

(2006) 11 OHC CK 0042
In the Orissa High Court

Orient Paper Mills

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 06-11-2006

Acts Referred:

Central Sales Tax Act, 1956 — Section 10, 10A, 6, 6A, 7
Income Tax Act, 1961 — Section 271

Citation : (2007) 103 CLT 147 : (2007) 10 VST 547

Hon'ble Judges : I. Mahanty, J;A.K. Ganguly, J

Bench : Division Bench

Final Decision : Allowed

Judgement

A.K. Ganguly, J.—The Petitioner, a registered company, claims to have established its plant in 1937 to manufacture paper and pulp. The case of the Petitioner is that as there was erratic supply of power by the State, it wanted to establish new captive power generation plant under which the power would be captively used by the Petitioner's factory which is situated at Brajarajnagar. The further case of the Petitioner is that it is a registered dealer both under Orissa Sales Tax Act and Central Sales Tax Act. The relevant registration certificates of the Petitioner, both under OST and CST, show that the Petitioner is entitled to purchase among other things plants, machinery and accessories on the strength of its registration certificates. The Petitioner's own case is that on such certificate it continued to purchase for its existing power plant, machinery and articles on concessional rate of tax u/s 8(1) of the CST Act and this was done to the knowledge of opposite party No. 2 who was issuing blank "C Forms.

2. The further case of the Petitioner is that for manufacturing of paper and paper boards, both steam and electricity are essential and without which paper cannot be manufactured. The main raw materials for- manufacturing paper and paper boards being Bamboos and wood, the same are to be processed with the help of steam and chemicals. The plant and machinery, which are utilized for processing such raw materials, can be operated only with electricity. Therefore, steam and

electricity are indispensable for manufacturing of paper. In view of the acute power shortage and continuous restriction on supply, the production of Petitioner's Mill was adversely affected and it was impossible for the Petitioner to run the paper mill economically without power being continuously made available to it. As such, the Petitioner applied to the Orissa State Electricity Board for permitting it, to install a new power generation complex. The Board after considering all the aspects permitted the Petitioner to install the new power generation complex. The Petitioner's case is that it has been specifically debarred by the Board from selling any electrical energy generated by new plant. Therefore, the Petitioner does not come in the category/of industry engaged in distribution of electricity or of any other form of power. According to the Petitioner, this was done by it without amending the certificate of registration and by following the accepted practice of purchasing plants and machinery and to the knowledge and acquiescence by the Revenue. It is admitted case of the Petitioner that it purchased machinery and equipments for generation of steam and electricity to the extent of Rs.706.24 lakhs which were inter-state transactions against declarations in Form "C on payment of Sales Tax at the applicable rate of 4% and for the purpose of erection and installation of power plant, outside contractors were engaged as the Petitioner's staff had no experience at all in such erection and materials purchased against "c" form were given to those outside contractors. But the materials and machinery issued to the contractors for erection and installation always belonged to the Petitioner and were the properties of the Petitioner and the Petitioner asserts that the use of the materials and machinery by those contractors does not amount to any sale of such machinery or materials.

3. However, the Sales Tax Officer, Sambalpur through its circle Jharsuguda issued a show cause notice u/s 10-A of CST Act alleging inter alia that the Petitioner purchased several machinery and spares worth Rs.7,05,24,333.14 during the period from 1984-85 to 1987-88 at a concessional rate of tax on the strength of declaration forms. It is also alleged that those goods were not used for the process of manufacture of paper but for some other purposes thereby the provision of CST Act has been contravened. It is also alleged that the goods so purchased were handed over to different contractors to be used in the construction of the electricity plant and according to the allegations in the show cause notice, goods were not used by the Petitioner for the purpose for which they were purchased. The Petitioner therefore was asked to show cause why the items of plant and machinery will not be deleted from its registration certificate and penalty will not be imposed u/s 10-A of the CST Act.

4. Pursuant to the said show cause notice, the Petitioner gave a detailed reply denying the allegations and praying for dropping the said show cause proceeding.

