entries relating to the said goods were not made in the books of account, registers or other documents of the dealer without any proper justification" that the seizing authority receives the jurisdiction to impose penalty and not otherwise. The expression "the entries relating to the said goods were not made in the books of account, registers or other documents of the dealer" would obviously mean complete absence of entries and not the deficiency or absence of proper or due or valid entries. It would be in violation of the rules of interpretation of a statute to forcibly import into, or forcibly read into, any provision of a statute, a word or an expression, which the Legislature has chosen not to import into or add, for, reading into anything, besides what Clauses (a), (b) and (c) reflect, would mean re-legislation, which is impermissible in law.

70. On a patient and cautious reading of the provisions contained in Section 74(5)

(a), there remains no room for doubt that the condition precedent for making seizure of the goods, u/s 74(5)(a), is that entries had not been made in respect of the goods in the books of account, registers or other documents maintained in the ordinary course of the business by the dealer. If the entries have been made and with the help of the entries so made, the goods, in controversy, can be identified, it can, by no stretch of imagination, be construed that the entries have not been made in terms of the provisions of Section 74(5)(a). If the goods, sought to be seized, are identifiable, because of the brand-name or because of the code number, etc., of the product, it cannot be said, in the face of existence of such an entry in the books of account, register or documents, that no entries in respect of the goods exist and to a situation of this kind, provisions of Section 74(5)(a) would not be attracted.

71. What surfaces from the above discussion is that it is the non-existence of any entry or complete absence of entries in his books of account, register or other documents maintained by a dealer in the ordinary course of his business, which can become the foundation or basis for seizure of the goods. The power of seizure of goods, as embodied u/s 74(5)(a), cannot be exercised, if there exists an entry in respect of the goods, which are sought to be seized. The purpose of Section 74(5)(a) is to ensure that in respect of the goods, which a dealer may have in his possession, there must be some entry in his books of account, register or other documents, maintained in the ordinary course of the business by the dealer so that the goods can be traced into the stock of the dealer. If, in respect of some goods, a dealer has made no entry in his books of account, register or other documents, it would not be possible to trace out or identify the goods and such a situation may warrant seizure of such goods.

72. The respondents contend, as already indicated above, that the expression, "not accounted for", which appear in Section 74(5)(a), must be construed to mean "not validly, properly or duly accounted for".

73. Is such an interpretation, in the light of the language used in Section 74(5)(a) and under the scheme of the Act, sustainable ? This question, in turn, brings us to the difference between the powers conferred on a seizing authority, while seizing the goods and those while he is seizing the books of account. The provisions, with regard to seizure of goods and books of account, have been separately made in the Act. I have already reproduced hereinabove the provisions of Section 74(5)(a), (b) and (c), which relate to the seizure of goods. As regards the question as to when seizure of the books of account can take place, Sub-section (3) of Section 74 states as under:

Section 74(3)(a) : If any authority referred to in Sub-section (1), has reasons to believe that any dealer has evaded or is attempting to evade the payment of any tax due from him and is keeping or has kept his accounts in such a manner as is likely to cause evasion of tax payable under this Act, such authority may, for reasons to be recorded in writing, seize such accounts, registers, documents including electronic records or computer of the dealer, as may be necessary, and

shall grant a receipt for the same and obtain acknowledgement of the receipt so given to him:

Provided that if the dealer or person from whose custody the books of account, registers, documents including electronic records or the computer are seized refuses to give an acknowledgement, such authority may leave the receipt at the premises and record this fact.

74. A plain reading of Clause (a) of Sub-section (3) of Section 74 makes it clear that when the authority concerned has reason to believe that the dealer has evaded or is attempting to evade payment of tax due from him or is keeping or has kept the accounts in such a manner as is likely to cause evasion of tax payable under the Act, the books of account of the dealer may be seized. However, no such condition has been imposed by Sub-section (5)(a) of Section 74 of the Act. If entries, in respect of the goods, which is sought to be seized, have been made in the books of account, registers or documents maintained in the ordinary course of business, then, such goods cannot be seized on the plea that the goods have not been "properly" or "duly" or "validly" entered into the books of account, registers or documents or that entries have been made therein in such a manner that the same is likely to cause evasion of tax payable under the Act. That such is the legislative intent, while enacting Clause (a) Sub-section (5) of Section 74 of the Act, becomes all the more clearer, when one takes, in this regard, note of the relevant provisions of the Assam General Sales Tax Act, 1993 (in short, "the Act of 1993"), which stands replaced by the Act, which is, now, under consideration.

