

(2006) 11 P&H CK 0109
In the Punjab And Haryana At Chandigarh

Xcell Automation

APPELLANT

Vs

Government of Punjab and Another

RESPONDENT

Date of Decision : 22-11-2006

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 6
Constitution of India, 1950 — Article 12, 14, 19, 20, 21

Citation : (2007) 146 PLR 685 : (2007) 2 RCR(Civil) 158 : (2007) 5 VST 308

Hon'ble Judges : Rajesh Bindal, J; Adarsh Kumar Goel, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. This petition seeks quashing of order dated February 28, 2005 (annexure P 6), passed by respondent No. 2, Excise and Taxation Officer, Information Collection Centre, Balongi District, Ropar.
2. By the said order, penalty has been imposed on the petitioner by recording a finding that the petitioner attempted to evade tax, by declaring in the invoice, accompanying the goods under transport, that the goods were liable to tax at the last stage while as per provisions of the Punjab General Sales Tax Act, 1948 (for short, "the Act"), the goods were liable to tax at first stage.
3. Case of the petitioner is that it is a dealer registered under the provisions of the Act at Mohali. It deals in goods manufactured from cast iron and is also a consignment agent of Electro-steel Castings Limited, Kolkata (West Bengal) for cast iron items.
4. On February 24, 2005, the petitioner sent one consignment of goods to a Pathankot dealer through Shiv Shakti Transport Company from its place of business, i.e., Mohali, to the place of the consignee at Pathankot.
5. At the check-post, set up under the provisions of the Act, the driver of the vehicle duly reported the transaction, but the concerned officer detained the goods on the ground that the goods were liable to be taxed at the first stage,

while as per the bill accompanying the goods, tax had not been charged. After preliminary inquiry, notice was issued to the petitioner and the designated officer heard petitioner. The goods and the vehicle were released against bank guarantee on March 1, 2005, pending consideration of the matter.

6. According to the petitioner, the goods were general goods, liable to tax at last stage and though Schedule "D" read with Section 5(3) of the Act, dealing with the declared goods mentioned one of the items as pipes, the goods in question being pipes manufactured from cast-iron, were not declared goods, as per judgment of the honourable Supreme Court in *Vasantham Foundry Vs. Union of India and others*, .

7. The petitioner later on learnt that an order purporting to have been passed on February 28, 2005, imposed penalty by recording a finding that the designated officer was satisfied that the petitioner had attempted to evade tax. The petitioner obtained a copy of the said order which is annexed as annexure P 6.

8. It has been submitted that the order declaring that the petitioner had attempted to evade tax was patently erroneous and uncalled for. It is pointed out that if the goods were claimed as "declared goods", the petitioner is benefited as the rate of tax on the "declared goods" is four per cent as against the tax on general goods being 8.8 per cent attracted as per petitioner's declaration. It is further pointed out that the power to detain goods under the scheme of the statute cannot be exercised as a substitute for assessment, being summary power and also the provision being stringent inasmuch as 30 per cent of the value of the goods is provided as penalty as against two times of the tax, as penalty in the course of regular assessment. It is pointed out that in jurisdiction for imposing penalty at the check-post, the assessee is required to bring evidence at the check-post as against leading evidence before the Assessing Authority at the place of business of the assessee itself in case of regular assessment proceedings. It is further pointed out that the jurisdiction at the check-post should be exercised only in case of clear violation, where there is patent mis-declaration showing attempt of evasion and disputed questions of interpretation cannot be sorted out there merely on the ground that according to a Check-post Officer, different interpretation should be placed as the proceedings before the authorities at the check-post are summary in nature. It is further stated that the order has been purportedly passed on February 28, 2005 while the goods were released, pending decision of the matter, on March 1, 2005, the factum of goods having been released on March 1, 2005, finds mention in the order, thus, the order is clearly ante-dated and was mala fide.

