

(2004) 08 KAR CK 0017
In the Karnataka High Court
Case No : S.T.R.P. No. 47 of 2001

State of Karnataka and Another

APPELLANT

Vs

H. Dasappa and Sons (P) Ltd.

RESPONDENT

Date of Decision : 12-08-2004

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 12 B (3), 23 (1)

Citation : (2004) ILR (Kar) 4486 : (2004) 4 KCCR 407 SN : (2008) 11 VST 286

Hon'ble Judges : H.L. Dattu, J;A.C. Kabbin, J

Bench : Division Bench

Advocate : B. Anand, for the Appellant; A. Shankar, for the Respondent

Final Decision : Allowed

Judgement

H.L. Dattu, J.—The revenue is before this Court in this revision petition filed u/s 23(1) of the Karnataka Sales Tax Act, 1957 ("KST Act" for short) inter alia calling in question the correctness or otherwise of the order passed by the Karnataka Appellate Tribunal in appeal No. STA. 1033/1999.

2. The question of law raised for our consideration and decision is:

"Whether the Tribunal was justified in setting aside the orders passed by the assessing authority and the first appellate authority in levying penalty u/s 12-B(3) of the KST Act?"

3. The relevant facts for the purpose of this case are as under:

The respondent is a Private Limited Company dealing in arrack. It is registered as a dealer both under the Karnataka Sales Tax Act, 1957, and the Central Sales Tax Act, 1956 ("CST Act" for short). For the non-payment of advance tax every month on the basis of monthly returns within the prescribed time for the assessment year 1993-1994, the assessing authority in his proposition notice issued u/s 12-B(3) of the Act dated 26.8.1995 had propose to levy penalty u/s 12-B(3) of the Act, 1957. In the notice, it was informed to the petitioner as

under:

"H. Dasappa and Son"s Pvt. Ltd., Peenya Industrial Area, Bangalore, have filed monthly statement of turnover in Form-3 admitting taxable turnover and paid tax through cheques. The cheques for all the months when presented to the Bank were returned back unrealised. Said admitted tax is paid quarterly through demand drafts. Thereby the dealer has failed to pay the admitted advance tax within the stipulated time and committed an offence punishable u/s 12-B(3) of the KST Act. Therefore, it is proposed to levy penalty both under KST and CST Act as stipulated u/s 12-B(3) of the KST Act, 1957."

4. This notice was served on the respondent company, but in the reply filed by it, the respondent company did not advert to the proposed penalty.

5. The assessing authority while concluding the assessment order for the assessment year in question, passed an order u/s 12-B(3) of the Act also levying a penalty of Rs. 25, 00, 000/- (Rupees Twenty-five lakhs only). In his order, the assessing authority observes:

"In response to the above notice, they have filed their objections on 1.9.1995 stating that they sell their products on credit basis and receive the sale proceeds beyond 90 days which was resulted in delaying payments and there is no intention and hence, requested to drop the proceedings.

I have examined the objections filed by them and found that the contentions made therein are not acceptable as per the provisions of Section 12-B(1) of the Act. As there is continuous dishonour of cheques causing delay in payments, I have left with no other alternative except to levy the penalty. However, considering the circumstances of the case and delay in payments, infact, still there is balance for February and March, 1994 taxes, and nature of the business, a penalty of Rs. 25, 00, 000/- (Rupees twenty-five lakhs only) is levied u/s 12-B(3) of the KST Act, 1957."

6. It is relevant at this stage itself to notice that the reply filed by the assessee to the proposition notice is available in the assessment records. The assessee infact has not adverted to the proposal made by the assessing authority for levy of penalty u/s 12-B(3) of the Act. However, it appears that the assessee"s representative appears to have argued the cause for delay in not paying the advance tax along with its monthly returns at the time of hearing before the assessing authority. Be that as it may.

7. This levy of penalty by the assessing authority was questioned by the assessee before the first appellate authority, who by his order dated 8.2.1996 allowed the appeal in part and reduced the penalty imposed from Rs. 25, 00, 000/- to Rs. 15, 00, 000/- and further .directed the assessing authority to issue a fresh demand notice to recover the penalty as modified by him.