5. Ultimately, hearing took place before the Sales Tax Officer and in the said hearing, the Sales Tax Officer by a detailed order rejected the explanation given by the Petitioner and came to a finding that the Petitioner violated the provision

of Section 10(d) read with the provision of Section 8(3)(b) of the CST Act and a penalty of Rs.1 ,05,78,000,00 was imposed on the Petitioner.

6. Being aggrieved, the Petitioner by the aforesaid order filed a revision against the said order. The Revision also dismissed by an order dated 10th January 1989 passed by the Addl. Commissioner, Sales Tax, Northern Zone, Orissa, Cuttack. In the revisional order, the penalty was merely reduced by deducting 4% tax which was paid by the Petitioner on those goods but otherwise the findings of the Sales Tax Officer were upheld. This Writ Petition has been filed by the Petitioner challenging both these, orders.

7. Most of the contentions of the Petitioner, noted above, were put forward as grounds of challenge. It was also urged that generation of power by the captive power plant was integrally connected with the manufacture and processing activities of the Petitioner and power was exclusively used for that purpose. The Petitioner also stated that the Court should take judicial notice of the fact that the supply of electricity was very irregular in this state and used to be disrupted for prolonged period at the, material time. In order to meet such situation, the Petitioner decided to set up a new captive power plant. By way of alternative submission, it was urged that even if there was any violation in the use of Form "C, while purchasing plant and machinery for captive power plant, such violation is not without reasonable excuse. Therefore, the penal provision of Section 10(d) of the CST Act is inapplicable since the Petitioner bona fide believed that the machinery and spares for the captive power plant will come within the fold of "machinery" mentioned in the registration certificate. It was further stated that mens rea is a condition precedent for imposing penalty and in the absence of mens rea, penalty cannot be imposed on the Petitioner. It was submitted that the penalty proceedings which were initiated for the period 1984-85 was barred by limitation as it was initiated on 14th July, 1988 which was much after three years from the assessment year.

8. The contention of the Revenue, on the other hand, is that in the registration certificate of the Petitioner under CST Act no item for generation and distribution of electricity has been included. Therefore, the Petitioner is not entitled to purchase plant and machinery to be used for generation of electricity against "C form. In support of such contention, the Learned Counsel for the Revenue relied on Clause (d) at page 128 of the Paper Book. The Learned Counsel for the Revenue also relied on the Petitioner's reply to the show cause notice wherein the Petitioner admitted that the plant and machinery which were purchased on the strength of "C form and are being utilized "in the new power plant and not in the manufacture of paper and pulp. The Learned Counsel also submitted that "plant and machinery for the purpose of generation of electricity" is different from "plant and machinery for use in the manufacture and processing of paper and paper board". It is also submitted by the Revenue that generation of electricity is a process which is prior to the manufacture and processing of paper and paper board. So it cannot be included within the expression" of

"manufacture and processing of goods for sale of paper and paper boards". The Learned Counsel further submitted that from the facts and circumstances it is clear that the plant and machinery have been handed over to the contractors in furtherance of execution of the contract and this is in violation of Section 10(d) of the Act as the dealer himself has not utilized the goods. The Learned Counsel also submitted that in the facts and circumstances of the case, the default in complying with the statute is sufficient and the infraction of law is complete for invoking the penal clauses and to show the existence of mens rea is not necessary. The Learned Counsel submitted that there has been no limitation in the facts of the case. These are the rival contentions of the parties.

9. Having regard to the "aforesaid contentions of the parties, in my judgment, the questions which really fall for determination by this Court are whether the Petitioner is entitled to purchase machinery and equipments for erection of a new captive power plant for generation of electricity on the basis of "C" forms? The subsidiary question is whether in purchasing the said items against "C" form the Petitioner has contravened the provisions u/s 10A of the CST Act to attract penalty and whether the plea taken by the Petitioner company that in the absence of mens rea the penalty should not have been imposed, is a valid plea in the facts of the case.