9. In the reply filed, apart from objection of alternative remedy, the stand taken is that the tax was leviable at the first stage under item No. 3(d)(vi) of the Schedule "D" of the Act and therefore, the impugned order was justified. Further stand is that the goods were released after passing of the order on February 28, 2005 and the order passed on February 28, 2005 was only a zimni order and subsequently, a detailed order was passed, wherein the date of March 1, 2005

was also incorporated. It is stated that the order was passed after March 1, 2005 but bears the date of February 28, 2005, by which, no prejudice was caused.

10. From the pleadings of the parties, following questions arise for consideration:

(i) Whether the writ petition is liable to be dismissed on account of alternative remedy available to the petitioner ?

(ii) Whether the impugned order dated February 28, 2005, annexure P 6 is ultra vires the provisions of Section 14B of the Act ?

(iii) Whether the impugned order dated February 28, 2005, annexure P 6, is ante-dated inasmuch as it refers to release of goods on March 1, 2005 and its effect ?

Re : Question No. (i)

11. Learned Counsel for the State, while substantiating his plea of alternative remedy being available to the petitioner, relied upon judgments in *The Transport Corporation of India Ltd. Vs. State of Andhra Pradesh and Others*, , *State of Goa and others Vs. Leukoplast (India) Ltd. etc.*, and *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, .

12. In *The Transport Corporation of India Ltd. Vs. State of Andhra Pradesh and Others*, , the Andhra Pradesh High Court was dealing with a number of writ petitions filed to challenge show cause notice as to why penal action should not be taken for violation of the provisions of the Andhra Pradesh General Sales Tax Act, 1957 on the allegation that intra-State sales taking place in the State were being shown as inter-State sale and on enquiry, a scam came to the notice of the department. The High Court upheld the validity of the statutory provisions following judgment of the honourable Supreme Court in *Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others*, and other judgments and on facts, did not find any ground to quash the show cause notice.

13. In *State of Goa and others Vs. Leukoplast (India) Ltd. etc.*, , the assessee filed a writ petition challenging the decision of the Assessing Authority holding that products of the assessee like zinc oxide, adhesive plaster, etc., were not "drugs and medicines" which were exempted from tax. Writ petition was allowed. The honourable Supreme Court held that the question whether products of the assessee were drugs and medicines could not be straightaway answered and required determination of several facts and in such a situation, the writ petition could not have been entertained.

14. In *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, , the assessee filed a writ petition against the order of assessment treating the transaction of intra-State sales claimed by the assessee to be inter-State sales as taxable and disallowing deduction claimed by the assessee. The writ petition was dismissed by the High Court on the ground of availability of alternative remedy and the decision was upheld by the honourable Supreme Court. Noticing its earlier judgment in *State of U. P. v. Mohammad Nooh* AIR 1958 SC 86, at page

94 that if an order was without jurisdiction or patently in excess of jurisdiction or in violation of rules of natural justice, writ petition could be entertained even if an appeal was provided, it was observed that the said principle was not applicable as the order could not be held to be without jurisdiction.

15. Though the general rule is that this Court does not entertain a writ petition when an alternative remedy is available, but such a rule is not an absolute bar and in an appropriate case, inspite of availability of alternative remedy, this Court is not debarred from entertaining writ petition where on undisputed facts, an authority is shown to have assumed jurisdiction which it does not possess. Article 226 of the Constitution of India, as such, does not debar entertainment of writ petitions but it is a self-imposed limitation put by the courts.

16. Reference may be made to the judgment of the honourable Supreme Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , where a writ petition was filed against cancellation of trade mark registration, which was dismissed. On appeal, the honourable Supreme Court observed:

15. Under article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point put to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

17. For the reasons given in the later part of this judgment holding that the jurisdiction assumed by respondent No. 2 in passing the impugned order, annexure P 6 was without any legal basis and in the facts and circumstances of the case, we are of the view that writ petition is not liable to be dismissed on account of availability of alternative remedy. Therefore, we overrule preliminary objection raised on behalf of the State.

