

(2005) 06 KAR CK 0048

In the Karnataka High Court

Case No : Sales Tax Revision Petition No. 32 of 2005

Shri Gopalakrishna Shetty

APPELLANT

Vs

State of Karnataka and Another

RESPONDENT

Date of Decision : 23-06-2005

Acts Referred:

Constitution of India, 1950 — Article 265
Karnataka Sales Tax Act, 1957 — Section 12 D, 22, 28 AA, 28 AA (4), 28 AA (5)
Karnataka Sales Tax Rules, 1957 — Rule 23F (2), 30

Citation : (2005) ILR (Kar) 2993 : (2008) 13 VST 328

Hon'ble Judges : H.N. Nagamohan Das, J;H.L. Dattu, J

Bench : Division Bench

Advocate : G.K.V. Murthy and P.E. Umesh, for the Appellant; Parthasarathy, for Sujatha, HCGP, for the Respondent

Judgement

H.L. Dattu, J.—This Sales Tax Revision Petition is filed against the order passed by the Karnataka Appellate Tribunal in appeal No. 1219/2004 dated 21st day of October, 2004 by the petitioner, being aggrieved by the same.

2. A brief reference to the facts may be necessary to resolve the legal issues raised by the petitioner in this revision proceedings. They are:

Petitioner is a transporter and owner of vehicle bearing registration No. KA-19 A-3435. On several occasions, in the month of May and June, 2002, he had transported superior kerosene oil and naptha from Mangalore Port or stock points at Mangalore to a place outside the State-Pondicherry/Chennai, consigned by companies like M/s PAS Petro Products, M/s Vivek Petro Chemicals Private Limited, who are registered dealers under the provisions of Karnataka Sales Tax Act, 1957 ("Act" for short), having their branch office at Mangalore and Head Office at Pondicherry/Chennai, etc., on stock transfer basis. According to the petitioner, the goods in question were imported by the consignors into the country from abroad and formed part of their stock at Mangalore after clearance from the Mangalore Port. To reach the consignors Head Office, the transport

vehicle has to pass through the State of Karnataka. If the vehicle has to move from Mangalore, in the normal course, it has to pass through Check Post at Kannur, Mangalore, which is the entry or inward Check Post in Karnataka and either the Sales Tax Check Post at Hosur Road, Attibele or N. Vaddarahalli Check Post, Mulabagal Taluk, Kolar District, which are known as exit or outward Check Posts.

3. The driver incharge of the aforesaid vehicle, in order to obtain a transit pass, to pass through the State while carrying imported naphtha and kerosene oil, as required u/s 28AA of the Act, had submitted an application in triplicate in Form 39AA to the Officer incharge of the Check Post at Kannur, Mangalore, which is the entry Check Post in Karnataka. The Check Post Officer after making necessary inquiries had issued a pass on the duplicate and triplicate copies of the application to the driver incharge of the vehicle and had retained the original application with him and in the transit pass so issued, had specifically directed the vehicle to cross the Check Post at Hosur Road (outward), Attibele, within the time and date specified. In the instant case, it so transpired that the driver incharge of the vehicle appears to have created documents as if the duplicate transit pass was surrendered at N. Vaddarahalli Check Post, Mulabagal Taluk, Kolar District, and the duplicate copy of the transit pass was received by the Officer, who had issued the transit pass in an envelope affixed with postal stamps used by the General Public, instead of Government Service Postage Stamp. This was the cause to suspect the genuineness of the movement of the goods vehicle out of the State by crossing at N. Vaddarahalli Check Post at Mulabagal Taluk. The Officer incharge of the Check Post at Kannur after making necessary inquiries and letter correspondence with his counter parts at Hosur Check Post and at N. Vaddarahalli Checkpost and being convinced that the goods vehicle for which transit pass had been issued had not crossed the State Borders, initiated proceedings u/s 28AA(4) and (5) of the Act by issuing a show cause notice to the owner of the vehicle, to show cause why he should not be assessed to tax as contemplated u/s 28AA(4) of the Act and the penalty u/s 28AA(5) of the Act should not be levied and collected as prescribed u/s 28AA(6) of the Act, for contravention of the provisions of Section 28AA(2) of the Act. In the notice so issued, the Check Post Officer had alleged:

"3. On the close scrutiny of the questioned transit passes received by post affixed with the stamps used by the public on the envelope, it was found clear that the seal and Officer's signature of N. Vaddarahalli Check Post mentioned in the said transit passes were forged with the ulterior motive of evading the tax to be paid to the State, the vehicle owners/drivers in collusion with the goods owners have created the duplicate seal and forged the signatures, created false (forged) documents of surrendering the said transit passes at N. Vaddarahalli Check Post, sent by post to this Check Post, created duplicate documents to show that the goods mentioned in the transit passes have been transferred to interstate, vehicle owners/ drivers with fraudulent action committed offences.

4. The owner of vehicles/drivers have failed to surrender the transit passes at the Attibele Check Post within the stipulated date as prescribed u/s 28AA(2) of KST Act and 23(F) (13) of KST Rules. But, it is found that fictitious documents were created for having surrendered at the N. Vaddarahalli Check Post and sent to this Check Post. The goods transported in the transit passes were not transported to the place Pondicherry mentioned in the document but were unloaded in the Karnataka State and thereafter were sold unauthorisedly defrauding (evading) the taxes to be paid to the State has been proved and hence, the goods sold in the State has to be brought to assessment and assessed to tax for the goods involved in the transit passes as per Section 28AA(4) of KST Act, 1957."

4. After receipt of the show cause notice, the owner of the goods vehicle had raised all possible objections to the proposal made in the show cause notice. The Check Post Officer after affording a reasonable opportunity of hearing to the owner of the vehicle and after considering several objections raised in the reply to the show cause notice had passed an order levying tax u/s 28AA(4) of the Act and penalty as provided u/s 28AA(5) of the Act for contravention of the provisions of Section 28AA(2) of the Act. The order passed by the Check Post Officer u/s 28AA(4) of the Act reads as under:

"Order u/s 28AA(4) of the KST Act, 1957 On perusal of the actual facts and circumstances explained in the proposition, the driver/owner of the goods vehicle has failed to transport the goods to the place noted in the questioned transport permit, the goods are unloaded within the State and thereafter, unauthorisedly sold them locally and it is decided to levy tax u/s 28AA(4) as proposed in the proposition notice and assessed as under:

Sl. No.	Transport	Goods	Qty.	Value	Rate	Tax	No. permit	of tax
Levied	No.	and Date						
			1.	0240301/	Naptha	8.150	1,40,180/-	
12%	16,822/-	15-5-2002	MT	2.	0240844/	Naptha	8.070	1,33,155/-
15,979/-	31-5-2002	MT	3.	0185013/	Naptha	8.090	1,39,148/-	12%
15-6-2002	MT	4.	01	85324/	Naptha	8.100	1,39,320/-	12%
16,718/-	27-6-2002	MT						
Total tax determined Rs. 66,217/-								

The above said amount of Rs. 66,217/- shall be paid within 21 days of receipt of demand notice and demand notice shall be issued accordingly".

The order passed by the Check Post Officer under Sections 28AA(5) of the Act reads as under:

"Order u/s 28AA(5) of the KST Act, 1957 On perusal of the actual facts and circumstances explained in the proposition, the owner/driver of the vehicle have failed to transport the goods to the place noted in the questioned transport permit, the goods in question are found to be sold within the State of Karnataka.

Apart from that, fictitious documents are created to show that the goods are transported outside the State, i.e., by creating duplicate seal of the checkpoint and by forging the signature of the officer, thereby it is proved that huge tax due to the Government is evaded. It is a preplanned tax evasion case and it is fit and deserving case to levy penalty. The driver of the vehicle has contravened the directions in Section 28AA(2) of the Act. Keeping in view of the facts of the case and as the tax has already been levied u/s 28AA(4), the penalty u/s 28AA(5) is levied equal to the tax and ordered accordingly.