8. The assessee being aggrieved by the aforesaid order passed by the first appellate authority, had carried the matter by filing second appeal before the

Karnataka Appellate Tribunal in STA No. 1033/1999. The Tribunal, if we may say so, by assigning very strange reasons, has allowed the appeal and has set aside the order passed by the first appellate authority, modifying the order passed by the assessing authority. The reasons assigned by the Tribunal for allowing the appeal is that, the assessee has not delayed payment of advance tax with malafide intention and that non-payment of advance tax along with the monthly return was not deliberate, in defiance of law, nor was it guilty of a conduct indicating a conscious disregard of its obligations. Secondly, in Karnataka Appellate Tribunal's opinion, levy of penalty of more than Rs. 11 lakhs (Rupees Eleven Lakhs) (interest) u/s 13(2) of the Act was a sufficient penalty on the respondent and that a lenient view was required to be taken in the levy of penalty u/s 12-B(3) of the Act. In support of its reasoning, the Tribunal has placed reliance on the observations made by the Apex Court in the case of Hindustan Steel Ltd. Vs. State of Orissa, , M.M. SOMAYYA v. COMMERCIAL TAX OFFICER, GOKAK (1973) 32 STC 541, and ELESTON's case (1983) (2) KLJ 345. The reasons assigned by the Tribunal, which are relevant, are extracted below:

"25. Considering all the facts only, the FAA has reduced the penalty to some extent. Thus, meeting the demands of the appellant less than half way through. When, he is convinced about the bonafidenes of the appellant's contentions, as admitted by himself in his order, the FAA should have conceded the appellant; submission not to levy the penalty. Somehow the FAA has not rendered full justice in the case of Hindustan Steel Limited thus:

"Even if a minimum penalty is prescribed the authority competent to impose the penalty, will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute."

Thus, for the reason for which the FAA has reduced the penalty, for the same reasons, he should have reduced the penalty to zero.

26. Further, the Karnataka High Court in the case of Manilal Monaji Somayya Vs. The Commercial Tax Officer, Gokak and Another, have ruled that:

"The observation of the Supreme Court in Hindustan Steel Ltd. Vs. State of Orissa, equally applies to cases of imposition of penalty u/s 12B(2) of the KST Act. In Hindustan Steel Ltd., case, it was held by the Supreme Court that penalty cannot be imposed merely because it was lawful to do so and the power of levying penalty should be exercised judicially and on a consideration of all the circumstances."

27. In the instant case, as rightly observed by the FAA, the dealer has not acted deliberately in defiance of law, at the same time, he states in his order that the records reveal that the appellants was not getting the taxes due by him well within the time. And the AA was also aware of such situation as was already penalized by levy of penalty worth more than Rs. 11 lakhs as penalty (interest) u/

s 13(2) of the KST Act itself. Under these circumstances, we feel the appellant need not be penalized further more. Thus, we come to conclusion that, the appellant deserves no penalty u/s 12-B(3) of the Act. As such, we have to allow the appeal."

9. The revenue has raised the following questions of law for our consideration and decision. They are:

"1. Whether hardship and liquidity in finances pleaded by the assessee could be accepted on the face of it, notwithstanding the decision in Eleston's case and whether it could be a ground for waiving the levy of penalty u/s 12-B(3) of the KST Act?

2. Whether it would not render Section 12-B(3) of the Act otiose if it is held that the levy of penalty u/s 13(2) by the very fact, required the authorities to consider waiving levy of penalty u/s 12-B(3) of the Act?

3. Whether it is a condition precedent to demonstrate or identify the guilty intention or mens rea before imposing any penalty, in the light of the judgment in the case of R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, ?"

10. The learned Govt. Advocate Sri Anand, appearing for the revenue would contend that the findings of the Tribunal and the conclusion reached by it for allowing the appeal are arbitrary and perverse they being contrary to the provisions of the Act and the settled legal principles and that therefore, the order requires to be set aside.

Per contra, Sri Shankar, learned Counsel appearing for the respondent justifies the impugned order passed by the Tribunal. The learned Counsel relies also on the rulings of this Court and the Apex Court, reference to which will be made while considering the submissions made by the learned Counsel.