Re : Question No. 2

18. Admitted facts, as noticed in the impugned order, annexure P 6, are that the driver of the vehicle reported at the check-post with documents, namely, bill dated February 24, 2005 in respect of the goods carried in the vehicle, GR dated February 24, 2005 of the transport company and ST-XXIV A dated February 24, 2005. Notice was given to the driver to prove how the goods, which were liable to be taxed at first stage, were being sold as sales to registered dealers against declaration form which was permissible only in respect of goods liable to tax at last stage. The advocate for the petitioner appeared and thereafter, Manager of the petitioner-firm appeared and filed a reply submitting that goods were cast iron spun pipes which did not figure in Schedule "D", the list of declared goods in respect of which sales tax was attracted at the first stage. Judgment of the honourable Supreme Court in *Vasantham Foundry Vs. Union of India and others*, , was cited, holding that cast iron was different from iron. Respondent No. 2 held that casting to produce things like pipes, etc., could not be treated as cast iron. On these facts, it was held that "cast iron pipes" were "iron" liable to tax at the first stage and tax having not been charged at the first stage, there was attempt to evade tax calling for penalty equal to 30 per cent of the value of the goods.

19. On March 22, 2005, this Court passed the following order:

Let notice of motion be issued to the respondents.

Mr. MS Joshi, Assistant Advocate-General, Punjab, accepts notice. Let a complete set of the paper book be supplied to him within 2 days.

Written statement on behalf of the respondents shall be filed within 4 weeks.

Replication, if necessary, be filed within 2 weeks thereafter.

In the meanwhile, the bank guarantee in the sums of Rs. 26,750 and Rs. 80,250 stated to have been furnished by the petitioner on March 1, 2005 shall not be encashed.

List for hearing on May 17, 2005.

20. On August 3, 2005, following order was passed:

Rule DB.-List the matter for final disposal on November 7, 2005 at Sr. No. 1 in the category of regular matters.

Interim order, dated March 22, 2005, is made absolute till the disposal of the writ petition. However, the petitioner shall keep the bank guarantees, in terms of the said order, alive till further orders.

21. In *Vasantham Foundry Vs. Union of India and others*, , the question before the honourable Supreme Court was whether "cast iron" in the list of "declared goods" included "cast iron castings". The assessee claimed that "cast iron castings" were being treated as "declared goods" prior to the judgment of the honourable Supreme Court in *Bengal Iron Corporation v. Commercial Tax Officer*

[1993] 90 STC 47 SC, but after the said judgment, a circular was issued that "cast iron castings" were not to be treated as "declared goods".

22. In Bengal Iron Corporation's case [1993] 90 STC 47 (SC), it was observed as under:

It is thus clear that "cast iron" is different from "cast iron castings" manufactured by the appellant. "Cast iron" is purchased by the appellant and from that "cast iron", he manufactures several goods like man-hole covers, bends, cast iron pipes, etc. In other words "cast iron" used in item (iv) of Section 14 of the Central Act is the material out of which the petitioner's products are manufactured. Position remains the same, even if the appellant purchases iron and mixes it with carbon and silicon thereby deriving "cast iron" and then pours it into different moulds. In sum, "cast iron" is different from the cast iron pipes, manhole covers, bends, etc., manufactured and sold by the appellant. It cannot be denied, in such a situation that the products manufactured by the appellant are, in commercial parlance, different and distinct goods from the cast iron. Indeed this aspect is not seriously disputed by Shri Ganguli, the learned Counsel for the appellant.

23. The assessee submitted that if the cast iron pipes or other items were being produced in a foundry, the same could not be treated as cast iron but cast iron casting at its primary stage must be declared as cast iron.

24. The honourable Supreme Court observed as under:

But these statements have to be understood in the context of sales tax enactment-the test being whether the basic metal remains the same after the treatment or whether commercially known different goods emerge. It cannot be said that cast iron after it is machined and finished and sold as different goods, e.g., bends, pipes, man-hole covers, motor parts, etc., will still be treated as cast iron. The test is whether the goods are being dealt with as cast iron or as different goods made out of cast iron in the market place.