10. The Counsel for both the parties have relied on several decisions in support of their contentions.

11. The relevant provision of law that has come up for consideration in this case is Section 8(3)(b) of CST and Rule 13 of Central Sales Tax (Registration and Turnover) Rule, 1957. For better appreciation of the points involved, Section 8(3) (b) is set out below:

8. Rates of tax on sales in the course of inter-State trade or commerce.

XXX XXX XXX XXX (3) The goods referred to in Clause (b) of Sub-section (1)

XXX XXX XXX XXX (b) are goods of the class or classes specified in the certificate of registration of the registered dealer purchasing the goods as being intended for re-sale by him or subject to any rules made by the Central Government in this behalf, for use by him in the manufacture or processing of goods for sale or (in the telecommunications network or) in mining or in the generation or distribution of electricity or any other form of power." Similarly, Rule 13 of the CST (Registration and Turnover) Rules, 1957 is set out below:

13. The goods referred to in Clause (b) of Sub-section (3) of Section 8 which a registered dealer may purchase, shall be goods intended for use by him as raw materials, processing materials, machinery, plant, equipment, tools, stores, spare parts, accessories, fuel or lubricants, in the manufacture or processing of goods for sale, or in mining, or in the generation or distribution of electricity or any other form of power.

12. One thing is to be noticed that goods which are permitted to be purchased on

the basis of registration are goods which are to be used by the dealer in the manufacture or processing of goods for sale. It appears that there is "a distinction between the expressions "goods used in the manufacture of goods" and "goods used for manufacture of goods". In the case of J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. Sales Tax Officer, Kanpur and Another, the expression "in the manufacture or processing of goods for Sale" in Section 8(3) (b) of CST Act came up for consideration. The Learned Judges held that the expression "in the manufacture" takes in its fold processes, which are directly related to the actual production of the goods. The Learned Judges further held that the expression "in the manufacture of goods" in Section 8(3)(b) of CST - Act covers the entire process carried on by the dealer for converting raw materials into finished goods.

13. It is nobody's case that electricity is a raw material for paper which are the finished goods manufactured by the Petitioner.

14. The Learned Judges in J.K. Cotton Spinning & Weaving Mills Co. Ltd. (supra) on a combined reading of Rule 13 read with Section 8(3)(b) of CST Act further clarified the position as under:

...mere intention to use the, goods in the manufacture or processing of goods for sale, will not be a sufficient ground for specification the intention must be to use the goods as raw materials, as processing material, as machinery, as plant, as equipment, as tools, as stores, as spare parts, as accessories, as fuel or as lubricants.

15. Therefore, if the process is so integrally connected with the ultimate production of goods that without the material in question the goods will become commercially inexpedient. In such cases the goods used in the process will fall within the expression "in the manufacture of goods". It cannot be said that without a captive power plant the manufacturing of paper is not possible.

16. In J.K. Cotton. Spinning & Weaving Mills Co. Ltd, (supra) another decision rendered in the case of Indian Copper Corporation Ltd v. Commissioner-of Commercial Taxes, Bihar reported in 16 STC 259 was considered. The Indian Copper Corporation, the Petitioner, mined copper and iron ore from its own mines and then transported the ore to its factory and manufactured finished products from the ore for sale. Therefore, it was found that the dealer was engaged both, in mining operations and in the manufacturing process and the two processes were inter-dependant. Therefore, the Learned Judges held that such a process should include the vehicles, which are directly used for removing ores from where the mining operations were carried on to the factory where the manufacturing process starts. The Apex Court made it clear that having regard to the peculiar nature of manufacturing process, the vehicles which are not directly used in the manufacturing process are not entitled to the special status. Saying so the Learned Judges made it very clear that expression "goods intended to be used in the manufacture or processing of goods for sale" cannot be equated with

those good which are likely to facilitate the conduct of the business of manufacturing". This ratio in Indian Copper Corporation Limited was followed by the Supreme Court in J.K. Cotton Spinning & Weaving Mills Co. Ltd. (supra).