11. To understand and appreciate the submissions made by the learned Counsel for the parties, it would be useful to refer to the provisions of Section 12-B of the Act as it existed during the relevant assessment year. The provisions are as under:

"Section 12-B : Payment of tax in advance:

(1) Subject to such rules as may be prescribed, every dealer shall send every month to the assessing authority a statement containing such particulars as may be prescribed including the taxable turnover during the preceding month and shall pay in advance the full amount of tax payable by him under this Act within twenty days after the close of the preceding month to which such tax relates on the basis of the turnover particulars shown in the statement and the amount so payable shall for the purposes of Section 13 be deemed to be an amount due under this Act from such dealer.

Provided that where a dealer's turnover in a year is not more than five lakh

rupees or where the dealer is a small scale industrial undertaking as defined in the Industries (Development and Regulation) Act, 1951, (Central Act LXV of 1951) and registered with the Director of Industries and Commerce, Government of Karnataka, such dealer shall send such statement and shall pay in advance the full amount of tax payable for every quarter within twenty days after the close of that quarter.

Provided further that the full amount of tax payable by a dealer in advance for the year as reduced by the amount of tax already paid under this section shall be paid within thirty days after the close of the year to which such tax relates;

Provided also that where the tax payable for any quarter by a small scale industrial undertaking is not paid within thirty days after the close of the quarter to which such tax relates, such undertaking shall be liable to pay tax thereafter as provided under this sub-section excluding the first proviso.

(2) If no such statement is submitted by a dealer under sub- section (1) before the date prescribed or if the statement submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority may assess the dealer provisionally for that month to the best of his judgment, recording the reasons for such assessment, and proceed to demand and collect the tax on the basis of such statement.

Provided that before taking action under this sub-section the dealer shall be given a reasonable opportunity of being heard.

(4) If at the end of the year is found that the amount of tax paid in advance by any dealer for any month or quarter or for the whole year in the aggregate was less than the tax payable for that month or quarter or the tax for the whole year as finally assessed, as the case may be, by more than fifteen percent, the assessing authority may direct such dealer to pay, in addition to the tax, by way of penalty, a sum not exceeding one and a half times the amount by which the tax so paid falls short of the tax payable for the month or quarter or for the whole year, as the case may be"

Provided that no penalty under this sub-section shall be imposed unless the dealer affected has had a reasonable opportunity of showing cause against such imposition"

12. The provisions of the Act provide for submission of the monthly returns by a dealer registered under the Act on his own, declaring his monthly turnover and tax payable thereon and these returns become the base for determination of his liability for payment of tax under the Act. Rules have been framed prescribing the precise manner in which monthly returns should be filed and the information, which the dealer should supply to the assessing authority. The time limit is also prescribed under the provisions within which time, the monthly returns require to be filed by the dealer.

Under Section 12-B of the Act, a dealer is required to send every month a

statement containing such particulars as may be prescribed in the Rules, including the taxable turnover during the preceding month. These are called monthly returns. The dealer's obligation under the Act does not end there. Along with his returns, he is required to pay in advance the full amount of tax payable by him as admitted by him in his monthly returns. Any failure to pay the admitted tax, shall, for purposes of Section 13 of the Act be deemed to be an amount due under the Act from the dealer.

Under sub-section (2) of Section 12 of the Act, the power is vested with the assessing authority to assess the dealer provisionally for that month to the best of his judgment and proceed to demand and collect the tax on the basis of such assessment under two circumstances. Firstly, if the dealer has failed to file his monthly returns as required by sub-section (1) of Section 12 of the Act and secondly, if the statement submitted by the dealer before him is either incorrect or incomplete. Before passing the provisional assessment order, the assessing authority is expected to give an opportunity of hearing to the dealer and this is only to comply with the principles of nature justice.