Therefore, in our view, "cast iron casting" in its basic or rough form must be held to be "cast iron". But, if thereafter any machining or polishing or any other process is done to the rough cast iron casting to produce things like pipes, man-hole covers or bends, these cannot be regarded as "cast iron casting" in its primary or rough form, but products made out of cast iron castings. Such products cannot be regarded as "cast iron" and cannot be treated as "declared goods" u/s 14(iv) of the Central Sales Tax Act. This view is not in conflict with the view taken in the case of Bengal Iron Corporation v. Commercial Tax Officer [1993] 90 STC 47 (SC); [1994] Suppl 1 SCC 310, but it is in consonance with the decision in that case.

25. Learned Counsel for the petitioner submitted that if the goods are declared goods, the rate of tax would be four per cent and the petitioner could have no intention to evade tax by declaring the goods as general goods, where the rate of

tax applicable would be eight per cent.

Scope of powers to be exercised at check-posts:

26. Before deciding the question whether impugned order is ultra vires the provisions of Section 14B of the Act, it is necessary to examine the scope of exercise of power at the check-post, relevant provisions whereof are extracted below:

Establishment of check-posts or barriers and inspection of goods in transit.-(1) If with a view to preventing or checking evasion of tax under this Act, the State Government considers it necessary so to do, it may by notification, direct the establishment of a check post or information collection centre or both at such place or places, as may be specified in the notification.

(2) The owner or person-in-charge of a goods vehicle shall carry with him a goods vehicle record, a trip sheet or a log book, as the case may be, and a goods receipt and a sale bill of sale or a cash memo, or delivery note containing such particulars as may be prescribed, in respect of such goods meant for the purpose of trade as are being carried in the goods vehicle and produce a copy of each of the aforesaid documents to an officer-in-charge of a check-post or information collection centre or any other Officer not below the rank of an Excise and Taxation Commissioner checking the vehicle at any place:

Provided that a dealer selling the goods from within the State or outside the State in the course of inter-State trade or commerce, shall also furnish a declaration with such particulars, as may be prescribed:

[Provided further that a registered dealer, who sells or despatches goods from within the State of Punjab to a place outside the State of Punjab or imports or brings any goods or otherwise receives goods from outside the State of Punjab, shall furnish particulars of the goods in a specified form to be obtained from the appropriate Assessing Authority in respect of the amount of transaction as may be prescribed],

(3) At every check post or information collection centre or at any other place when so required by any officer referred to in Sub-section (2), the driver or any other person-in-charge of the goods vehicle shall stop the vehicle and keep it stationary, as long as may reasonably be necessary, and allow the Officer-in-charge of the check-post or the information collection centre or the aforesaid Officer to check the contents in the vehicle by breaking open the packages, if necessary, and inspect all records relating to the goods carried which are in the possession of the driver or any other person as may be required by the aforesaid officer, and if considered necessary, such officer may also search the goods vehicle and the driver or other person-in-charge of the vehicle or of the goods.

(4) The owner or person-in-charge of a goods vehicle entering the limits or leaving the limits of the State of Punjab, shall stop at the nearest check-post or information collection centre, as the case may be, and shall furnish in triplicate a

declaration mentioned in Sub-section (2) along with the documents in respect of the goods carried in such vehicle before the officer-in-charge of the check post or information collection centre. The officer-in-charge shall return a copy of the declaration duly verified by him to the owner or person-in-charge of the goods vehicle to enable him to produce the same at the time of subsequent checking, if any:

Provided that where a goods vehicle bound for any place outside the State of Punjab passes through the State, the owner or person-in-charge of such vehicle or vessel shall furnish, in duplicate to the officer-in-charge of the check-post or information collection centre, a declaration in respect of his entry into the State of Punjab in the prescribed form and obtain from him a copy thereof duly verified. The owner or person-in-charge of the goods vehicle, shall deliver within forty eight hours the aforesaid copy to the Officer-in-charge of the check post or information collection centre at the point of its exit from the State, failing which, he shall be liable to pay a penalty to be imposed by the officer-in-charge of the check post or information collection centre not exceeding two thousand rupees or twenty per cent of the value of the goods, whichever is greater.