75. It is Section 46(2)(b) of the Assam General Sales Tax Act, 1993, which conferred powers on the authorities concerned to seize goods. Clause (b) of Sub-section (2) of Section 46 read as follows:

46(2)(b) : The authority referred to in Clause (a) shall have the power to seize any goods found in any such office, shop, godown, vessel, receptacle, vehicle or any other place of business or building or place mentioned in Clause (a), if such goods are found not properly accounted for or if the said authority has reasons to suspect that evasion of tax payable under this section may take place in respect of the goods:

Provided that a list of all goods seized under this clause shall be prepared by such officer and be signed by the officer and the carrier or the bailee or the person-in-charge of the goods and not less than two witnesses.

76. From a microscopic reading of Clause (b) of Sub-section (2) of Section 46, embodied in the Act of 1993, what becomes crystal clear is that the Legislature had given the power of seizure to the authority concerned if the goods were found to have not been "properly accounted for" or if the authority had reason to suspect that "evasion of tax, payable under the Act of 1993, may take place in respect of the goods". The expressions "if such goods are found not properly accounted for", or, "if the said authority has reason to suspect that evasion of tax

payable under the Act may take place in respect of the goods" [which occurred in Section 46(2)(b)] stand noticeably changed inasmuch as Section 74(5)(a) of the present Act does not now require that the goods, in question, must have been "properly accounted for", rather, Section 74(5)(a) makes seizure possible only when the goods have not been accounted for in the sense that no entries in the books of account, register or other documents, maintained during the ordinary course of business, has been made. Similarly, seizure of goods, under the Act of 1993, was possible even if the authority concerned had reason to suspect that evasion of tax may take place in respect of the goods, sought to be seized. No such suspicion, as regards the possibility of evasion of tax can, now, under the present Act, be made the foundation for seizure of goods. When the corresponding provisions, as embodied in the Act of 1993, are borne in mind, it becomes abundantly clear that a misclassification of goods could have, undoubtedly, been made a ground for seizure under the old Act of 1993, but not under the present Act, for, the word "properly", which appeared in Section 46(2) (b), stands, now, consciously omitted in the present Act.

77. It is interesting to note that even when there were some semblance of authority, under the old Act of 1993, to make seizure of goods if the goods had not been "properly accounted for" or when there was reason to suspect evasion of tax, this High Court, in *Shri Kamal Kumar Sharma v. State of Assam* reported in *Shri Kamal Kumar Sharma Vs. State of Assam and Others*, , having considered the scope of the power of seizure of an authority u/s 46(a) and (b) of the Act of 1993, observed and held as under:

The rival submissions advanced on behalf of the parties have received the due and anxious consideration of the court. What must be emphasised at the outset is that the Act contemplates exercise of different species of power at different stages leading to the assessment of levy and collection of tax and what is to be exercised by the assessing authority at the stage of final assessment, are powers that are clearly identifiable and distinct from the powers to be exercised at the stage of seizure and imposition of penalty. The petitioner is a registered dealer of goods and therefore would be amenable to the requirement of filing of returns and proper assessment thereof at periods contemplated under the Act. The power of seizure and the power of levy of penalty are drastic powers conferred on the authority by the provisions of the Act with a view to prevent leakage of Government revenue. In so far as a registered dealer is concerned, if goods either in transit or in stock are not properly accounted for, an inference would arise that there is an attempt at evasion of tax and therefore until and unless the identity of the goods is duly verified and provision is made to ensure that tax due will be paid, the goods should remain under seizure. The yardstick that has to be applied while exercising the aforesaid power is to be found within the four corners of Section 46(2)(b) and (c), i.e., that the goods are not properly accounted for. The meaning of the said expression though is capable of being understood in either ways as contended by the learned Counsel for the parties, the eventual meaning that should be ascribed will depend on the scheme