Section 12-B(3) of the Act authorises the levy of penalty of a sum not exceeding one and half times the amount by which the tax paid falls short of the tax payable for the month or quarter or the whole year as the case may be. This provision can be pressed into service- by the assessing authority only while framing the assessment order for the relevant assessment year. For the purpose of calculation of penalty in respect of default committed by the dealer under this Section, the difference between the assessed tax and the tax paid in advance during the financial year preceding the assessment has to be worked out. It means, the tax determined on the basis of regular assessment as reduced by the amount of advance tax paid along with the monthly returns. If it exceeds by more than fifteen percent, then only the provisions of Section 12-B(3) of the Act are attracted. In other words, the assessing authority gets jurisdiction to levy penalty under sub-section (3) of Section 12-B of the Act, only if the finally assessed tax exceeds the aggregate advance tax paid by more than fifteen percent. In such circumstances the assessing authority while directing the dealer to pay the quantified tax may also direct the dealer to pay a penalty in a sum not exceeding one and a half times the tax not paid. The word "may" used in the sub-section gives discretion to the assessing authority to levy penalty or not to levy penalty, but if he decides to levy penalty it should not exceed the limit prescribed in the provisions itself. Whether a penalty should be levied or not and if so, what should be the quantum of penalty will depend on facts and circumstances of each case which will primarily depend on whether the default was willful, deliberate or merely accidental. In order to justify the imposition of penalty, the assessing authority should not only find that there is default but also consider the question whether there was good and sufficient reason for the default and when he finds the reason assigned by the assessee not satisfactory or the assessee has failed to furnish reasons, he can impose penalty u/s 12-B(3) of the Act.

13. A Division Bench of this Court in the case of SHANTHI INDUSTRIES v. COMMISSIONER OF COMMERCIAL TAXES (1993) 89 STC 190 while considering the discretion to levy penalty and conditions requisite for levy of penalty, after referring to the decision of the Apex Court in the case of HINDUSTAN STEEL LTD. v. STATE OF ORISSA, in the case of M.M. SOMAYYA v. COMMERCIAL TAX OFFICER - and in the case of ELESTONE ESTATE AND INDUSTRIES LIMITED v. STATE OF KARNATAKA, has observed that despite the principles laid down in these cases, one should not lose sight of the fact that the Supreme Court in the case of COFFEE BOARD, BANGALORE v. JOINT COMMISSIONER OF COMMERCIAL TAXES (1970) 25 STC 528, stated that the facts must always play their due part and each case should depend on its own facts. In the said decision, the Court was pleased to observe:

".... it was not possible to lay down all tests for all cases but it was always possible to lay down some tests, which would be applied to all cases. Therefore, when an authority is required to exercise a discretionary power coupled with a duty, certainly he should have due regard to the facts of the case with which he is dealing. One cannot simply brush aside all explanations offered in regard to the alleged breach of law inviting the penalty, merely because the authority has the power to impose such penalty. There must be implicit evidence in the process of imposition of penalty that all materials relevant to the exercise of discretion which was before the authority was indeed considered by it before penalty came to be imposed."

The Court was further pleased to observe:

".... Normally, a person who pleads cause must support the same by adequate material placed and if by ignorance or otherwise, he had failed to do it, the authority must, in order to see that the rules of natural justice were observed invite material and only on failure to produce the material or such material being produced and not being satisfied with the material and for reasons of not being so satisfied, it may proceed to levy the penalty and not otherwise."

14. Now coming to the facts of the present case, it is not in dispute nor can it be disputed by the respondent that it is one of the established dealers in breach doing business from few decades in arrack with one of the highest turnover in the State of Karnataka and therefore, it knows fully well that it is required to file monthly returns as required by Sections 12-B(1) of the Act. In fact, in this case, it is seen that it filed monthly returns within due dates as prescribed under the Act and issued cheques towards its tax liability. But all those, cheques were dishonoured and this happens not for one month but through out the assessment year 1993-1994. This in our opinion, is not only willful, but also deliberate. To demonstrate this aspect, we have gone through the entire assessment records for the assessment year 1993-1994 and in that we observe:

STATE OF MONTHLY PAYMENT PAID FOR THE YEAR 1993-94 IN THE CASE OF M/ S. D. DASAPPA AND SONS PVT. LTD.

SI. No.

Month.

Date of Receipt

Page No.

Amount payable

Paid

Remarks

Page No.