Provided further that no penalty shall be imposed unless the person concerned has been given a reasonable opportunity of being heard.

(5) At every station of transport of goods, bus stand or any other station or place of loading or unloading of goods, when so required by Commissioner or any other person appointed to assist him under Sub-section (1) of Section 3, the driver or the owner of the goods vehicle or the employee of transport company or goods booking agency, shall produce for examination, transport receipts and all other documents and account books concerning the goods carried, transported, loaded, unloaded, consigned or received for transport maintained by him in the prescribed manner. The Commissioner or the person so appointed shall, for the purpose of examining that such transport receipts or other documents or account books are in respect of the goods carried, transported, loaded unloaded or consigned or received for transport, have the powers to break open any package, or packages of such goods.

6(i) If the officer-in-charge of the check-post or information collection centre or any other officer as mentioned in Sub-section (2), has reasons to suspect that the goods under transport are meant for trade and are not covered by proper and genuine documents as mentioned in Sub-section (2) or Sub-section (4), or the driver has not stopped the vehicle as required under Sub-section (3) or that the person transporting the goods is attempting to evade payment of tax, he may, for reasons to be recorded in writing and after hearing the person concerned, order the detention of the goods along with the vehicle for such period, as may reasonably be necessary. Such goods shall be released on furnishing a security or executing a bond with sureties in the pre-scribed form and manner by the consignor or consignee, if registered under the Act, to the satisfaction of the officer detaining the goods and in case the consignor or the

consignee is not registered under the Act, then on furnishing a security in the form of cash or bank guarantee or crossed bank draft, which shall be thirty per cent of the value of the goods, rounded up to the nearest hundred.

(ii) If the owner or the person-in-charge of the goods has not submitted the documents as mentioned in Sub-section (2) and Sub-section (4) at the nearest check-post or information collection centre, in the State of Punjab, as the case may be, on his entry into or exit from the State, such goods shall be detained and shall be released only after the matter is finally decided under Clause (iii) of Sub-section (7).

(7)(i) The officer detaining the goods shall record the statement, if any, given by the consignor or consignee of the goods or his representative or the driver or other person in-charge of the goods vehicles and shall require him to prove the genuineness of the transaction before him in his office on a specified date on which date, the officer shall submit the proceedings along with the concerned records to such officer, as may be authorised in that behalf by the State Government for conducting necessary enquiry in the matter.

(ii) The officer authorised by the State Government shall, before the conducting enquiry, serve a notice on the consignor or the consignee of the goods detained under Clause (i) of Sub-section (6), and give him an opportunity of being heard and if, after the enquiry, such officer finds that there has been an attempt to avoid or evade the tax due or likely to be due under this Act, he shall, by order, impose on the consignor or consignee of the goods, a penalty, which shall not be less than twenty per cent and not more than thirty per cent of the value of the goods and in case he finds otherwise, he shall order the release of the goods and the vehicle, if not already released, after recording reasons in writing and shall decide the matter finally within a period of fourteen days from the commencement of the enquiry proceedings.