17. The decision of the Supreme Court in the case of Indra Singh & Sons (P) Ltd. V. Sales Tax Officer reported in (1966) 17 STC 510 sc is also pertinent in this context. In that case the company, the owner of a colliery, was carrying on the business of mining coal and trading in coal and coke. The question which fell for consideration was whether the company was entitled to include in its certificate of registration, sanitary goods, spare parts for motor vehicles including tyres and tubes, furniture and motor trucks. The Court held that furniture and sanitary fittings are not to be included in the registration certificate since they are not to be used in mining though they may facilitate the business of mining.

18. Here also the new captive power plant might facilitate the manufacturing of paper, but the erection of such a plant is not integrally connected with the manufacturing process of paper.

19. Learned Counsel for the Petitioner has relied on several decisions in support of his contention that the plant and machinery purchased for erection of a captive power plant were rightly purchased under "C" form. He has first relied on a judgment of the Supreme Court in the case of Industrial Machinery and Manufacturers Pvt. Ltd. v. The State of Gujarat reported in (1965) 16 STC 380 guj In that case, the question was whether humidifiers fall within the Entry 15 or Entry 20 of Schedule-C of Bombay Sales Tax Act. From the facts of that case it appears even though the Deputy Commissioner of Sales Tax negated the assessee's claim that humidifiers are to be covered by concessional rate, but accepted that humidifiers are used in various departments of textile Industries for improving the quality of the production in general". Even -after opining as above, the Deputy Commissioner held that humidifiers, being run by electric motors, were electrical goods and were not machinery used in the manufacture of cloth.

20. When the matter ultimately reached the Hon"ble Supreme Court, the Supreme Court agreeing with the opinion of Lord Atkins on "machinery" in the decision of the Privy Council in the case of Corporation of Calcutta v. Kashipura Municipality reported in AIR 1922 PC held that there was a danger in attempting to give a definition of the word "machinery" which would be applicable in all cases. The Apex Court came to the conclusion that humidifiers are used by the Cotton Textiles Mills for the purpose of increasing strength of yarn, avoiding breakages of yarn and improving the quality of yarn and are covered by the concessional rate under Entry 15 of Schedule C and not Entry 20 of Schedule C. The rationale behind the finding of the Apex Court held is that in the modern textile "any machinery which helps to improve the quality of yarn, to avoid breakages in yarn and to secure smooth functioning of the ring would certainly be machinery used in the manufacture of cloth".

21. But in the instant case, the erection of a new captive power plant for generation of electricity does not fall within the manufacturing process of paper and pulp, it might facilitate the process. Therefore, the decision in the case of Industrial Machinery (supra) is not applicable to the facts of the case.

22. The next decision cited by the Learned Counsel for the Petitioner was in the case of Mohavir Prasad Jain and Anr. v. State of Orissa and Ors. reported in (1987)67 STC 376. ori In that case, the question which fell for consideration was whether a generator set in the background of erratic supply of , electricity by the State should be included in the certificate of registration of the Company by amending the same. Prayer for inclusion was rejected on the ground that generation is not needed when normal conditions prevailed. On a writ petition by the Petitioner, the Court took judicial notice of the erratic supply of electricity in the State and its effect on industry. Considering these peculiar facts, the Learned Judges held that there is nothing in Section 8(3)(b) of CST Act to exclude the use of a generator as a standby measure and the Court directed amendment of the certificate of registration of the Petitioner by inclusion of generator in the Registration Certificate.

23. This Court, finds that the said decision was peculiar to the facts of that case, but the said decision cannot be treated as a binding precedent on construction of Section 8(3)(b) of CST Act since the said decision was rendered without at all advertent to the decisions of the Supreme Court, referred to above on , construction of Section 8(3)(b) of CST Act. Therefore, the decision in Mohavir Prasad Jain (supra) must be confined to facts of that case and cannot be treated as a binding precedent.