1

Apr.93

20.5.93

3-4

1,004,713

1,004,713

Ch.No. 037085/20.5.93 bounced Paid vide D.D.'s Are as follows.: 50,000, 50,000, 2,50,000, 3,00,000 1,00,000, 1,00,000 1,54,713=10,07,413 vide CR. 1267 to 173 C2 2522/29.7.93

16

11

2

May.93

21.6.93

7-8

1,379,054

1,379,054

Ch.No. 037904/21.6.93 bounced Paid vide DD;s as Follows: 3,40,000, 3,39,054 7,00,000=13,79,054 Vide CR. 1487 to 1489 Cs-2196/12.8.93

28

38

3

Jun.93

20.7.93

12-13

1,128,967

—

Cheque bounced

51-52

4

Jul.93

24.8.93

35-36

1,026,157

—

Ch.No.969056/ 30.8.93 bounced

44

5

Aug.93

20.9.93

39-41

404,634

—

Ch.No. 969086/ 20.9.93 bounced Form 41 issued

74

6

Sep.93

22.10.93

56-58

1,009,437

—

Ch.No. 925104/ 30.10.93 bounced Form 41 issued

98

7.

Oct.93

23.11.93

61-62

874,928

—

Ch.No.925132/ 20.11.93 bounced Form 41 issued

93

8. Nov. 93 22.12.93 63 528,180 _ Ch.No.925181/ 20.12.93 bounced Total for June to Nov. 93-4972303 Paid as follows: 69

10,00,000 9,00,000 & 1,00,000 Cr.3984 & 3985

7,00,000 7,00,000 Cr. 4040/ 24.3.94 110

50,000 50,000/- Cr.4286/ 29.3.94

5,00,000 5,00,000/- Cr.4305 C2-2227/30.3.94

5,00,000 5,00,000/- Cr.4355 C2-2309/2.4.94

9. Dec.93 28.1.94 108 970,211 _ Ch.No.063707/ 31.1.94 bounced 153 -154

10. Jan.94 22.2.94 112 1,121,867 _ Ch.No.63714 21.2.94 bounced 169

11. Feb.94 22.3.94 162 1,462,879 _ Ch.No.063747/ 30.3.94 bounced DD. Paid

9,00,000 9,00,000/- Cr. 9398 C2-2245/8.4.94

1,00,000 1,00,000/-Cr.9399 C2-2245/8.4.94

12 Mar.94 30.4.94 183 1,538,363 _ Ch.No. 06377/ 30.4.94 bounced

Total

12,449,390 6,133,767 Payments made after 20,4, 1994 is 4,637,305/- on different dates between 30.4.94 till 22.12.1994

Total

46,37,305

Total Paid 10,771,072

15. The statement extracted above would show that the assessee had filed its monthly returns for the assessment year 1993-1994 (ending on 31.3.1994) regularly and along with the returns, had issued cheques towards the tax liability. All the cheques so issued were dishonoured by their bankers due to lack of funds

in the account of the assessee; and it is only after the department issued Form - 41 notice for recovery of the dues under the Act, the assessee had discharged the debts due for those months nearly three to four months after the dates they became due. The statement extracted above would show that the total tax liability of the assessee for the assessment year 1993-1994 was in a sum of Rs. 10, 771, 072/- and what was paid by him along with the monthly returns during that year was only a sum of Rs. 6, 133, 767/- that too belatedly. Despite these hard facts indicating breach of law by the assessee and its attempt to hoodwink the department by issuing cheques knowing fully well that requisite amount to satisfy the cheques in question was not available in its accounts, the Karnataka Appellate Tribunal in its order holds that the defaults committed by the assessee were intentional and without malafide intention. The findings and conclusion reached by the Tribunal are not only difficult to comprehend, but also difficult to accept. The wrong approach relating to the burden of proof adopted by the Tribunal also might have contributed to the conclusion reached by the Tribunal in setting aside the penalty levied by the authorities under the Act.

16. The assessee is not a small time dealer or mere casual trader. The assessee is a dealer doing business from the last two decades. The assessee knowing the provisions of law had promptly filed its monthly returns and had also enclosed cheques for the amounts due under the Act for those months, but had allowed those cheques to be dishonoured not once, but several times during the entire year. It is only when the authorities under the Act resorted to take coercive measures to recover the tax that the assessee paid the tax due under the Act unwillingly by way of demand drafts. Once the assessee has failed to pay the amount of tax due under the Act along with his monthly returns on the due date, default has occurred and it is for the assessee to satisfactorily show that he is not liable to pay the penalty for the said default. The fact that the assessee has subsequently paid that amount would not wipe out or efface the default which had already occurred and the consequent liability to pay the penalty which the assessee has incurred. The provisions of the Act give discretion to the assessing authority depending on the facts and circumstances of each case to decide whether penalty should be levied or not and if so, what should be the quantum of penalty. This will primarily depend on whether the default was willful or merely accidental. This will again depend on the cause shown by the assessee in not paying the tax admitted in its monthly returns within the prescribed time. The cause shown must be such that it should be reasonable and it is for the assessee to establish that there was a reasonable cause for the default in order to escape the penalty.