(iii) The officer referred to in Clause (ii), before conducting the enquiry, shall serve a notice on the consignor or the consignee of the goods, detained under Clause (ii) of Sub-section (6) and give him an opportunity of being heard and if, after the enquiry, such officer is satisfied that the documents as required under Sub-section (2) and Sub-section (4), were not furnished at the information collection centre or the check post, as the case may be, with a view to attempt to avoid or evade the tax due or likely to be due under the Act, he shall by order for reasons to be recorded in writing, impose on the consignor or to the consignee of the goods, penalty equal to fifty per cent of the value of the goods involved. In case, he finds otherwise, he shall order release of the goods for sufficient reasons to be recorded in writing. He may, however, notwithstanding anything contained in Clause (ii) of Sub-section (6), order release of the goods and the vehicle on furnishing a security by the consignor or the consignee in the form of cash or bank guarantee or crossed bank draft for an amount equal to the amount of penalty imposable and shall decide the matter finally within a period of fourteen days from the commencement of the enquiry proceedings; and

(iv) The officer-in-charge of a check-post or information collection centre or any other officer referred to in Sub-section (2), may receive the amount of cash security as referred to in Clause (i) of Sub-section (6) and the amount of penalty imposed under Sub-section (4) and clauses (ii) and (iii) of Sub-section (7) against a proper receipt in the prescribed manner.

(8) In the event of the consignor or consignee of the goods not paying the penalty imposed under Sub-section (7) within twenty days from the date of the order imposing the penalty, the goods detained shall be made liable to be sold by the officer, who imposed the penalty, for the realisation of the penalty by public auction in the manner prescribed. If the goods detained are of a perishable nature or subject to speedy or natural decay or when the expenses of keeping them in custody are likely to exceed their value, the officer-in-charge of the check-post or information collection centre or any other officer referred to in Sub-section (2), as the case may be, shall immediately sell such goods or otherwise dispose them of. The sale proceeds shall be deposited in the Government Treasury and the consignor or consignee of the goods shall be entitled to only the balance amount of sale proceeds after deducting the amount of penalty, the expenses and other incidental charges, incurred in detaining and disposing of the goods:

Provided that if the consignor or consignee of the goods does not come forward to claim the goods, then the entire sale proceeds, shall be deposited in the Government Treasury and no claim for balance amount of sale proceeds will be entertained from any other person.

(9) The officer detaining the goods shall issue to the owner of the goods or his representative or the driver or the person-in-charge of the goods vehicle or receipt specifying the description and quantity of goods so detained and obtain an acknowledgement from such person or if such person refuses to give an acknowledgement, then record the fact of refusal in the presence of the two witnesses.

(10) If the order of detention of goods under Sub-section (6) or of imposition of penalty under Sub-section (4) or Sub-section (7) or order under Sub-section (8), is in the meantime set aside or modified in appeal or other proceedings, the officer detaining the goods and imposing the penalty, as the case may be, shall also pass consequential orders for giving effect to the orders in such appeal or other proceedings, as the case may be.

(11) No dealer or any person including a carrier of goods or agent of a transport company or booking agency, acting on behalf of a dealer, shall take delivery of, or transport from any station, airport or any other place, whether of similar nature or otherwise any consignment of goods other than personal luggage or goods for personal consumption, the sale or purchase of which is taxable under the Act, except in accordance with such conditions, as may be prescribed, with a view to ensure that there is no avoidance or evasion of the tax imposed by or

under this Act.

27. Learned Counsel for the petitioner submitted that object of conferring power on the officer at the check-post was not to settle highly debatable issues as attempt at evasion could not be alleged merely on the ground that the assessee was raising a bona fide legal dispute, which required adjudication. Attempt at evasion, which was the essence of the jurisdiction conferred on the Check-post Officer could not be inferred when adjudication of legal dispute was involved. Raising of a bona fide legal argument could not be equate to the mens rea for evasion of tax.

28. On the other hand, learned Counsel for the State submitted that power conferred on Check-post Officer could be exercised if the said officer was of the opinion that the assessee had given a declaration without any basis and such declaration had possibility of tax evasion.