contemplated by the statute. As already noted, the statute contemplates exercise of different powers at different stages by the various statutory authorities and though all such powers are designed to ensure proper levy and collection of taxes, the manner and extent of such exercise must vary. In case of a registered dealer if the total quantity of goods in stock or in transit are identifiable and the variety thereof is also known, to hold that the goods are not properly accounted for merely because there is a difference of opinion as to the sale price thereof, in the considered view of the court, would be doing violence to the scheme contemplated by the Act. Not only that, it would be inherently dangerous to read any such conferment of power at the stage of seizure in view of the possibility of abuse and misuse and it would be far more reasonable to understand such a conferment of power to have been made by the Legislature at the stage of completion of the quasi-judicial act of assessment. When effective remedy can be attempted at the stage of final assessment and the object of the Act, i.e., to ensure due and proper collection of tax can be achieved at the stage of assessment, there is no reason why by a process of judicial interpretation such a power should be conferred to the authority at the stage of seizure. The power to determine the sale price for the purpose of assessment of tax under the Act, in case of a dispute, therefore, must be understood to have been vested in the assessing authority and insofar as a registered dealer like the writ petitioner is concerned, if the quantity of the goods in transit and the variety thereof is known what should be the sale price for the purpose of assessment of tax is a question that must be understood to have been relegated by the statute to the stage of final assessment, a conclusion that appears to be fortified by the provisions contained in the proviso to Section 2(34)(d) of the Act.

78. Thus, even when the words, used in Section 46(2)(b) of the Act of 1993, were "not properly accounted for" and even when the goods might have been seized if the authorities had reason to suspect that evasion of tax may take place in respect of the goods, seizure of such goods was possible, this High Court had held that so long as the goods could be identified and tax payable could be assessed, seizure of goods was not warranted or even permissible.

79. In the case at hand, there is no dispute that goods are identifiable, there is not even the slightest indication, in the averments made by the respondents in their affidavit-in-opposition that the goods were, or are, not identifiable. As a corollary, there can be no escape from the conclusion that the goods, in question, stand entered into the stock register and once an entry has been made in the books of account, registers or other documents, maintained in the ordinary course of business, seizure, by taking resort to the provisions of Section 74(5) (a), is not legally possible. This inference gets strengthened, when one takes note of the seizure list, in question. The seizure list is, therefore, reproduced once again:

Seizure list

In exercise of power conferred upon me u/s 74(5)(a) of the AVAT Act, 2003, I Sri

D. Khersa, Inspector of Taxes, Guwahati Unit-B, do hereby seize the following goods found at the godown of Dhanani Shoes Ltd. at Amtola Dhirenpara, Guwahati, from the possession of Sri Abdul Kuddus, S/o. Lt Sher Ali, Godown in-charge of the Dhanani Shoes Ltd. on today the February 6, 2008 at 4 p. m. on the grounds stated below in presence of witnesses.

Grounds of seizure:-Stock of goods were found not matching with the invoices produced. Goods taxable at the higher rate are found shown as taxable at the lower rate of taxes and thereby causing evasion of taxes payable under the AVAT Act of 2003.

List of goods seized:-Stock of goods found in the stock register which are shown as four per cent taxable.

Sd./- Illegible 6/2/2008 Signature of the person from whom seized.

Sd./- Illegible. 6/2/2008 Signature of seizing officer Inspector of Taxes, Unit B, Guwahati.

Witness : 1. Sd./- Illegible 2. Sd./- Illegible 6/2/2008.