17. Now coming to the reasoning adopted by the Tribunal for allowing the appeal, the Tribunal firstly in its order observes that the delayed payment of advance tax by the assessee was without any malafide intention and that the non-payment in time was not deliberate, in defiance of law, nor was the assessee guilty of conduct indicating a conscious disregard of its obligation. This reasoning of the Tribunal in our opinion, is contrary to the fact situation in the present case.

The entire records of the assessing authority were before the Tribunal and if the Tribunal had just scanned through the assessment records and had applied its mind after going through the monthly returns filed by the assessee and had noticed the dishonoured cheques not for one month but several months during the entire year, it would not have come to the conclusion that the default committed by the assessee was not deliberate or unintentional or in breach of law or Rules. So far as fiscal statutes are concerned, absence of mens rea is relevant only in the matter of fixing quantum of penalty and not regarding imposition thereof. In GUJARAT CO-OPERATIVE MILK MARKETING FEDERATION LIMITED v. STATE OF KARNATAKA (1996) 103 STC 369, a Division Bench of this Court was pleased to observe that the presumption that mens rea is an essential ingredient in every offence, get displaced both by words used in the relevant statute creating the offence as also by subject matter with which the same deals. For the correct view on the question whether mens rea is essential for the imposition of a penalty, not only the language used in the statute but also the subject with which it deals ought to be considered. In so far as fiscal statutes are concerned, the acceptance of the non-application of the above mentioned doctrine has been recognised more readily by the Courts. The classical view that "no mens rea, no crime" has been inapplicable from a long time regarding economic crimes. Absence of mens rea would be relevant only in the matter of fixing the quantum of penalty; and the imposition of the penalty as also the quantum thereof are in the discretion of the authority concerned which discretion has to be exercised fairly and reasonably and not arbitrarily or whimsically.

In a recent decision, the Madras High Court following the observations made by the Supreme Court in the case of Director of Enforcement Vs. M/s. MCTM. Corporation Pvt. Ltd. and others, has stated that a penalty imposed by the sales tax authority is only a civil liability though it is penal in character. The element of mens rea is not always interrelated or an essential condition precedent to the levy of civil penalty in a taxation statute for violating a civil obligation and it can be dispensed with or excluded in appropriate cases depending on the facts and circumstances of the case.

18. The second reason assigned by the Tribunal for waiving the penalty imposed by the assessing authority was that the levy of penalty u/s 13(2) of the Act which is mandatory in nature was a sufficient penalty on the respondent/assessee and that a lenient view required to be taken in the levy of penalty u/s 12-B(3) of the Act. This reasoning of the Tribunal is contrary to the provisions of the Act and the Rules framed thereunder and also the law laid down by this Court in VARALAKSHMI ENTERPRISES AND ORS. v. STATE OF KARNATAKA 1988 (32) KLJ T.S. 37 - wherein the Court has stated that Rule 17 of the Rules makes it obligatory on the part of the dealer to deposit the tax payable on the returns submitted by him in Form-3 within the prescribed time limit. Any default in making such deposit attracts penalty not only u/s 12-B(3), but also u/s 13(2) of the Act.

19. The third reason assigned by the Tribunal was that the plea of the assessee that paucity of funds should have been taken into consideration both by the appellate authority and the assessing authority before levying penalty u/s 12-B(3) of the Act. In support of its reasoning, the Tribunal has relied on the observations made by the Apex Court in Hindustan Limited's case and the decision of this Court in Elestone Estates and Industries Limited's case and also Farm House Biscuit Company Pvt. Ltd. Vs. Commissioner of Commercial Taxes, Karnataka and another, .