Sl.	Transport	Goods	Qty.	Value	Tax	Penalty	No. permit	Levied	No.
and Date									
15-5-2002	MT	1. 0240301/ Naptha	8.150	1,40,180/-	16,822/-	16,822/-			
31-5-2002	MT	2. 0240844/ Naptha	8.070	1,33,155/-	15,979/-	15,979/-			
15-6-2003	MT	3. 0185013/ Naptha	8.090	1,39,148/-	16,698/-	16,698/-			
31-5-2003	MT	4. 0185324/ Naptha	8.100	1,39,320/-	16,718/-	16,718/-			
				Total tax determined Rs. 66,217/-					

It is ordered that the above said penalty of Rs. 66,217/- shall be paid within 21 days failing which recovery action will be taken as per law".

5. The owner of the vehicle aggrieved by the aforesaid orders of the Check Post Officer, had carried the matter before the first appellate authority as provided u/s 20 of the Act, who by his order dated 22-7-2003, after allowing the appeal has remanded the matter to the Check Post Officer for a fresh disposal in accordance with law and in the light of the observations made by him in the course of his order.

6. The State Representative, at the instance of the Joint Commissioner of Commercial Taxes, had preferred appeals before the Karnataka Appellate Tribunal, interalia questioning the correctness or otherwise of the orders passed by the first appellate authority, which according to him was prejudicial to the interest of the revenue. The Tribunal which is the last fact finding authority under the Act after a very lengthy discussion of the modus operandi adopted by the owner of the vehicle, has come to the conclusion that the owner of the vehicle has contravened the provisions of Section 28AA(2) of the Act therefore, the Check Post Officer at Kannur was justified in passing an order u/s 28AA(4) of the Act in levying tax under the Act and also in levying penalty u/s 28AA(5) of the Act and accordingly, has set aside the common order passed by the first appellate authority.

7. Before the Tribunal, petitioner had also filed cross objections, firstly, justifying the findings and the conclusions reached by the first appellate authority, and secondly, objecting to the orders passed in remanding the matter of the Check Post Officer for a fresh disposal in accordance with law and in the light of his

findings and conclusions. At this stage, we do not intend to refer to the issues raised by the petitioner before the Tribunal, since the very issues are raised and canvassed by the learned Counsel for the petitioner in this revision petition filed before us.

8. A revision petition can be filed by an aggrieved person before this Court u/s 23 of the Act against the orders passed by the Appellate Tribunal, on the ground, that, the Tribunal has either failed to decide or decided erroneously any question of law. This settled principle of law, in our view, does not require elaboration.

9. In this revision petition proceeding, petitioner has raised the following questions of law for our consideration and decision and they are:

"(i) Whether in the fact and circumstances of the case, the Karnataka Appellate Tribunal is justified in holding that the State Representative has got authority to file the appeal before it inspite of the fact that he had not been authorised by the State Government to file the appeal as required u/s 22(1) of the Karnataka Sales Tax Act, 1957 as per which only an Officer empowered by the State Government in that behalf can file appeal before the Tribunal?

(ii) In the facts and circumstances of the case, whether the Karnataka Appellate Tribunal is right in holding that the words, "State" and "Government" used in Section 22(1) of the Karnataka Sales Tax Act, 1957 have a broader meaning and include all Officers and Authorities under the said Act and therefore, the Commercial Tax Officer, Check Post, Kannur and the State Representative have got authority to file appeals before the Karnataka Appellate Tribunal u/s 22(1) of the said Act?

(iii) Whether in the facts and circumstances of the case, the Karnataka Appellate Tribunal is right in holding that the Check Post Officer is justified in imposing tax and penalty on the petitioner by presuming that the goods carried in the petitioner's vehicle are sold inside the State of Karnataka even though the assessing authorities of the consignors of the goods in their assessment orders had levied tax on the consignors of the very same goods covered by the transit passes in question by holding that they have sold the goods inside the State and the First Appellate Authority of one of the consignors has held that the consignor has transported the goods out of the State of Karnataka?

(iv) Whether in the facts and circumstances of the case, the Karnataka Appellate Tribunal has committed an error in not disposing of the Memorandum of Cross-Objections filed by the petitioner even though as per Section 22(2-A) of the Karnataka Sales Tax Act, 1957, such memorandum shall be disposed of by the Tribunal as if it were an appeal presented before it?

(v) Whether in the facts and circumstances of the case, the Karnataka Appellate Tribunal has committed an error in not dismissing the appeal filed by the State of Karnataka by holding that the provisions of Section 28AA(4) and 28AA(5) of the Karnataka Sales Tax Act, 1957 are not applicable to the facts of the present case

and therefore the entire proceedings initiated against the petitioner which culminated in the order of the first appellate authority are void-ab-initio?

(vi) Whether in the facts and circumstances of the case, the Karnataka Appellate Tribunal has committed an error in not (holding that the proceedings u/s 28AA of the Karnataka Sales Tax Act, 1957 ought not to have been initiated against the petitioner in view of Explanation to Section 28AA of the said Act as per which the hirer of the vehicle shall be deemed to be the owner for the purpose of the said Section?

(vii) Whether in the facts and circumstances of the case, the Karnataka Appellate Tribunal has committed an error in not) giving any finding on the ground urged before it that the Check Post Officer has violated the principles of natural justice in not summoning the books of accounts of the consignor of the goods and the concerned officials of the consignors for cross-examination to enable the petitioner to rebut the presumption contemplated u/s 28AA(4) of the KST Act as per which the owner of the goods vehicle is presumed to have sold the goods inside the State if he fails to surrender the transit pass at the exit Check Post before leaving the State?"

10. The first two questions of law are interrelated and therefore, they are taken together for consideration. These questions were also raised before the Tribunal by the petitioner. The Tribunal while answering this specific legal issue, after referring to the provisions of Section 22 and Section 3(2) of the Act, has observed, that, the provisions are wide enough to permit filing of appeal either by the State Representative himself or when any other Officer requests him to do so. According to them, this has been the understanding in all these fifty (50) years of Sales Tax Law and therefore, they do not find any ample reason to hold any other view. They have further observed, that both the provisions should be read, not only harmoniously, but also in such a way that they become functional. According to them, the word "State" and "Government" used do have a broader meaning so as to include all Officers and authorities. Who work under the concerned Statute; the right to defend an order is akin to "lis" accrued by the aggrieved Officer (the C.P.O. in this case); for all Officers and the Government, the SR is the presenting hand before this Court; the authorities under the Act are not lesser than the alleged violators of law before adjudicating Courts. The Officers can defend their orders. If the argument that the Government Secretariat alone is competent to decide whether to go in an appeal is accepted, the conclusion would be the one which will say that the CPO cannot defend his own actions. The Tribunal concludes by referring to the observations made by the Supreme Court in the case of Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, that "the Law Courts are more honoured not because they become stringent to technicalities (which are also debatable) but they render substantial justice and treat both the amending parties equally".

11. We do not subscribe to the findings and the conclusion reached by the Tribunal on this primary legal issue raised and canvassed before the Tribunal by

the Learned Counsel for petitioner. Infact, the State also does not defend the over enthusiastic approach of the State Representative. Therefore, before us they have taken appropriate steps to overcome this legal hurdle, to which we will make reference a little latter.

12. To resolve this issue, the provisions of the Act, which requires to be noticed, are, Section 3(2) and Section 22 of the Act, and the Rules framed thereunder.

Chapter II of the Act provides for "Authorities and Appellate Tribunal. This Section authorises the State Government to appoint Commissioner and other Officers for the purpose of performing the functions conferred on them by or under this Act or by or under any other law for the time being in force, Sub-section (1-A) of Section 3 of the Act gives power to Commissioner of Commercial Taxes to empower an Officer not below the rank of Assistant Commissioner of Commercial Taxes, or an Advocate or a Chartered Accountant or a Sales Tax Practitioner enrolled in the prescribed manner, to perform the functions of the State Representative.