80. When the list of goods seized, appearing in the seizure list, dated February 6, 2008 is read, it becomes clear that goods, which came to be seized, were, indeed, entered in the stock register as goods taxable at four per cent. It clearly implies that the stock of goods stood entered in the stock register and, therefore, in the face of such entries having been, admittedly, made, in the stock register, it cannot be said that the goods had not been accounted for and, hence, the seizing authority must be held to have acted arbitrarily and illegally in seizing the said goods from the godown of the petitioners. It appears that the seizure was made only on the ground that the goods, which, according to the petitioner, were plastic shoes taxable at the rate of 4 paise in a rupee, were, in the opinion of the seizing authority, not plastic goods and, therefore, taxable at the rate of 12.5 per cent in a rupee. The misclassification of an item cannot be a reason for the seizure of the goods u/s 74(5)(a) of the Act. As already pointed out above, the pre-condition for seizing goods, u/s 74(5)(a), is that no entry whatsoever has been made in respect of the goods in the books of account or registers or documents.

81. In the present case, seizure has been upheld, if I may reiterate, not on the ground that the dealer had shown the goods in the stock register taxable at four per cent (because the seizure was not even sought to be sustained on this ground by the respondents), but on the ground that the goods seized did not tally with the invoices produced meaning thereby that there was no entry anywhere in respect of the goods, which were seized. It, now, appears, when the list of seized goods, as mentioned in the seizure memo, dated February 6, 2008 is considered, in the light of the impugned notice, dated April 16, 2008, and the averments, now, made by the respondents, that the seizure had taken place not because of the fact that there was no entry in respect thereof in the books of

account, stock register or other documents maintained by the petitioner in their ordinary course of business, but because of the reason that in respect of these goods, appropriate rate of tax payable had not been mentioned. No wonder, therefore, that the respondents have, now, abandoned their previous stand that no entry had existed in respect of the goods seized and what they, now, contend is that the expression "not accounted for", which appears in Section 74(5)(a), must be construed to mean validly, duly or properly accounted for.

82. I have already pointed out as to what the expression "not accounted for", appearing in Section 74(5)(a)(ii), means and conveys. In the light of the conclusions, which this Court has reached above, there remains no room for doubt that the conditions precedent for making seizure of the goods, in question, were not available at all in the case at hand. Seizure was, therefore, clearly without jurisdiction and ought not to have been upheld by this Court.

83. Thus, the decision, under review, suffers from manifest error of law and this error has, undoubtedly, caused serious miscarriage of justice. In fact, it has not even been disputed that if the seizure, in question, is found to be without jurisdiction by the seizing authority, the error needs to be corrected or else, there would be serious miscarriage of justice, for, saleable goods of the petitioners stand seized adversely affecting their business. Situated thus, this Court has no escape but to acknowledge its error in reaching the conclusion, which it had reached, as regards the validity of the seizure, and when this error becomes too transparent and too glaring to be refused to be taken notice of, it becomes the duty of this Court to correct the error, which had crept in its decision, under review.

84. When the seizure, in question, has, now, been held to be without jurisdiction, it logically follows that the impugned notice to show cause, dated April 16, 2008 (which is dependent upon the verification carried out on the strength of the seizure of the goods), too suffers from lack of jurisdiction and cannot be sustained. Thus, this Court's finding with regard to its own decision, under review, is sufficient not only to set aside the seizure, in question, but also the impugned notice to show cause.

W.P. (C). No. 1781 of 2008:

85. Bearing in mind what has already been indicated above, let me, now, deal with W. P. (C). No. 1781 of 2008, whereby the present petitioners have challenged the validity of the impugned show-cause notice, dated April 16, 2008. Though, in the light of the decision, reached on the review petition, the impugned notice to show cause cannot survive, what needs to be pointed out is that the review petitioners have, by way of a separate writ petition, challenged the show-cause notice, dated April 16, 2008, aforementioned and it is this writ petition, which, as indicated above, has given rise to W.P. (C) No. 1781 of 2008. The impugned notice is sought to be sustained by the respondents on the ground that the notice had been issued pursuant to the directions given by this Court in

its earlier decision, under review, and, hence, the notice to show cause cannot be said to be without jurisdiction. Yet another ground on which the impugned notice is sought to be sustained by the respondents is that since the notice, in question, gives an opportunity to the present petitioners to show cause against the proposed penalty, they can, in their reply to the show-cause notice, very well agitate the ground as to whether the authority, which issued the notice, was or was not competent to issue the notice and/or whether the notice itself suffers from lack of jurisdiction. In support of these submissions, reliance is placed on T.N. Godavarman Thirumulpad Vs. Union of India (UOI) and Others, , V.S.T. Industries Ltd. Vs. State of Assam and Others, and M.S. Associates and Another Vs. Union of India (UOI) and Others,