24. The next decision cited on this, point ,was rendered in the case of Micro Abrasive India Limited v. Commissioner of Sales Tax, UP Lucknow reported in (1996) 102 STC 19 up In that case, the Petitioner was a dealer registered under the Central Sales Tax Act and was engaged in the business of manufacture and sale of lapping abrasive powder. In its certificate of registration, "diesel engine and alternator set" was an item mentioned as intended to be used in the manufacture or processing of goods. The dealer purchased a diesel generating set by paying a concessional rate of tax. Against the dealer, proceeding u/s 10-A of the CST Act was initiated for levy of penalty on the ground that the diesel generating set was used for the production of electricity and not for production of lapping abrasive powder. On those facts, the Allahabad High Court held that the diesel generating set which had been purchased by the dealer had no other use except to produce" electricity which was necessary for running the plant and machinery for production of goods and therefore held that penalty was not leviable. But in the instant case, the Petitioner, as noted above, had not purchased machinery and spares against "C Forms for its existing power plant but for the erection of a new power complex for facilitating the manufacture of paper. Therefore, the machinery and plant purchased for erection of the new captive power plant cannot be said to be integrally connected with the

manufacturer of paper. Therefore, the decision in *Micro Abrasive India Ltd.* (supra) does not support the Petitioner's contention.

25. Reliance was also placed on the decision of *National Aluminum Co. Ltd. v. State of Orissa and Ors.* reported in 1994 (93) STC 529. In that case; the dealer was registered for business of generation and distribution of electricity. Therefore, there was no dispute over registration. The dispute that arose, whether the purchase order placed before the date of registration would attract the penal provision u/s 10-A of the CST Act. The Court found that by the time the goods were actually purchased and payment was made, the dealer was registered. Therefore, the date of purchase order is not relevant and imposition of penalty was not called for. Therefore, the dispute in *NALCO* was on a totally different basis.

26. The next decision, cited by the Learned Counsel for the Petitioner is the case of *Arun Trading Co. v. Additional Commissioner of Sales Tax, Orissa*, (disposed of on 12th November, 1992 in O.J.C. No. 7351 of 1992) was also totally against a different factual background. In *Arun Trading Company*, the question was whether mill, machinery and huller mill parts included in the "certificate of registration" were improved electric motors, generators, switches, cable, etc. These parts are essentially required for running the mill in question for which the Petitioner was carrying on his business. In the instant case, as noted above, the purchase of plant and machinery for erection of a new power plant does not come within the manufacturing process of paper.

27. The decision cited by the Learned Counsel for the Revenue on this aspect has some application to the present case. In the case of *Koodal Industries Limited v. State of Tamil Nadu* reported in (1994)93 STC 446 AP the High Court of Madras has held that a generator cannot be said to be machinery particularly connected with a flour milling even though generally a generator may be used in any industry for generation of electricity for running its machinery. In that case, the Petitioner's certificate of registration under CST entitled the Petitioner to purchase "machinery connected with flour milling" and on the strength thereof the Petitioner had purchased the generator. The Court held that even though the generator may be used for generation of electricity and running the machinery, it cannot be said that the same is covered by the certificate of registration.

28. Following that ratio, this Court is of the opinion that purchase of plant and machinery for a new captive power plant cannot be covered by "C" Form inasmuch as those machinery are not integrally connected with the manufacture of paper and pulp.

29. Now the next question that arises is whether in the facts of the case, the penal provision u/s 10-A of the CST Act is attracted. In the instant case, the show cause notice has been issued to the Petitioner asking him to show cause on two points. The first point is; why the goods namely, machinery and spares which are specified under CST in the registration certificate of the Petitioner

should not be deleted from the said certificate and the second point is; why the penalty shall not be levied u/s 10-A of the CST?

30. By order dated 14.9.1988, the Sales Tax Officer, Sambalpur came to the conclusion that the Petitioner had violated the provision of Section 10(d) read with the provision of Section 8(3)(b) of the C.S.T. Act and as such, the provision of Section 10-A of the CST Act was attracted. The revisional order also affirmed the said finding inasmuch as it came to a clear finding that the Petitioner had mensrea in mis-utilising the goods purchased on the strength of "C forms and its contumacious conduct in committing an offence u/s 10(d) of the C.S.T Act has been well established". Therefore, the penalty was imposed on the Petitioner on his committing an offence u/s 10(d) of the C.S.T. Act.