Sub-section (2) of Section 3 of the Act, authorises the State Representative to perform certain functions in proceedings before the Appellate Tribunal. He is authorised, to prepare and sign applications, appeals and other documents; to appear, represent, act and plead; to receive notices and other processes; and to do all other acts connected with such proceedings on behalf of the State Government. These functions can also be performed by any other Officer appointed under this Act by the Commissioner in exercise of his powers under Sub-section (1A) of Section 3 of the Act.

Section 22 of the Act provides for filing of an appeal before the Appellant Tribunal. Section 22 of the Act is extracted by omitting what is not necessary for the purpose of this case.

"Section 22: Appeal to the Appellate Tribunal : Any Officer empowered by the State Government in this behalf or any other person objecting to an order passed u/s 12-D or an order passed by the Deputy Commissioner or the Joint Commissioner u/s 20 or Section 21 may appeal to the Appellant Tribunal within a period of sixty days from the date on which the order was communicated to him".

13. An appeal is an application by a party to an Appellate Court asking it to set aside or revise a decision of a Subordinate Court in an "appeal" within the ordinary acceptation of the term. It is now well settled that there is no inherent or constitutional right to file an appeal and that right of appeal is a creature of the Statute and the same has to be expressly conferred to enable its exercise. It is open to the legislature to impose an accompanying liability upon a party on whom a legal right is conferred or prescribe a condition for exercise of right, if a party seeks to avail such remedy. Alternatively, it can be said that the right of appeal is a statutory right and it can be circumscribed by the conditions of grant. If the statute gives a right to appeal upon certain conditions, it is upon fulfillment of those conditions that the right becomes vested in and exercisable. If the

Statute specifically provides that an appeal could be filed only by a person authorised by the State Government in that behalf or if the Statute limits the time within which an appeal can be filed, it has to be filed only by the person empowered by the State Government and it has to be filed within the period so prescribed. Any power for the State Representative to file such an appeal without such specific empowerment or any power of condonation of delay in doing so has to be traced to the provisions of the Statute under consideration.

14. The Sales Tax Act is self-contained code exhaustive of the matters dealt therein. It provides for a complete and self-contained machinery for imposing and collecting tax, and for obtaining relief against improper orders both for the assessee as well as to the department by way of appeals, revisions, etc.

15. A right of appeal is not merely a matter of procedure. It is a matter of substantive right. This right of appeal from the decision of an appellate authority or the interior Tribunal to a superior Tribunal becomes vested in a party when proceedings are first initiated and before a decision is given by a interior Court. It is well established that the Statutes pertaining to right of appeal should be given liberal construction in favour of the right, since they are remedial and the right should not be restricted or denied unless such a construction is unavoidable and in case of doubt; the same should be resolved in favour of the right of appeal (statutory construction by Crawford 1940 Edition). In the case of Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, , Caltex Oil Refining (India) Ltd. Vs. Commissioner of Income Tax, , CIT v. Ashoka Engineering Company, : [1992]194ITR645(SC) , the Courts have observed that the Judges should be slow to adopt a construction which deprives parties of valuable rights of appeal.

16. The substantive law defines the remedy and the right. While law of procedure defines the modes and conditions of application of the one to the other. Likewise, the distinction between the right to remedy and mere procedure to be followed in prosecuting that remedy must also be kept in view. The law of procedure deals with the process by which a remedy for the enforcement of a right is prosecuted. Therefore, the forum of appeal as also the limitation are matters of procedural law and that no person has a vested right in the course of procedure. He has only the right of appeal in the manner prescribed for the time being in force.

17. The Act provides for filing of an appeal to the Appellate Tribunal both to the revenue as well as to an assessee under the Act, if they are aggrieved by an order passed by the Assessing Authority u/s 12-D of the Act or an order passed by the Deputy Commissioner or Joint Commissioner under Sections 20 and 21 of the Act respectively, within a period of sixty (60) days from the date on which the order is communicated to them. When it comes to filing of an appeal to the Appellate Tribunal by the revenue/department, the Statute provides that it can be preferred by an Officer empowered by the State Government in this behalf;

18. The power of taxation is essentially legislative power, for the reason, Article 265 of the Constitution states that "no tax shall be levied or collected except by

authority of law". The Tax Law has essential three features. Firstly, the provisions declaring liability to pay the tax, i.e., charging provisions; secondly, provisions for assessment of tax; and thirdly, provisions for collecting or recovering the tax including provisions for checking evasion of tax. Regarding the charging Section, the declaration by a legislature of the liability to pay tax is the essential feature of a taxing statute and cannot be delegated. The other details regarding the procedure for assessment of tax, collection and recovery could be delegated by the legislature to the State Government or to an authority, who normally is the person who is primarily responsible for effectively implementing the will of the legislature.

19. The legislature has delegated the power to the State Government u/s 22 of the Act to empower an Officer to file an appeal to the Appellate Tribunal under certain circumstances, the dictionary meaning of the expression "empowered" is to invest legally or formally with power. In the context this expression is used if carefully analysed and understood, it means, that the State Government should legally and formally invest power in an Officer to file an appeal to the Appellate Tribunal, if the revenue is aggrieved by any one of the orders mentioned in the Section itself and that too within a period of sixty (60) days from the date on which the order is communicated. The Tribunal is vested with the power to admit an appeal preferred after the period of sixty (60) days referred in sub-section, if it is satisfied that the appellant had sufficient cause for not preferring the appeal within that period. The Legislature has yet again restricted the power of the Tribunal to admit an appeal preferred after sixty (60) days, if sufficient cause is shown, for not preferring the appeal within the time prescribed only for a further period of one hundred and eighty (180) days. Since the right of appeal is a creature of the Statute, it has to be exercised strictly in conformity with the statutory provisions which creates it. The power given to the revenue to prefer an appeal to the Appellate Tribunal can be traced only to Section 22 of the Act. If the Statute limits the power of filing an appeal to an Officer empowered by the State Government, this power cannot be exercised by any other Officer. However, the Appellate Tribunal relying on Section 3(2) of the Act, has negated the issue canvassed by the learned Counsel for the petitioner solely on the ground, that the said provision is wide enough to permit the State Representative to prefer an appeal to the Appellate Tribunal either on his own or when a request is made by any other Officer. Further, relying on the language used in Section 22 of the Act, the Tribunal observes, that "the word "State" and "Government" used in Section 22 of the Act has a broader meaning to include all Officers and authorities, who work under the concerned Statute and for all Officers and the Government, the State Representative is the presenting hand before the Tribunal". The fallacy in the conclusion reached by the Tribunal is that, it is equating a State Representative with an Officer empowered by the State Government to prefer an appeal against the orders passed by the authorities under the Act. There is no basis for this conclusion of the Tribunal and infact it runs counter and contrary to the statutory provision. A right of appeal is a remedy for the enforcement of a