Sri Shankar, learned Counsel appearing for the respondent would contend that the paucity of funds or the financial difficulties faced by the assessee is one of the mitigating circumstances that required to be taken by the assessing authority while considering the cause shown by the assessee for waiver of penalty u/s 12-B(3) of the Act. In aid of his submission, apart from relying on the decision which the Tribunal has noticed in its order, he invites our attention to the observations made by the Delhi High Court in the case of Addl. Commissioner of Income Tax, Delhi-II Vs. Free Wheels India Ltd., - a decision of this Court in the case of MYSORE KIRLOSKAR v. STATE OF KARNATAKA (1997) 107 STC 601.

In Hindustan Limited - (1970)25 STC 211, the Supreme court has observed that an order imposing penalty for failure to carry out statutory obligation is the result of quasi criminal proceedings and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct or dishonest or acted in conscious disregard of its obligation.

In M.M. Somayya's case - (1973) 32 STC 541, this Court has observed that the observation of the Supreme Court in the case of Hindustan Steel Limited's case equally applies to causes of imposition of penalty u/s 12-B(3) of the KST Act, 1957.

In ELESTONE ESTATES AND INDUSTRIES LTD. v. STATE OF KARNATAKA¹³, this Court has observed that the penalty u/s 13(2) of the Act cannot form the basis for imposing penalty u/s 12-B(3) of the Act and secondly, the financial difficulties is one of the factors, which should be taken into consideration before levying penalty u/s 12-B(3) of the Act.

In Mysore Kirloskar's case - (1997) 107 STC 601, a Division Bench of this Court has observed that once the Tribunal comes to the conclusion that the defiance was not deliberate and there was no dishonest intention on the part of the petitioner in not acting in accordance with law in payment of advance tax and that the contravention has occurred because of the circumstances beyond its control, it was contrary to the settled principles of justice and equity to have still subjected the petitioner to penal consequences.

In Addl. Commissioner of Income Tax, Delhi-II Vs. Free Wheels India Ltd., , a Division Bench of Delhi High Court has observed that imposition of penalty is not an automatic consequence of default and the financial difficulties pleaded and substantiated by the assessee by cogent and reliable evidence can be taken note

of by the Income Tax Officer before levying penalty u/s 140A of the Income Tax Act.

20. It may be noted that even the observations made by the Apex Court in Hindustan Steel Limited's case, show that penalty may be imposed where the party either acted deliberately in defiance of law or was guilty of conduct or dishonest or acted in conscious disregard of its obligation. The observations made by the Supreme Court in the case of DIRECTOR OF ENFORCEMENT v. MCTM CORPORATION PVT. LTD.¹⁴, that the penalty imposed for a tax delinquency is a civil obligation remedial and coercive in its nature and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal laws, cannot be lost sight of. In the present case, assessee knew that he was required to pay the tax on his monthly returns within certain time and had issued the cheques towards the tax due under those statements and when those cheques were dishonoured, his action in not paying the tax was quite clearly deliberate and willful.

21. The other reasoning of the Tribunal is that the first appellate authority having reduced the penalty by accepting the explanation of the assessee should have waived the penalty altogether. This reasoning of the Tribunal, in our opinion, is wholly absurd. The authorities under the Act are vested with the powers to exercise their discretion while quantifying the quantum of penalty by taking into consideration the facts and circumstances of each case. The Section only prescribes the maximum penalty that could be levied if there is default committed by the assessee in not filing the monthly returns or filing incorrect or incomplete returns. The appellate authority after coming to the conclusion that the penalty levied by the assessing authority is slightly disproportionate, has modified the penalty imposed by the assessing authority by reducing it from Rs. 25, 00, 000/- to Rs. 15, 00, 000/-. In our opinion, the Tribunal could not have taken exception to the order passed by the first appellate authority by showing undue indulgence to an assessee, who attempted to create an impression of payment of tax promptly but in effect, he had not made the payment. We therefore, hold that the reasoning of the Tribunal is not based on facts and is illegal and consequently, the order of the Tribunal must be held to be erroneous.

22. In the result, the revision petition is allowed the order made by the Karnataka Appellate Tribunal in STA No. 1033/1999 dated 29.6.2000 is set aside. The order passed by the first appellate authority in appeal No. 129/95-96 dated 8.2.1996 is restored.