86. While considering the grounds on which the respondents, now, seek to sustain the impugned notice, it needs to be re-emphasised that when the seizure itself has been held to be without jurisdiction, it logically follows (as already pointed out above), that the impugned show-cause notice cannot survive, for, the notice is nothing, but an extension or after-effect of the seizure, which has already been held to be without jurisdiction. In such circumstances, the impugned notice cannot be sustained and, in consequence thereof, there is no option, but to allow the writ petition, namely, W.P. (C). No. 1781 of 2008, whereby the petitioners have put to challenge the show-cause notice, dated April 16, 2008, as a notice having been issued without jurisdiction.

87. Coupled with the above, what may also be pointed out is that the seizure, in question, was made in purported exercise of the powers u/s 74(5)(a)(ii). There is also no dispute that the notice, in question, has been issued in exercise of powers u/s 74(5)(b). A notice, under Clause (b) of Section 74(5), can be issued only when there is legally sustainable seizure u/s 74(5)(a)(ii). When the seizure itself has been held to be without jurisdiction, the notice, in question, which stands issued under Clause (b) of Section 74(5), cannot survive on its own or independent of the said seizure. Suspicion of evasion of tax is one of the conditions for seizure of the books of account, registers or documents, but it cannot become a ground for seizure of the goods unless no entry, in respect of the goods, sought to be seized, is found to have been made in the books of account, registers or documents maintained by a dealer in the ordinary course of his business. The seizing authority can assume jurisdiction, u/s 74(5)(b), to issue show-cause notice only when the dealer defaults in making entry in respect of the goods in his books of account, registers or other documents as aforementioned.

88. The very fact that the impugned show-cause notice claims that the goods, taxable at 12.5 per cent, have been shown as taxable at four per cent, logically implies that the entries in respect of the goods, which were seized, did exist in the books of account, documents or registers, although, in the opinion of the seizing authority, tax would be payable at 12.5 per cent instead of at four per cent.

89. What is also equally important to note is that a dealer is free to sell taxable goods without realising sales tax from his buyer. As far as the dealer is concerned, he would be liable to pay sales tax, which he may or may not have realised from his buyer. Liability to pay sales tax arises only when the dealer sells goods and not before sale takes place. Before sale, the liability is to make entry in the books of account, registers or documents as regard the goods and no more. In the case at hand, the goods, in question, have not been sold and, hence, in such a situation, when the goods stand entered in the stock register, it is not material at what rate the dealer has decided to realise sales tax, for, his liability to pay sales tax would arise only when he sells goods and if he realises sales tax lesser than what he ought to have had, it is the dealer, who would have to pay requisite sales tax for the goods sold. If a dealer sells goods and does not make payment at the rate at which sales tax is payable, his books of account, register or other documents, which can show entry of the goods and its sale, can be seized and tax can be realised by taking resort to Section 74(3).

90. When, in a given case, conditions precedent for assumption of jurisdiction are non-existent, the High Court would be, within the ambits of its powers under Article 226, if it strikes down the notice to show cause, which has been issued by assuming jurisdiction, where conditions precedent for assumption of such jurisdiction did not exist.

91. In the present case, as already discussed above, the conditions precedent for assumption of jurisdiction to issue show-cause notice under Clause (b) of Section 74(5) being non-existent, the impugned notice cannot be sustained. To the facts of the present case, the Constitution Bench decision, in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , is most appropriate, wherein the apex court has held:

...It is well-settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well-settled, will issue appropriate orders or directions to prevent such consequences.