right and this remedy is equally a substantive right, though remedial in nature. This right which is a superior right can be exercised only in accordance with the procedure prescribed by the Statute and not by resorting to any other method and yet again, on an assumed statutory power. u/s 3(2) of the Act, a State Representative in a proceeding or proceedings before the Appellate Tribunal is competent to prepare and file a memorandum of appeal and also prosecute the same. In Section 3(2) of the Act, the legislature in its wisdom has used the expression "the State Representative shall be competent" to prepare memorandum of appeal and nowhere in the said sub-section, the legislature has used the expression, that the State Representative is empowered to prefer an appeal to the Appellate Tribunal. In the absence of such empowerment of power to prefer an appeal to the Appellate Tribunal, the State Representative either on his own or on a request made by an Officer under the Act, can prefer an appeal before the Appellate Tribunal, even if the State Representative is of the view that an order passed by the assessing authority or the first appellate authority requires a correction/modification/annulment by a superior forum. That equally applies to an Officer under the Act. If an assessing officer or the Check "Post Officer entertains a doubt about the correctness of the orders passed by the first appellate authority against his order, he necessarily has to approach the State Government to empower any Officer or the State Representative to prefer an appeal before the Appellate Tribunal and that again has to be done by routing his request through the Head of the Department, namely, the Commissioner of Commercial Taxes or through an Officer authorised by the Commissioner of Commercial Taxes. Otherwise, the system will fail and the hierarchy of the Officers will have no meaning. If the reasoning of the Tribunal is accepted, and if it is held that the State Representative can prefer an appeal either on his own or on a request made by an Officer of the Department, the State Representative, either can choose or not to choose to prefer an appeal before the Appellate Tribunal depending on his own notions and at his whims and fancies, and this would be giving him unbridled and unguided power to the State Representative and the legislature rightly has not chosen to create this sort of chaotic situation. Take yet another situation, which may lead to an absurd result, if the conclusion reached by the Tribunal is accepted. Under Sub-section (1-A) of Section 3 of the Act, the Commissioner is empowered to appoint an Officer not below the rank of the Assistant Commissioner of Commercial Taxes to perform the functions of a State Representative. In the hierarchy of Officers in the department, the Joint Commissioner and the Deputy Commissioner are his Senior Officers. If the revenue is aggrieved by the orders passed by the Joint Commissioner in exercise of his powers u/s 21 of the Act or the orders passed by the Deputy Commissioner u/s 20 of the Act, it can prefer appeals to the Appellate Tribunal. If an Assistant Commissioner, who is a Junior Officer in the hierarchy of Officers in the Department is allowed to prefer appeal/appeals before the Tribunal without specific authorisation by the State Government, he would be deciding the correctness or otherwise of the orders passed by his Superior Officer either to prefer or not to prefer any appeal before the Tribunal. The same is impermissible

either under Common Law or under Sales Tax provisions. Therefore, the Legislature in order to avoid such an anomalous situation, has entrusted the power to the State Government to scrutinise the orders passed by the Officers under the Act, may be at the instance of Commissioner of Commercial Taxes and take a decision whether to prefer an appeal before the Tribunal against the orders passed by an Officer, who are superior in rank, than, that of the State Representative. Therefore, in our opinion, u/s 3(2) of the Act, a State Representative is competent to prefer an appeal after he is authorised to do so by the State Government and effectively pursue the same. The memorandum of appeal that he prefers before the Tribunal contains the grounds on which judicial examination is invited. The making of "an appeal" is not equivalent to "memorandum of appeal". The expressions "appeal" and "memorandum of appeal" are used to denote two distinct things. For the purposes of limitation and for the purposes of the Rules of the Court or the Tribunal, it is required, that, a written memorandum of appeal requires to be filed. Preparation of such an appeal, filing it and effectively pursuing it, is entrusted to the State Representative and this process would commence only, when the State Government authorised him or any other Officer under the Act to prefer an appeal to the Appellate Tribunal against the orders specifically provided u/s 22 of the Act, by following the procedure prescribed under Rule 30 of Karnataka Sales Tax Rules, 1957. Therefore, necessarily we have to hold that the appeals presented by the State Representative before the Appellate Tribunal was without authority of law.

20. The learned Advocate General, who appeared for the revenue, may be realising the procedural error committed by the State Representative when he presented the appeals before the Appellate Tribunal against the orders passed by the first appellate authority, files a memo dated 2-6-2005 before this Court, enclosing a copy of the order of the State Government dated 31-5-2005, according post-facto permission to the State Representative in the Karnataka Appellate Tribunal, to prefer Appeals u/s 22(1) of the act in respect of (62) appeals which are disposed off by the Tribunal by its common order dated 21st day of October, 2004 and copy of the same is also furnished to the learned Counsel Sri G.K.V. Murthy for petitioner.

21. The order passed by the State Government dated 31-5-2005 ratifying the action of the State Representative is as under:

"Government Order No. LAW 509 LSM 2005, Bangalore, Dated: 31-5-2005

In the circumstances explained above, post-facto permission is accorded in respect of 62 appeals vide, Nos. STA 215, 288, 289, 290, 291, 292, 867, 868, 869, 870, 871, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 496, 1065, 1066, 1067, 1068, 1069, 1071, 1073, 1082, 1152, 1154, 1156, 1158, 1160, 1161, 1162, 1217, 1218, 1219, or 2004: STA Nos. 183, 1064, 1070, 1072, 1151, 1153, 1155, 1157, 1159, 1215 of 2004 and STA Nos.: 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1216, 1220, 1221, 1163 of 2004 filed by State

Representative Sri Syed Jamal before the Karnataka Appellate Tribunal, Bangalore, which are already disposed of.

By Order and in the name of the Governor of Karnataka,

Sd/- Vineetha P. Shetty Assistant Solicitor and Ex-Officio, Under Secretary to Government, Law Department (Lit-II)."

22. The Learned Counsel for petitioner after going through the memo filed by the learned Advocate General, would contend, that the post-facto permission granted by the State Government authorising the State Representative for having filed sixty-two (62) appeals before the Tribunal still remains, the acts, without any authority or power and that defect cannot be cured by subsequent post-facto permission/ ratification.

23. The issue that now falls for our consideration is, whether post-facto permission or the order passed, ratifying the action of the State Representative by the State Government would cure the defect pointed by Learned Counsel for petitioner? We have already pointed out, that u/s 3(2) of the Act, the State Representative is competent in a proceedings before the Appellate Tribunal to prepare a memorandum of appeal and effectively pursue the same on behalf of the State Government. When he preferred the appeal in the present cases before the Appellate Tribunal, he was not empowered to do so by the State Government as required u/s 22 of the Act. This is a procedural irregularity committed by the State Representative. This action of the State Representative is now ratified by the State Government by granting post-facto permission and thereby ratifying his action in preferring the appeals before the Appellate Tribunal and in our opinion, this post-facto permission or ratification of the action of the State Representative by the State Government relates back to the date when the appeals were presented by the State Representative before the Appellate Tribunal.

24. In Shri Parmeshwari Prasad Gupta Vs. The Union of India (UOI), , the Supreme Court has observed:

"Even if it is assumed that the telegram and the letter terminating the services of the appellant (the General Manager of the Company) by the Chairman was in pursuance to the invalid resolution of the Board of Directors to terminate his service, it would not follow that the action of the Chairman could not be ratified in a regularly convened meeting of the Board of Directors. The point is that even assuming that the Chairman was not legally authorised to terminate the services of the appellant, he was acting on behalf of the Company in doing so, because, he purported to act in pursuance of the invalid resolution. Therefore, it was open to a regularly constituted meeting of the Board of Directors to ratify that action which, though unauthorised, was done on behalf of the Company. Ratification would always relate back to the date of the act ratified and so it must be held that the services of the appellant were validity terminated by the Chairman".

25. The Apex Court in the case of the High Court of Judicature for Rajasthan Vs.

P.P. Singh and Another, , has observed that "even in a case where the initial action is illegal, the same can be ratified by a competent authority therefor".

26. The Supreme Court in the case of Devender Pal Singh Vs. State National Capital Territory of Delhi and Another, , has observed:

"Procedure is handmaid and not the mistress of law intended to sub-serve and facilitate the cause of justice and not govern or obstruct it. Like all rules of procedure, the requirement of recording "under his own hand" demands an approach, which would be rational and practical and not otherwise".

27. The State of Punjab and Another Vs. Shamlal Murari and Another, , the Apex Court has held:

"Procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant not a resistant in the administration of justice where the non-compliance, though procedural will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But grammar apart, if the breach can be corrected without injury to a disposal of the case, the Court should not enthrone a regulatory requirement into a dominant desideratum. After all, Courts are to do justice, not to wreck this end product on technicalities.

Further, the Court has observed:

"So even what is regarded as mandatory traditionally may, perhaps have to be moderated into wholesome directions to be complied within time or in extended time".

28. The Apex Court in the case of S. Amarjit Singh Kalra (dead) by Lrs. and Others and Smt. Ram Piari (dead) by L.Rs. and Others Vs. Smt. Pramod Gupta (dead) by Lrs. and Others, had laid down that:

"Laws of procedure are meant to regular effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. With the march and progress of law, the new horizons explored and modalities discerned and the fact that the procedural laws must be liberally constructed to really serve as handmaid, make it workable and advance the ends of justice, technical objections which lend to be stumbling blocks to defeat and deny substantial and effective justice should be strictly viewed for being discouraged, except where the mandate of law inevitably necessitates it".