Section 10 of CST Act runs as follows;

10. Penalties.

If any person

(a) furnishes a certificate or declaration under Sub-section (2) of Section 6 or Sub-section (1) of Section 6A or Sub-section (4) (or Sub-section 8) of Section 8, which he knows; or has reason to believe to be false; or

(aa) fails to get himself registered as required by Section 7, or fails to comply with an order under Sub-section

(3A) or with the requirements of Sub-section (3C) or Sub-section (3E), of that Section); or

(b) being a registered dealer, falsely represents when purchasing any class of goods that goods of such class are covered by his certificate of registration; or

(c) not being a registered dealer, falsely represents when purchasing goods in the course of inter-State trade or commerce that he is a registered dealer; or

(d) after purchasing any goods for any of the purpose specified in Clause (b) or Clause (c) or Clause (d) of Sub-section (3) (or Sub-section (6) of Section 8 fails, without reasonable excuse, to make use of the goods for any such purpose; or

(e) has in his possession any form prescribed for the purpose of Sub-section (4) (or sub- Section (8) of Section 8 which has not been obtained by him or by his principal or by his agent in accordance with the provisions of this Act or any rules made thereunder;

(f) collects any amount by way of tax in contravention of the provisions contained in Section 9-A);

he shall be punishable with simple imprisonment which may extend to six months, or with fine, or with both; and when the offence is a continuing offence, with a daily fine which may extend to fifty rupees for every day during which the offence continues.

31. On a comparison of various sub-clauses of Section 10 of CST Act, it would be clear that they cover different situations. Section 10-A of CST Act, on the other hand, gives an option to the authority to impose penalty for an offence u/s 10 (b), or (c) or (d) in lieu of prosecution. In the show cause notice, Petitioner has been asked only to show cause why penalty will not be levied u/s 10-A of the CST Act but the show cause notice is totally silent as to which provision of Section 10, namely, whether Clause (b), (c), or (d) has been violated by the Petitioner. The ultimate finding is, as noted above, that the Petitioner has violated the provision of Section 10(d). This is not permissible in law.

32. It is well settled that if a person is fastened with penalty by a quasi judicial authority, the person proceeded against must be informed clearly of the provision which he has violated. This salutary principle has been breached in this case. On this ground alone, the penalty which has been imposed on the Petitioner cannot be sustained (See 2005 (190) ELT 433 (SC)).

33. Of course, this point has not been urged by the Petitioner, But since this point appears from the show cause notice itself and is apparent on the face of the record of the case, this Court, in exercise of its certiorari jurisdiction, can take notice of the same and specially when for taking notice of the same, this Court need not go into any disputed facts. This infirmity in the show cause notice which initiated the proceeding is so patent that it totally vitiates the imposition of penalty both by the Assessing Officer as also by the revisional authority.

34. It is well settled that in a penalty- proceeding the decision making process in imposing the penalty calls for very close scrutiny by Courts and the citizen need not separately establish his prejudice where fundamental principles in the matter of imposition of penalty, namely, notice of the provision which has been allegedly violated is not given. Therefore, taking notice of these infirmities in the proceeding, this Court cannot sustain the penalty imposed on the Petitioner.

35. Another point urged by the parties is that penalty u/s 10(1)(d) Act can be imposed-only where a person after purchasing goods for any of the purposes specified in Clause (b), or Clause (c) or Clause (d) of Section 8(3) of the CST Act fails "without reasonable excuse" to make use of the goods for any such purpose.

36. In this context, the expression "without reasonable excuse" assumes considerable importance and various decisions has been cited on that aspect. The consistent defence taken by the Petitioner before the authorities is that in the facts of the case, "mens rea" is a necessary ingredient before imposing penalty on the Petitioner and secondly that in the facts of the case mens rea on the part of the Petitioner has not been established.