92. It needs to be pointed out that in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , it was contended, on behalf of the State, that since provisions exist in the statute enabling the person, proceeded against, to show cause against the assessment, which is sought to be made, and when provisions also exist for preferring appeal against the order, which may be passed in the assessment proceeding, there was an alternative remedy available to the person proceeded against and, hence, writ jurisdiction, under Article 226, was not invokable. Reacting to the submissions so made, the Constitution Bench pointed out that when the conditions precedent for assumption of jurisdiction, u/s 44 of the Income Tax Act, are not satisfied, the

High Court would be justified in invoking its jurisdiction under Article 226. In fact, leaving no room for doubt, the apex court emphasised, in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, , that when the Constitution confers on the High Courts the power to give relief, it becomes the duty of the High Court to give such relief in fit cases and the courts would be failing to perform their duty if relief is refused without adequate reasons. Thus, existence of alternative remedy cannot be construed as a bar to the exercise of jurisdiction under Article 226 if a statutory authority exercises a power without satisfying the conditions subject to which exercise of such power is permissible. In such a case, such exercise of power would be treated as an exercise of power without authority of law and without jurisdiction.

93. In the case of *Wazir Chand Vs. The State of Himachal Pradesh*, , the Constitution Bench had, in no uncertain words, held that when seizure is made in the absence of any authority under the law, such a question can be raised in a writ petition and for restoration of goods so seized, a writ, in the nature of mandamus, can be issued.

94. In *Assistant Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd.*, , a three-judge Bench of the Supreme Court, while reacting to the question as to whether the collector, who had issued the impugned notice, did or did not have the authority under the relevant Rules, reacted by observing that such a question, i.e., a question as to whether the authority, which issues a notice, has or does not have any authority of law is a question of jurisdiction and when such a question goes to the root of the case and when such a question can be decided without taking further evidence, a writ petition under Article 226 can be entertained.

95. I may also refer to *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, , wherein the apex court has clarified the position of law in the following words:

The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the fundamental rights contained in Part III of the Constitution but also for "any other purpose".

Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the

principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged....

96. From what have been observed and laid down, in *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, , it becomes clear that an alternative remedy is not an absolute bar to the exercise of jurisdiction, under Article 226, in, at least, three contingencies, namely, (i) where the writ petition has been filed for the enforcement of any of the fundamental rights, or (ii) where there has been a violation of the principles of natural justice, or (iii) where the order or proceeding is wholly without jurisdiction or where the vires of an enactment is under challenge.

97. In *Buishi Yada Motors Vs. State of Arunachal Pradesh and Others*, , this Court has held that when a show-cause notice is issued on consideration of assumption of law, which are extraneous and untenable, the same makes the notice one without jurisdiction and thereby deserves to be interfered with under Article 226 of the Constitution of India. The relevant observations, made in *Buishi Yada Motors Vs. State of Arunachal Pradesh and Others*, , read as under:

What follows from the above discussions and the position of law as laid down by the apex court is that an assessing authority can demand even by way of a notice to show cause payment of alleged unpaid tax only when it is satisfied, on application of its own mind, that such a demand can be raised. This apart, the demand, which is so raised, has to be based on materials, which are prima facie tenable under the law. If the demand raised is contrary to the law or not based on any authority of law, such a demand can be interfered with by the High Court in exercise of its powers under Article 226 of the Constitution of India even at the very initial stage, when such a demand is raised. Viewed from this angle, the show-cause notice, which proceeds on the assumptions, namely, (i) that in order to constitute a contract of sale during the course of inter-State trade and commerce, the contract must be supported by materials in writing, (ii) the vehicles, in question, could have been sold to only registered dealers and not to individuals and/or (iii) that a declaration in form C ought to have been furnished by the petitioner in respect of each sale of vehicle to enable it (i.e., the petitioner) to claim benefits of the notification (annexure "A"), although no such pre-conditions is required to be fulfilled by the petitioner to be able to claim the benefits of the notification (annexure "A"), the very issuance of the show-cause notice is, at its very threshold, being on considerations and assumptions of law, which are extraneous and untenable make the notice without jurisdiction and deserves to be interfered with.