29. The Supreme Court in the case of Marathwada University Vs. Seshrao Balwant Rao Chavan, has observed:

"24. By this resolution, we are told that the Executive Council has ratified the action taken by the vice-chancellor. Ratification is generally an act of principle

with regard to a contract or an act done by his agent. In Friedman's Law of Agency (Fifth Edition) Chapter 5 at P. 73, the principle of ratification has been explained:

"What the "agent" does on behalf of the "principal" is done at a time when the relation of principal and agent does not exist: (hence the use in this sentence, but not in subsequent ones, of inverted commas). The agent, in fact, has no authority to do what he does at the time he does it. Subsequently, however, the principal, on whose behalf, though without whose authority, the agent has acted, accepts the agent's act, and adopts it, just as if there had been a prior authorisation by the principal to do exactly what the agent has done. The interesting point, which has given rise to considerable difficulty and dispute, is that ratification by the principal does not merely give validity to the agent's unauthorised act as from the date of the ratification: it is antedated so as to take effect from the time of the agent's act. Hence the agent is treated as having been authorised from the outset to act as he did. Ratification is equivalent to an antecedent authority".

25. In Bowstead on Agency (14h Ed.) at P.39 it is stated:

"Every act whether lawful or unlawful, which is capable of being done by means of an agent (except an act which is in its inception void) is capable of ratification by the person in whose name or on whose behalf it is done The words "lawful or unlawful", however, are included primarily to indicate that the doctrine can apply to torts. From them, it would follow that a principal by ratification may retrospectively turn what was previously an act wrongful against the principle, e.g., an unauthorised sale, or against a third party, e.g., a wrongful distress, into a legitimate one; or become liable for the tort of another by ratifying".

26. These principles of ratification apparently do not have any application with regard to exercise of powers conferred under statutory provisions. The statutory authority cannot travel beyond the power conferred and any action without power has no legal validity. It is ab initio void and cannot be ratified".

30. The observations made by the Apex Court in the aforesaid decisions, in sum and substance is, ratification is an act of confirmation and acceptance of a previous act, thereby making the act valid from the moment it was done. Keeping in view these principles, let us revert back to the issue, which we have posed for our consideration:

Under Section 22 of the Act, it is the State Government which as to empower an Officer to prefer an appeal to the Appellate Tribunal, if the revenue is aggrieved by any of the orders passed by the authorities under the Act, either under Sections 12-D, 20 or 21 of the Act. It is the State Representative u/s 3(2) of the Act, who has to prepare, file and prosecute the appeal before the Appellate Tribunal on behalf of the State Government. On the day when the appeal was filed by the State Representative against the orders passed by the first appellate authority, may be at the instance of the Joint Commissioner of Commercial

Taxes, he was not empowered to do so. But this action of the State Representative is now ratified by the State Government, by passing an order according post-facto sanction of the action of the State Representative. This ratification by the State Government relates back to the date, when the State Representative had filed appeals before the Appellate Tribunal. In view of this conclusion of ours, the first two questions of law raised and canvassed before us requires to be answered in the affirmative and against the petitioner, for the reasons stated by us.

31. In order to appreciate the other legal issues raised and canvassed by the Learned Counsel for petitioner, it is necessary to keep in view two aspects. Firstly, the provisions of Section 28AA of the Act and the Rules framed thereunder, and secondly, some pertinent observations made by Justice V.R. Krishna Iyer (as he then was) while writing a foreword to the book "Interpretation of Fiscal Statutes in India", he has said that "the law-abiding class obeys the biblical mandate: "Render therefore unto Caesar the things, which are Caesars". But the question arises what is truly due to him (the State) under the law? This turns on an interpretation of the relevant fiscal statute, not as a Judge fancies nor as taxing department desiderates but as read and decoded according to rules of reason and justice sanctioned by precedents of the highest judiciary. A constellation of principles governing interpretation of taxation legislation handed down to us by the High Bench, when systematised, becomes the jurisprudence of interpretation.

32. Section 28AA of the Act as substituted by Act 5 of 2000 with effect from 1-4-2000, provides for transit of goods by road through the State and issue of transit pass.

Sub-section (1) of Section 28AA of the Act envisages that where a vehicle carrying goods taxable under the provisions of Karnataka Sales Tax Act, from any place outside the State and bound for any place outside the State and passes through this State; or and which goods are imported into the State from any place outside the country and such goods are being carried to any place outside the State, the driver or any person-in-charge of such goods vehicle shall furnish such information to the Check Post Officer, (inward Check Post) established near the point of entry into the State or the first Check Post and submit an application in triplicate to obtain a transit pass. On the request so made, the Officer in-charge of the entry Check Post after examining the documents and after making such enquiries shall issue a pass on the duplicate and triplicate copies of the application retaining the original himself. The transit pass shall specify the Check Post of the State to be crossed by the vehicle, the route to be followed and the time within which it should leave the borders of the State.

33. Under Sub-section (2) of Section 28AA of the Act, the driver or person incharge of the vehicle shall deliver within the stipulated time a copy of the transit pass obtained under Sub-section (1) to the Officer incharge at the last Check Post or the barrier before his exit from the State.

34. Sub-section (3) of Section 28AA of the Act may not be relevant for the purpose of this case.

35. Under Sub-section (4) of Section 28AA of the Act, a deeming provision is introduced by the Legislature to create a legal fiction. The sub-section provides, that, if the driver or any other person incharge of the vehicle does not comply with the provision of Sub-section (2) of Section 28AA of the Act, it shall be presumed that the goods carried in the goods vehicle to which transit pass is obtained under Sub-section (1) have been sold within the State by the owner of the vehicle and shall be assessed to tax by the Officer empowered in this behalf in the manner prescribed, notwithstanding anything contained in Sub-section (5) of Section 5 of the Act. The legislature by using the expression "shall be presumed" in the sub-section, assumes that the goods must have been sold inside the State by the owner of the vehicle, if the driver or any person incharge of the vehicle has failed to deliver the transit pass to the Officer at the Check Post or the barrier near the place of exit from the State. This presumption is a rebuttal presumption as observed by the Apex Court in the case of *Sodhi Transport Co. and others Vs. State of U.P. and others*, . The Court in the said decision, while explaining the concept of "rules of presumption" and in particular, "rebuttable presumption" has observed.

"In our opinion, a statutory provision which creates a rebuttable presumption as regards the proof of a set of circumstances which would make a transaction liable to tax with the object of preventing evasion of the tax cannot be considered as conferring on the authority concerned the power to levy a tax which the Legislature cannot otherwise levy. A rebuttable presumption which is clearly a rule of evidence has the effect of shifting the burden of proof and it is hard to see how it is unconstitutional when the person concerned has the opportunity to displace the presumption by leading evidence.

We are of the view that the words contained in Section 28-B of the Act only require the authorities concerned to raise a rebuttable presumption, that the goods must have been sold in the State if the transit pass is not handed over to the officer at the check post or the barrier near the place of exit from the State. The transporter concerned is not shut out from showing-by producing reliable evidence that the goods have not been actually sold inside the State. It is still open to him to establish that the goods, had been disposed of in a different way. He may establish that the goods have been delivered to some other person under a transaction which is not a sale, they have been consumed inside the State or have been re-dispatched outside the State without effecting a sale within the State, etc. It is only where the presumption is not successfully rebutted the authorities concerned are required to rely upon the rule of presumption in Section 28-B of the Act. It is, therefore, not correct to say that a transaction which is proved to be not a sale is being subjected to sale tax. The authority concerned before levying sales tax arrives at the conclusion by a judicial process that the goods have been sold inside the State and in doing so

relies upon the statutory rule of presumption contained in Section 28-B of the Act which may be rebutted by the person against whom action is taken u/s 28-B of the Act."