37. So far as the first defence is concerned, the same appears to have been concluded in view of the decision of this Court in the case of NALCO (supra) referred to before in connection with another point.

38. In NALCO's case dealing with similar provision of CST Act, a Division Bench

of this Court held that in a penalty proceeding, being quasi-criminal, in nature, unless it is proved that the dealer acted deliberately in defiance of law or was guilty of conduct which is dishonest or acted in conscious disregard of its obligation, penalty cannot be imposed. In NALCO, the Learned Judges clarified the position by saying that where a breach flows from a bone fide belief of the dealer that he had acted in accordance with the registration certificate, the assessing officer should refuse to impose penalty. Similarly, it has been stated that when a dealer is technically guilty of violation but did not act in conscious disregard of the provisions, no penalty can be levied. The Division Bench further conclusively held that "in other words mens rea constitutes a condition precedent for levy of penalty". The Learned Judges while coming to such conclusion relied on the ratio of the decision of the Supreme Court in the case of Hindustan Steel Ltd. Vs. State of Orissa, and also the decision of the Gujarat High Court in the case of Morvi Cotton Merchants' Industrial Corporation Ltd. Vs. The State of Gujarat, . In both the cases, the expression "without reasonable excuse" in Section 10(d) of CST Act has been considered. The Learned Judges while deciding the NALCO Case also referred to another Division Bench judgment of this Court in the case of Deputy Chief Mining Engineer, South Balanda Colliery and Anr. v. State of Orissa and Ors. reported in (1993)91 STC 372 ORI From the ratio of the aforesaid cases, it is clear that before imposing penalty u/s 10(1)(d) revenue must establish mens rea on the part of the assessee in view of the expression "without reasonable excuse" occurring in Section 10(1)(d)

39. The Learned Counsel for the Revenue cited a few decisions in order to contend that mens rea is not required to be established for imposing penalty u/s 10(d). It was also contended that, in the alternative, in the facts of the case mens rea of the Petitioner has been established.

40. The Learned Counsel has first relied on the decision of the Supreme Court in the case of R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, . In that case, the Learned Judges held that the principle "no mens rea, no crime" has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties have created severe punishments where the offences have been defined to exclude mens rea. Those observations were made by the Constitution Bench of the Supreme Court in R.S. Joshi (supra) while construing the provisions of Sections 37 and 46 of the Bombay Sales Tax Act. The question which came for consideration in that case was if any person, not being a dealer, and not liable to pay any tax, he collects tax under the Act, collects any sum by way of tax, or if as a dealer, he collects tax in excess of the tax payable by him, or if he collects tax in contravention of the provisions of Section 46, he shall be liable to pay, in addition to any tax for which he may be liable, a penalty and in addition, any sum collected by the person by way of tax in contravention of Section 46, shall be forfeited to the State Government. But in the instant case, the text of the relevant law is different. Section 10(d) of CST under which the Petitioner has been charged uses the expression "without reasonable excuse". This expression is absent either in

Section 37 or 46 of Bombay Sales Tax Act. So this ratio in R.S. Joshi (supra) is not relevant here. Therefore, before imposing penalty u/s 10(d) of CST Act, Revenue has to consider reasonable excuse shown by the person proceeded against. So "mere technical violation on a bona fide belief will not expose the person to the penal provision in the R.S. Joshi (supra) is not attracted to the facts of the present case. The other two decisions which have been cited by the Learned Counsel for the Revenue, namely, the decision in the case of Jayashree Chemicals Ltd. v. Addl. Commissioner, ST, Orissa reported in (1992)87 STC 359 ORI and the decision in the case of Vijaya Electricals v. State of Tamil Nadu reported in 82 STC 268 are clearly distinguishable. In both the cases the Court said that mens rea is required to be established and the Court came to the conclusion that the onus of the Revenue to prove mens rea has been discharged in the facts of those case. In the instant case, in the show cause notice it has not even been alleged that the Petitioner has, without any reasonable excuse used the plant and machinery in the new power plant. Since the same has not been alleged by the Revenue in the show cause notice, it cannot be said that the Revenue has discharged its onus of establishing the mens rea on the part of the Petitioner. Therefore, the decision in the aforesaid two cases are not attracted in the facts of the present case. On the contrary, those decisions reiterate that mens rea is required to be established by the Revenue. Similarly, the decision of the Madras High Court in the case of State of Tamil Nadu v. C.A. Akthar and Company reported in (1997) 108 STC 510 MAD is also of no avail to the Revenue inasmuch as while construing the provision of Section 10(b) in the context of Section 10-A of CST Act, the Court held that mens rea is required to be established and the Learned Judges held that the mens rea of the assessee was established.