98. From the decisions referred to above, it becomes clear that it is no longer res integra that when show-cause notice is found to be without jurisdiction and/or found to be issued in excess of jurisdiction or when the notice is found to have been issued without fulfilment of the pre-conditions laid down by the Legislature for issuance of such notice, High Court, in exercise of its extraordinary power, under the Article 226, can interfere with such a notice. In *Union of India (UOI)*

Vs. Hindalco Industries, , where the High Court had interfered with the show-cause notice, the Supreme Court held that if an authority, which has the jurisdiction in regard to one aspect, launches an enquiry into a matter in respect of which it had no jurisdiction, then, merely because it had, in regard to one aspect, jurisdiction, the court cannot ignore the fact of lack of jurisdiction and allow the Tribunal to proceed in the matter in respect of which it had no jurisdiction to make enquiry. The observations made, in this regard, by the Supreme Court read as under:

...We are unable to accept the contention of the learned Counsel for reasons more than one. First, as submitted by Mr. K.K. Venugopal, if an authority which has jurisdiction in regard to one aspect takes upon itself to make enquiry into a matter in respect of which it had no jurisdiction then merely because in regard to one aspect it has jurisdiction, the court cannot ignore the fact of lack of jurisdiction and allow the Tribunal to proceed with the matter in respect of which it has no jurisdiction to make inquiry. Secondly, the position, stated above, namely, that valuation once accepted under Clause (a) and there being no vitiating factor, no recourse can be had to valuation under Clause (b) is a settled position of law. Therefore, at this stage, if the party is directed to go back to the authority, it would be directing it to undergo a futile exercise.

99. It may be pointed out that in Union of India (UOI) Vs. Hindalco Industries, , the submission, advanced on behalf of the Union of India, that the apex court had, in the past, deprecated the practice of entertaining writ petitions at the stage of show-cause notice and, hence, the High Court ought not to have decided the case on merit, at the stage of show-cause notice, was negated by the apex court. In fact, in Seimens Ltd. v. State of Maharashtra reported in [2006] 12 SCC 33, the apex court has clearly held that, ordinarily, a writ court may not exercise discretionary jurisdiction by entertaining a writ petition, which questions show-cause notice unless the same appears to be, inter alia, without jurisdiction.

100. Reverting to the cases of T.N. Godavarman Thirumulpad Vs. Union of India (UOI) and Others, , V.S.T. Industries Ltd. Vs. State of Assam and Others, and M.S. Associates and Another Vs. Union of India (UOI) and Others, which the respondents rely upon to contend that the present writ petition cannot be entertained at all, it needs to be clarified, and bear repetition, that then this Court has upheld, as noted above, that the notice to show cause is wholly without jurisdiction, it is not really necessary for this Court to determine as to whether the alternative remedy, provided to the petitioners, in the form of show-cause notice to the proposed penalty, creates any legal bar to the entertainment of the present writ petition. That an alternative remedy is not a bar to the entertainment of a writ petition, when the action proposed by an authority is without jurisdiction, as already indicated above, is no longer res integra.

101. V.S.T. Industries Ltd. Vs. State of Assam and Others, is, in fact, a case, where a notice to show cause was challenged by filing a miscellaneous application without amending the writ petition. This apart, the show-cause

notice, issued in V. S. T. Industries Ltd. [2004] 2 GLT 290, aimed at finding out the facts with participation of the assessee ; whereas the notice to show cause, in the present case, is, as already held above, without jurisdiction and when the notice to show cause suffers from complete lack of jurisdiction, the fact that an opportunity to show cause has been provided against the proposed penalty is of no real significance. To the facts of the case at hand, therefore, the decision in V.S.T. Industries Ltd. Vs. State of Assam and Others, has no application at all.