36. Sub-section (5) of Section 28AA of the Act provides for levy of penalty on the owner of the vehicle, if the owner of the vehicle having obtained a transit pass fails to deliver the same to the Officer at the Check Post or the barrier near the place of exit from the State. The penalty that could be levied is a sum not exceeding double the amount of tax leviable on the goods transported.

37. Sub-section (6) of Section 28AA of the Act provides for machinery for collection of the amount of tax and the penalty levied under Sub-sections (4) and (5) of the Act respectively.

The other sub-sections need not be noticed by us for the purpose of this case. However, the Explanation appended to the Section requires to be noticed. The Explanation once again provides a deeming provision. The legislature deems for the purposes of this Section, that, in a case where a vehicle owned by a person is hired for transportation of goods by some other person, the hirer of the vehicle be deemed to be the owner of the vehicle.

38. Keeping in view these provisions, we turn to consider the third question of law raised for our consideration:

The Learned Counsel for the petitioner would content that Check Post Officer was not justified in imposing tax and penalty on the petitioner, who is only a transporter by presuming that the goods carried in the petitioner's vehicle are sold in Karnataka, even though the assessing authorities of the consignor of the goods in their assessment orders have levied tax on the consignor of the very same goods covered by the transit passes in question by holding that they have sold the goods inside the State. Therefore, the order passed by the Check Post Officer in levying penalty on the transporter of the goods, on mere assumption, that the goods carried in the vehicle have been sold in the State of Karnataka is contrary to the fact situation and therefore, without any authority of law. This legal issue is in two parts. Firstly, with regard to levy of tax u/s 28AA(4) of the Act and secondly, the levy of penalty u/s 28AA(5) of the Act by the Check Post Officer.

Sub-section (4) of Section 28AA of the Act presumes, that, if the driver or any other person incharge of the vehicle does not comply with the provision of Sub-section (2) of the Act, i.e. if he fails to hand over the transit pass to the Officer at the Check Post near the place of exit from the State, then it shall be presumed that the goods carried in the vehicle for which transit pass had been obtained as required under Sub-section (1) of the Act have been sold within the State by the owner of the vehicle and he is assessed to tax by the Officer empowered in this behalf, notwithstanding anything contained in Sub-section (5) of Section 5 of this provision. This presumption can be rebutted by the owner of the vehicle by producing reliable evidence that the goods have not been actually sold inside the

State or in the alternative, he can also show that the goods carried in the vehicle for which transit pass was issued infact had been transported outside the State. Now the question is, whether the owner of the vehicle has discharged his burden in rebutting the presumption raised by the Check Post Officer in his show cause notice before passing an order under Sub-section (4) of Section 28AA of the Act. To the proposal made, the initial reaction of the owner of the goods vehicle in his reply was, he is only a transporter and he do not have any copies issued by the Check Post Officer, and the consignment during the movement was accompanied by his Representative. He or his driver were not aware about, the issue of TPS or its non-surrender. But, by his further reply dated 30-3-2003, he has brought to the notice of the Check Post Officer, that the Assistant Commissioner of Commercial Taxes (Intelligence) - II, Mangalore, has passed provisional order dated 18-12-2002 and has levied sales tax on the very same transaction which is the subject matter of the notice and in that order, the Assistant Commissioner has held that the goods have been sold inside the State and has levied taxon the consignor and when his Superior Officer has held the consignor responsible for sale of goods inside the State, it is not open to presume that the transporter has sold the goods inside the State. It is his further case that the presumption u/s 28AA(4) of the Act would arise only when there is no other material is available with the department as to who has sold the goods inside the State and the department after through investigation has found that the consignor of the goods is responsible and therefore, the question of drawing any presumption u/s 28AA(4) of the Act does not arise. Further, by referring to the law laid down by the Apex Court in Sodhi Transport Company's case (supra), has informed the Check Post Officer that if anybody has sold the goods which is being transported in his vehicle inside the State, it is the consignor and therefore, the presumption drawn that they (transporter of the goods) have sold the goods inside the State is not based on any material whatsoever. In our view, the assertion made in this regard by the transporter is relevant to answer the specific issue, which the learned Counsel for the petitioner has posed for our consideration and therefore, the same is extracted and it is as under:

"Without prejudice to what is stated above, it is submitted that the goods transported in the said vehicle belonged to one M/s Vivek Petro (P) Ltd., Mangalore. This representative of the consignor accompanied the goods vehicle. He only obtained the transit pass and it was his duty to surrender the transit pass at the transit check post. The said goods vehicle also crossed the State border. Therefore, your presumption that the goods have been sold in the State of Karnataka only because the Transit Pass has not been surrendered at the exit check post at Attibele is not correct. In order to enable me to establish that your presumption that I have sold the goods inside the State is not correct, I request you to summon all the records of the proceedings initiated against the said M/s Vivek Petro Chem (P) Ltd., by the Assistant Commissioner of Commercial Taxes (Intelligence) - II, Mangalore, and all the account books of the consignor maintained at Mangalore and Pondicherry. I also request you to summon the

Managing Director and the Accounts Manager of M/s Vivek Petrol (P) Ltd, for cross-examination to elicit the correct facts from them. If you summon the account books of the consignor and verify the transactions carried out, the truth will come on record. In this connection, I would like to draw your kind attention to a decision of the Hon"ble Supreme Court of India in the case of Sodhi Transport Co. v. State of U.P. and Anr. (supra) wherein, while interpreting the provisions of Section 28-B of the Uttar Pradesh Sales Tax Act, 1948, which is similar to Section 28AA(4) of the KST Act, it has been held that the presumption that if the transit pass is not surrendered at the exit check post goods have been sold inside the State is a rebuttable presumption and it is open for the person concerned to displace the presumption by leading evidence".

39. The Check Post Officer, while considering the reply filed by the transporter, opposing the proposal made by him in the show cause notice, firstly, observes in his order that as per Section 28AA of the Act, in the cases of transit passes not being surrendered, vehicle owners/drivers are held responsible and it is provided, to levy tax and penalty on them and no action can be initiated on the consignor or the consignee. This conclusion of the Check Post Officer runs not only counter but also contrary to the observations made by the Apex Court in the case of Sodhi Transport Company-62 STC 381, wherein the Apex Court while considering the constitutional validity or otherwise of Section 28-B of Uttar Pradesh Sales Tax Act, 1948, which is in parameter with Section 28AA of the Karnataka Sales Tax Act, 1957, has observed that "the provisions contained in Section 28-B of the Act only require the authorities to raise a rebuttable presumption that the goods must have been sold in the State, if the transit pass is not handed over to the Officer at the Check Post near the place of exit from the State. This presumption can be rebutted by the transporter by producing reliable evidence that the goods have not been actually sold inside the State. It is only where the presumption is not successfully rebutted, the authorities concerned are required to rely upon the rule of presumption under the Act". In the reply filed to the show cause notice, the transporter, firstly, has brought to the notice of the Check Post Officer that he is only a transporter and he cannot be fastened with any liability u/s 28AA(4) of the Act and further, the consignor of the goods has been provisionally assessed by the Assistant Commissioner of Commercial Taxes (Intelligence)-II, Mangalore, on the very same transaction which is the subject matter of the show case notice and the goods transported in the said vehicle belonged to the dealers registered under the Act.