29. In this connection, reference may be made to observations of the honourable Supreme Court in Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, , in the context of imposition of penalty when there was a bona fide legal dispute about exigibility of tax:

5... But where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to condemn the return as a "false" return inviting imposition of penalty. This view which is being taken by us is supported by the decision of this Court in Hindustan Steel Ltd. Vs. State of Orissa, , where it has been held that "even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute...". It is elementary that Section 43 of the Madhya Pradesh General Sales Tax-Act, 1958, providing for imposition of penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, the section cannot be invoked for imposing penalty. If the view canvassed on behalf of the Revenue were accepted, the result would be that even if the assessee raises a bona fide contention that a particular item is not liable to be included in the taxable turnover, he would have to show it as forming part of the taxable turnover in his return and pay tax upon it on pain of being held liable for penalty in case his contention is ultimately found by the court to be not acceptable. That surely could never have been intended by the Legislature.

30. In Automobile Products of India Limited v. State of Karnataka [1991] 81 STC 414 (Karn), dealing with the jurisdiction of the Check-post Officer, it was observed as under:

Assuming for a moment that indeed the documents carried by the vehicle in question did disclose a sale between the seller in Bombay, manufacturer of the vehicles, and M/s. South India Automotive Limited at Bangalore who had to take

delivery of those scooters, then the information so gathered by the Check-post Officer could at best be utilised to bring to tax by the concerned authority at Bangalore where M/s. South India Automotive Corporation Limited would be a registered dealer. Any mistake made as claimed, as we have already expressed, cannot clothe the Check-post Officer with jurisdiction to do something which he was not expected to do under the provisions of Section 28-A of the Act. His job was to ascertain whether the prescribed documents accompanied the vehicle and the goods which in turn were liable to tax under the Act. Anything else he did would be without jurisdiction and we have no hesitation to state, that on account of his total misdirection, there was improper exercise of jurisdiction and the order of the Appellate Tribunal, the first appellate authority as well as Check-post Officer are, therefore, liable to be quashed and they are accordingly quashed.

31. In *Orient Paper & Industries Ltd. v. State of Orissa* [1995] 97 STC 490 (Ori), it was observed:

10. Before parting, we propose to deal with the submission of Shri "Mahanti that there is harassment of persons at the check-posts and we should intervene to see that honest tax-payers are spared the highhandedness of the persons manning the check-posts. Learned Standing Counsel, on the other hand, contends that evasion of tax being rampant and it being difficult to realise tax after the goods have slipped away, the State has to provide for check-posts to prevent or check evasion. It is urged by the learned Counsel that where the officer-in-charge of a check-post has to deal with a large number of vehicles crossing the check-post, some amount of inconvenience is unavoidable. Shri Patnaik would, however, be happy if inconvenience to the parties can be lessened in any way by educating the officers-in-charge of the check-posts about the scope and width of their power in intercepting goods while in transit.

11. We have applied our minds to this aspect of the case. According to us, much of the inconvenience or harassment would be obviated if the officers would bear in mind the fact that once there is no defect in the way-bill or the same is not incomplete, their jurisdiction to detain the goods would arise only if there be evasion of tax. While stating the law thus, we have excluded from our purview the contingency where the goods carried are not fully covered by the way-bill. Such a case presents no problem. Here too, we would like to observe that where the goods are meant for personal consumption, it is apparent that the same are not required to be covered by a way-bill. Coming to the question of the way-bill being defective or incomplete, we would like to emphasise that great scrutiny is called for in this regard because of the argument advanced by Shri Patnaik for the department that if the way-bill is found defective or incomplete, the same would raise the presumption of an effort on the part of the persons concerned to avoid payment of tax which would clothe the officers-in-charge with the powers of detaining the goods inasmuch as the power has been conferred not only to check evasion of tax but also to prevent evasion. We have spoken about the need of a greater scrutiny because as has been found by us in the present case