102. Turning to the case of M.S. Associates and Another Vs. Union of India (UOI) and Others, it needs to be pointed out that in M.S. Associates and Another Vs. Union of India (UOI) and Others, a notice to show cause was issued on the ground that the petitioner therein was rendering business of auxiliary services without obtaining service tax registration. The said notice was challenged on the ground that the apex court, in M/s. B.R. Enterprises Vs. State of U.P. and Others, , has held that the State lotteries cannot be construed to be a trade and business within the meaning of articles 301 to 304 of the Constitution of India. The facts of the case of M.S. Associates and Another Vs. Union of India (UOI) and Others, too, were, thus, completely different from the facts of the present case. The apex court's decision in T.N. Godavarman Thirumulpad Vs. Union of India (UOI) and Others, , which had been relied upon in M.S. Associates and Another Vs. Union of India (UOI) and Others, is a case, where the apex court was dealing with a SLP filed against an interim order passed by the High Court on a writ application, whereby show-cause notice was challenged. The apex court held that the proceedings, in pursuance of the show-cause notice, may continue, but no final order be passed. The apex court's decision in T.N. Godavarman Thirumulpad Vs. Union of India (UOI) and Others, , is not at all relevant to the facts of the present case.

103. Lastly, it has been contended, on behalf of the respondents, that there is anomaly in the stock of goods seized inasmuch as the figure of the stock seized, as per the seizure list, is different from what is contended in the writ petition. While considering this aspect of the case, it needs to be pointed out that there is no dispute between the parties as regards the number of goods seized inasmuch as the notice to show cause has been issued on the basis of the stock of goods seized. The petitioners have, in fact, pointed out that the shoes, manufactured by one of the companies, were not seized inasmuch as the said shoes were found to be taxable at 12.5 per cent. This apart, the present writ petition concerns itself with the seizure of the goods and the notice to show cause. In these circumstances, when the seizure as well as the notice to show cause have already been held to be without jurisdiction, any anomaly, in the writ petition, cannot become a ground for validating an illegal seizure and/or the notice aforementioned, which are, otherwise, without jurisdiction.

104. When the Legislature gives power to an authority subject to existence of certain conditions precedent, the authority concerned cannot assume jurisdiction unless the conditions precedent exist. Assumption of jurisdiction by an authority,

without the conditions therefore being satisfied, would obviously be a case of the authority acting without jurisdiction. If, however, an authority, while acting within its jurisdiction, makes an error of law, then, it may become a case of exceeding its jurisdiction. While the latter case is a case of excess of jurisdiction and may be corrected by supervisory jurisdiction, the former suffers from complete lack of jurisdiction and can be interfered with, at its very inception, by the superior court, for, the assumption of jurisdiction, without existence of the conditions precedent thereof, would make the decision, to be rendered, otherwise, also, a nullity.

105. If the Legislature enacts a law by stating that a power can be exercised by an authority subject to existence of certain state of affairs, it would logically follow, in such a case, that if the state of affairs, as conceived in the legislation, does not exist, the authority would have no jurisdiction.

106. A writ court cannot allow an authority to proceed with a matter even when an authority has no jurisdiction to proceed with the matter. An authority can exercise jurisdiction only when it has jurisdiction in the matter and not when the authority assumes or exercises jurisdiction, where it had no jurisdiction. In the present case too, since the seizing authority has assumed jurisdiction, as already indicated above, without the existence of conditions precedent therefor, it becomes a case of assumption of jurisdiction, where no jurisdiction exists, and a notice to show cause, issued on assumption of such jurisdiction, needs to be interfered with and set aside by issuing a writ in the nature of certiorari and, in the given circumstances, it is even possible to issue a writ in the nature of mandamus commanding the seizing authority to release the seized goods, when the seizure suffers from complete lack of jurisdiction.

107. Because of what have been discussed and pointed out above, it is hereby held and clarified that the seizure of the goods, in question, was without jurisdiction and must be set aside and, in consequence thereof, the notice to show cause, which stands impugned in the present writ petition, cannot survive and must fail.

108. In the result and for the reasons discussed above, the review petition is allowed. The seizure of the goods, in question, is hereby set aside and quashed and, in consequence thereof, the impugned notice to show cause, dated April 16, 2008, is also set aside and quashed.

109. In view of the fact that the seizure as well as the notice aforementioned have been set aside and quashed, the respondents are directed to, forthwith, release the seized goods, in question.

110. With the above observations and directions, this review petition and also the writ petition shall stand disposed of.

111. No costs.