40. The Check Post Officer while considering the objections filed by the transporter, in his order observes, that u/s 28AA of the Act, if the driver or person incharge of the goods vehicle does not surrender the transit pass, vehicle owners/drivers are held responsible and they are liable to be assessed u/s 28AA(4) of the Act and also liable for payment of penalty u/s 28AA(5) of the Act and no action can be initiated on the consignor or the consignee. To come to this conclusion, the Check Post Officer has relied on the law declared by the Court in the case of Saru D'souza v. CTO-II, Bellary (1991) 83 STC 429 sc. The approach

of the Check Post Officer, appears to us, that merely because the driver incharge of the vehicle, who had applied and obtained the transit pass requires to hand over the same to the Check Post Officer at the exit Check Post and since that is not done, the transporter is liable for levy of tax and penalty. This approach of the Check Post Officer is not only contrary to the provisions of the Act but also settled legal principles enunciated by the Apex Court in *Sodhi Transport Companies case-62 STC 381*, wherein the Court has observed that non-surrender of the documents by the driver or person incharge of the goods vehicle, a presumption would arise that the goods carried thereby have been sold within the State by the transporter or person incharge of the vehicle and this presumption is a rebuttable presumption and the transporter by producing reliable evidence may rebut the presumption that is drawn against him. In the instant case, the transporter in reply to the show cause notice has brought to the notice of the Check Post Officer, the provisional assessment orders passed by the Assistant Commissioner of Commercial Taxes (Intelligence)-II, Mangalore, wherein the consignors are held liable for payment of tax and the tax is levied on them on the ground that the goods transported in the vehicle had been sold inside the State. The Check Post Officer before passing the order levying tax u/s 28AA(4) of the Act on the transporter of the vehicle, should have considered the objections filed by the transporter in a proper perspective and it is only after recording a positive finding, that the goods have been sold inside the State, though with the help of presumption which is rebuttable one, then only he could be assessed to tax u/s 28AA(4) of the Act. In the present case, such an exercise has not been done by the Check Post Officer. At the cost of repetition, the Check Post Officer proceeds to levy tax on the transporter of the vehicle mainly on the ground that the driver incharge of the vehicle had not surrendered the transit pass at the exit Check Post. Whether a sale has taken place inside the State or not as contended by the transporter, some factual enquiry requires to be made by the Check Post Officer and it is only then the presumption could be applied, for the reason, Section 28AA(4) of the Act provides a rebuttable presumption and not irrebuttable conclusive presumption.

41. The Learned Counsel for the petitioner would submit that in view of the Explanation appended to Section 28AA of the Act, the initiation of the proceedings to levy tax and penalty on the transporter of the vehicle is without jurisdiction and without authority of law. It is further submitted that the transporter/petitioner on whom show cause notice was issued by the Check Post Officer proposing to levy tax and penalty under Sections 28AA(4) and (5) of the Act, had brought to the notice of the Check Post Officer that the consignor has hired his vehicle for transportation of goods and therefore, the hirer of the vehicle for the purpose of this Section be deemed to be the owner of the vehicle and therefore, the proceedings initiated against the petitioner, who is only a transporter is without authority of law and void-ab-initio. There is some merit in the contention of the Learned Counsel for petitioner. But this aspect of the matter was neither urged nor argued before the Check Post Officer. In our

opinion, the issue canvassed by Learned Counsel for petitioner is a pure question of fact. At the first instance, it should have been brought to the notice of the Check Post Officer while replying to the proposal made in the show cause notice. A point that was not raised before the authorities cannot be permitted to be raised in a revision petition before this Court for the first time. Even assuming that it is a mixed question of fact and law, the same should have been raised atleast before the Appellate Tribunal. A mixed question of fact and law not raised before nor adjudicated before the Tribunal cannot be raised before this Court in a revision proceedings filed u/s 23 of the Act.

42. Now coming to the orders passed by the Check Post Officer levying penalty u/s 28AA(5) of the Act, which is confirmed by the Appellate Tribunal, Sub-section (5) requires to be noticed and therefore, the same is extracted:

"(5) If the owner of the vehicle having obtained the transit pass provided under Sub-section (1) fails to deliver the same as provided under Sub-section (2), he shall be liable to pay by way of penalty a sum not exceeding double the amount of tax leviable on the goods transported".

The language employed by the legislature under Sub-sections (4) and (5) of Section 28AA of the Act is entirely different. The legislature while coming to levy of penalty for not handing over the transit pass obtained under Sub-section (1) by the driver or person incharge of the vehicle has designedly not used any deeming provision nor rebuttal presumption. The sub-section only says that if the owner of the vehicle having obtained the transit pass fails to surrender the same as provided under Sub-section (2), he is liable to pay penalty under Sub-section (5) of Section 28AA of the Act. The legislature always uses appropriate language to manifest its intention. When the language is clear and unambiguous, there is no case for reading down the provision, so as to read the Section as providing rebuttable presumption. Section 28AA(5) of the Act requires the delivery of transit pass to the Officer incharge of the Check Post or the barrier, before the exit of the goods vehicle from the State. If there is a failure to surrender the transit pass, then the consequences provided in Sub-section (5) would follow. The failure contemplated under Sub-section (5) of Section 28AA of the Act is a failure to deliver the transit pass by the owner of the vehicle at a point of time before the vehicle crosses the border of the State. Thus exit of the goods vehicle from the State without surrendering the transit pass at the last Check Post is the basis to invoke the provisions of Sub-section (5) of Section 28AA of the Act. This Section is not concerned with the owner of the goods. It operates only on the owner of the goods vehicle having obtained a transit pass provided in Sub-section (1) fails to hand over the same at the exit Check Post. Under this sub-section, the owner of the goods will have no liability to pay the penalty.

43. In the present case, the stand of the transporter in his reply to the proposal made in the show cause notice is that, it is the consignor's representative, who had applied and obtained the transit pass and he or his driver is not aware about

the issue of transit pass or non-surrender of the same, This version of the transporter is not only disbelieved by the Check Post Officer, but also by the Appellate Tribunal, which is the last fact finding authority. The Check Post Officer with reference to the documents available in his records has given a positive finding in the course of his order passed u/s 28AA(5) of the Act, that it is the driver of the vehicle, who has applied for issuance of transit pass in Form 39AA as prescribed under the Rules and had obtained the same and therefore, the transporter cannot plead ignorance of the issuance of transit pass or its non-surrender by the driver of the vehicle. The Check Post Officer in his order secondly notices that the driver incharge of the vehicle ought to have surrendered the duplicate copy of the transit pass at the Hosur Road Check Post which is the outward exit Check Post as specified by him at the time of issuing the transit pass to ensure by the Check Post Officer at the exit Check Post, that the goods being moved out of the State are the very same goods for which the transit pass is issued. The Officer incharge of the last Check Post will also acknowledge the receipt of the duplicate copy of the transit pass and on the triplicate copy of the transit pass, and the duplicate copy so received will be sent back to the Check Post Officer which had issued the transit pass at the time of entry of the goods vehicle into the State for periodical verification, that the goods vehicle for which the transit pass is issued has really moved out of the State and the goods carried therein are not sold in the State of Karnataka by evading taxes payable under the Act. In the present case, it so transpired, that the vehicle for which the transit pass was issued, instead of passing through the specified Check Post namely Hosur Check Post, it appears, had passed through N. Vaddarahalli Check Post at Mulabagal Taluk, Kolar District, and the duplicate copy which should have been surrendered at the last exit Check Post was received by the Check Post Officer, who had issued the transit pass by ordinary post with the duplicate or forged seal of the exit Check Post. With this material available on record, the Check Post Officer after a detailed verification and lot of correspondence with the Check Post Officer at the exit Check Post, has given a finding on facts, that the driver incharge of the goods vehicle, who had applied and received the transit pass has not surrendered the transit pass to any of the Check Post Officer at the last exit Check Post. In view of this factual finding, the Check Post Officer has levied penalty u/s 28AA(5) of the Act on the owner of the vehicle. This in our view, is perfectly in accordance with the penal provision provided under the Act and therefore, we do not find any good reasons to interfere with the order so passed by the Check Post Officer.

44. Now coming to the fourth issue, in our view, the same should not detain us for long. In this regard, the contention of the Learned Counsel for the petitioner is that, the Tribunal has committed an error in not disposing of the memorandum of cross objections filed by the petitioner, even though as per Section 22(2-A) of the Act, such memorandum of cross objections shall be disposed off by the Tribunal as if it were an appeal presented before it. To answer this issue, it may be necessary to notice the prayer made in the cross objections filed before the

Appellate Tribunal. A perusal of the grounds raised and the prayer made in the cross objections filed before the Tribunal would clearly indicate that the petitioner has merely justified the orders passed by the first appellate authority and the only exception taken in the cross objection filed against the orders passed by the first appellate authority is that the said authority was not justified in remanding the matter to the Check Post Officer for a fresh disposal of the matter in accordance with law in the light of the directions issued by him in the course of the order.