41. The decision of the Apex Court in Additional Commissioner of Income Tax, Gujarat v. I.M Patel and Co. reported in 1992 (86) STC 185, MAD cited by the Revenue, held that there is nothing in Section 271(1)(a) of the Income Tax Act, 1961 which requires mens rea to be established by the department. In doing so the Court opined "unless there is something in the language of the statute indicating the need to establish the element of "mens rea", it is generally sufficient to prove that a default in complying with the statute has occurred".

42. The statutory intent behind 271(1) (a) of I.T. Act and Section 10(d) of CST is not the same. In Section 271(1)(a) of I.T. Act, it is based on mere default, which is a time bound concept, but in Section 10(d) of CST Act it is one of improper use. In deciding whether "use" is proper or not various considerations are at play and in that context "reasonable excuse" has a very major significance. In NALCO (supra), Section 10(d) of CST Act has been held to contain the element of mens rea and that decision, on interpretation of Section 10(d) is holding the field. So the decision in I. M. Patel (supra) against a different statutory context does not help the Revenue.

43. For the reasons aforesaid, this Court is of the view that even though

purchase of plant and machinery, by the Petitioner for erection of the power plant by using "C form was not permissible in view of its registration certificate both under OST and CST, there was to certain extent reasonable excuse on their part inasmuch as all these items were purchased with the knowledge of the Revenue and the Revenue never took exceptions :at the time of purchase. Nothing has been concealed from the Revenue at the time of purchase but there was ample reason for the Petitioner to have bona fide belief that such goods which are utilized for erection of power plant are integrally connected with manufacturing process of paper and pulp since for the manufacture of paper and pulp electricity is a necessary ingredient. Therefore, the mens rea of the Petitioner in this case has not been established. Apart from that, in the show cause notice itself the Petitioner has never been put on notice that it has violated Section 10(d) of CST.

44. Therefore, the order of reduced penalty imposed by the revisional authority, namely, penalty of Rs.79,76,305.73, is set aside.

But, one thing is certain that since the purchases of plant and machinery for erection of power plant is not valid under the registration certificate, the Petitioner must pay the taxes on those purchases at the rates which were prevailing at the relevant point of time. It appears from the revisional order that the rate of tax was 10% and the Petitioner has admittedly paid 4% on account of furnishing declaration in Form "C". Therefore, the balance amount of tax which is 6% on the purchase value of the materials in question must be paid by the Petitioner along with interest at the rate of 6% on the said 6% (differential tax). Such interest should be calculated on the tax which is to be payable on the aforesaid basis from the date of purchase till the Petitioner filed the writ petition before this Court. If the Petitioner has made any payment during pendency of the proceeding either before the statutory authorities or before the High Court, the said amount shall be set off against the tax and interest which is to be calculated as directed aforesaid. The Sales Tax Officer shall make necessary calculation on the lines indicated above and raise the demand from the Petitioner within six weeks from-today and the Petitioner must make the payment on the basis of the said demand within a period of six weeks from the date of raising of the demand, in default, interest at the rate of 9% on the said demand will have to be paid by the Petitioner from the expiry of six weeks till the date of actual payment. This Writ Petition is allowed to the extent indicated above. Both the order of assessment and the revisional order are quashed to the extent indicated above.

I. Mahanty, J.

45. I agree.