45. Sub-section (2-A) of Section 22 of the Act provides for filing of cross objection by the opposite party in an appeal filed before the Appellate Tribunal by an aggrieved person and if such cross objections are filed, the Tribunal is expected to decide the same, as if it were an appeal presented within the time specified in Sub-section (1) of the Act.

46. The Tribunal, though in its impugned order has not specifically dealt with the cross objections filed by the petitioner, but has covered all the issues raised by the petitioner in its cross objections while considering the appeal filed by the revenue against the orders passed by the first appellate authority. The legal issues raised by the petitioner in his cross objections and the issues raised by the revenue in their appeal are infact overlapping. As we have already noticed, the main relief that the petitioner has claimed in his memorandum of cross objections are, (i) to declare that the entire proceedings initiated against the first respondent u/s 28AA of the Karnataka Sales Tax Act, 1957, are without jurisdiction; (ii) to quash the impugned order passed by the first appellate authority (second respondent) in so far as it related to remanding the matter back to the Check Post Officer. Both these issues have been taken note of by the Appellate Tribunal, while deciding the appeals filed by the revenue against the order passed by the first appellate authority. Therefore, in our view, even if there is a minor procedural irregularity in not disposing of the cross objections filed by the petitioner, it cannot be so fatal, which would warrant for setting aside the impugned order passed by the Appellate Tribunal.

47. The Learned Counsel Sri G.K.V. Murthy, to sustain the fifth legal issue raised in the memorandum of appeal would submit, that it is the consignor, who had imported the goods into the State from a place outside the country and having taken delivery of the same and further having accounted in its books of accounts, had entrusted the same for transportation to its office at Pondicherry/Chennai on stock transfer basis to the petitioner and therefore, the ingredients which would warrant either to assess the transporter to tax u/s 28AA(4) of the Act and to levy penalty u/s 28AA(5) of the Act is absent and therefore, the order passed by the Check Post Officer which has been confirmed by the Karnataka Appellate Tribunal are void-ab-initio. The submission made in this regard, in our view, has no merit whatsoever. We say so, for the reason, it is the driver, who was incharge of the petitioner's vehicle had filed application in triplicate in Form 39AA of the Officer incharge of the Check Post established near the point of entry into the State for

issue of transit pass to transport the taxable goods outside the State by passing through this State. Under Sub-rule (2) of Rule 23F of the Rules, the Officer incharge of entry Check Post is bound to issue such transit pass on the duplicate and triplicate copies of the application retaining the original with him. Having obtained the transit pass, the driver or the person incharge of the vehicle should deliver the duplicate transit pass within the stipulated time to the Officer incharge at the last Check Post or the barrier before his exit from the State. If the owner fails to deliver the same, it shall be presumed that the goods carried thereby have been sold within the State by the owner of the vehicle which is a rebuttable presumption, and he will not only be liable to be assessed to tax by the Officer empowered in this behalf and also for levy of penalty. It is for the driver incharge of the vehicle to provide necessary information with regard to goods carried in the vehicle at the time he makes the application for issue of transit pass or atleast when he is issued with a show cause notice to show cause why an order should not be passed u/s 28AA(4) of the Act and Section 28AA(5) of the Act. From the beginning it was the stand of the petitioner that he is only a transporter and he does not have any copies of transit permits issued by the Check Post Officer (Inward) and the consignment during its movement was accompanied by his representative. This is evident from the reply filed by the petitioner to the show cause notice issued by the Check Post Officer. In his first reply dated 18-10-2002, he has stated:

"We are only a transporter and we are not having any copies of TPS said to be issued from your Office, the consignment during its movement was accompanied by its representative. We or our Driver was not aware about issue of TPS or non-surrender or said to be affixing seal of STCP belonging to your department".

48. The petitioner yet again by his further reply dated 6-4-2003 to the show cause notice issued, would submit:

"Without prejudice to what is stated above, it is submitted that the goods transported in the said vehicle to belonged to one M/s Vivek Petro (P) Ltd., Mangalore, the representative of the consignor accompanied the goods vehicle. He only obtained the transit pass and it is his duty to surrender the transit pass at the transit Check Post".

49. This factual assertion is taken note of by the Check Post Officer and also by the Appellate Tribunal, which is the last fact finding authority, while considering whether or not to impose penalty on the owner of the vehicle. On verification of the records, they have given a positive finding that it is not the representative of the consignor, who had made an application for issuance of transit pass, but it is the driver incharge of the vehicle, who had sought for issuance of transit pass and it was he who was statutorily obliged to have surrendered the transit pass at the exit Check Post. Since that was not done, the vicarious liability is on the owner to pay penalty under Sub-section (5) of Section 28AA of the Act for contravention of the provisions of Sub-section (2) of Section 28AA of the Act. Before the Check Post Officer, petitioner could have firstly produced the

documentary evidence by securing the same from the consignor to show that the goods that were transported in the vehicle were imported goods and the delivery was taken at Mangalore and were accounted for in their books of accounts and it is only thereafter, the goods were transferred to its Office either at Pondicherry or Chennai, and therefore, it is not a case where the vehicle was carrying the taxable goods under the Act from a place outside the State and bound for any place outside the State and was passing through the State, nor a case where the goods are imported into the State from any place outside the country and such goods are being carried to any place outside the State. In support of this documentary evidence, the petitioner could have also examined the consignor of the goods. Instead of doing so, it was the stand of the petitioner that the consignment during its movement was accompanied by his representative and therefore, he was not aware of issuance of transit pass by the Check Post Officer at the entry Check Post nor its surrender at the exit Check Post. This assertion of the petitioner is not rightly accepted either by the Check Post Officer or by the Appellate Tribunal, which is the last fact finding authority in view of the documentary evidence that was available in their records. Therefore, the Learned Counsel for the petitioner is not justified in contending that the provisions of Section 28AA(5) of the Act are not applicable to the facts of this case. Accordingly, the fifth issue raised in the memorandum of revision petition requires to be answered against the assessee.

50. Lastly, the Learned Counsel for the petitioner would contend that the Appellate Tribunal has committed an error in not giving any finding on the ground urged before it that the Check Post Officer has violated the principle of natural justice in not summoning the books of accounts of the consignor of the goods and also the concerned Officials of the consignors for cross-examination to enable the petitioner to rebut the presumption contemplated u/s 28AA(4) of the Act as per which the owner of the goods vehicle is presumed to have sold the goods inside the State if he fails to surrender the transit pass at the exit Check Post before leaving the State. In our view, what is contemplated under the Act, is to provide an opportunity of personal hearing and to adduce evidence in support of the defence to a person, who is alleged to have violated the provisions of the Act. It is for that person to produce the evidence by obtaining copies of the provisional assessment orders passed against the consignors or the consignees that the goods for which transit passes have been issued are actually taken outside the State. It is not expected of the Check Post Officer to collect evidence from various other authorities to sustain the show cause notice issued by him. the cardinal rule in this regard is, service of notice is a condition precedent for making an order either to assess or to levy penalty or interest, etc. The person against whom the show cause notice is issued is in law entitled to rebut the allegations made against him, if he so chooses, by producing any evidence which is in his possession. This would satisfy the requirement of notice and fair hearing. In view of this, in our view, the contention canvassed by the Learned Counsel for the petitioner that fair opportunity of hearing was not afforded to the petitioner

before levying penalty cannot be accepted.

51. In view of the above, the following:

ORDER

I. Revision Petition is allowed in part.

II. The impugned order passed by the Check Post Officer u/s 28AA(4) of the Act dated 22-7-2003 in No. KST/TP-94/ 02-03/NHN is set aside. This aspect of the matter is remanded back to the Check Post Officer to redo the matter in accordance with law and in the light of the observations made by us in the course of the order, after affording a fair opportunity of hearing to the petitioner.

III. The other legal issues raised and canvassed are held against the petitioner and in favour of the department.

IV. In the facts and circumstances of the case, parties are directed to bear their own costs. Ordered accordingly.