itself, the two defects pointed out in form No. VI-B did not really exist and so there was no scope for the officer-in-charge of the check-post to entertain a reasonable belief that the goods were being transported clandestinely with a view to avoid payment of tax. Once the way-bill is found free from defect and is complete, the question of detention of goods can arise only if there be evasion of tax. As to this, it may be observed that question of evasion arises once the transaction has become taxable which would be when there has been either a sale or a purchase. As to the goods which are brought from outside the State, it is apparent that the same being in the course of inter- State trade or commerce, the liability to tax depends upon the situs of the sale. As in most of these cases the movement of the goods would be pursuant to the contract of sale or purchase, the situs would be outside the State because of which the goods would suffer Central sales tax or the State sales tax in the exporting State. So far as this State is concerned, the question of payment of sales tax would arise if after the goods have been brought into the territory, there is a further sale. The occasion for the same would be after the goods have entered the territory and not at the point of entry. So, there would be hardly any occasion to detain such goods at the check-posts. This apart, when in the way-bill the registration number of the buyer of the goods is reflected, there would be no justification for the check-post officers to entertain a belief that the payment of tax would get evaded by such a person on his selling the goods subsequently. So, goods of such a person are not to be ordered for unloading except where the goods be such which are not fully covered by the way-bill or the way-bill be defective or incomplete. We would reiterate that on these two conditions being absent, the incoming goods, specially those being brought by registered dealers, would not be detained at the check-posts. Any effort of the officers of the check-posts to do the contrary shall be deemed to be an unauthorised act which, it is the duty of the department to see, is not indulged by the concerned officers. Their education in law, as explained by us, should go a long way to meet the genuine grievance of the traders and the same would also protect the revenue of the State by catching the unscrupulous traders at the vulnerable point.

32. In *Utkal Galvanisers Limited v. Commissioner of Commercial Taxes, Orissa*[1997] 104 STC 222 (Ori), the assessee was transporting "excavator" by treating the same as "machinery". Check-post Officer held that "excavator" was a separate item attracting higher rate of tax and the assessee was making an effort to hoodwink the department and attempted to evade tax. Writ petition was filed challenging the said order. A division Bench of the Orissa High Court allowed the writ petition. Pasayat, J. (as his Lordship then was, now honourable Supreme Court Judge), observed:

5. Undoubtedly check-posts have been established to put a check on clandestine activities and attempts to evade tax. However, such action by the check-post officer cannot be taken on mere presumption or surmises. Even for coming to a conclusion that there is likelihood and/or possibility of evasion of tax, there must be some foundation for entertaining such a view. Where the purchaser is a

registered dealer and details of registration have been given normally the goods should not be detained unless good reasons exist therefor. When in the way-bill details of registration under the Act and/or Central Act are indicated, normally there would be no justification for the check-post officer to entertain a belief about possibility or likelihood of evasion. In the case of registered dealers it would not be difficult for the Revenue to ensure proper levy of tax at the time of assessment. The check-post officer can forward information gathered to the concerned assessing officer, so that the correctness of dealers' stand can be tested. At the stage of scrutiny of way-bills elaborateness of regular assessment does not exist. Such scrutiny and assessment are conceptually different.

6. What the check-post officer did in the present case amounted to a conclusion about acceptability of the claim of the petitioner regarding the nature of article purchased on the basis of analysis of scanty materials. While exercising powers u/s 16-A read with rule 94 of the Rules, there is no scope for such analysis and where controversial issues are involved, it would not be appropriate for the check-post officer to delve into that aspect. Such controversies should be left to be determined and adjudicated by the Sales Tax Officer under whose jurisdiction the concerned purchaser is registered as a registered dealer.

7. Judged in the aforesaid background, action of the check-post officer in directing payment of tax cannot be maintained, and is vacated. Petitioner shall file details of the purchase of excavator before the Sales Tax Officer, Cuttack-1, West Circle, who is its assessing officer, and shall file an undertaking to abide by the result of assessment so far as that article is concerned, as would be finally determined. The undertaking shall be filed within ten days from today. The check-post officer would do well to send all relevant materials to the assessing officer to facilitate a proper adjudication.

33. Learned Counsel for the State relied upon judgment of the honourable Supreme Court in *Shahnas Trading Co. v. State of Kerala* [2002] 127 STC 1 SC, which is a short order, relevant part of which is as under:

We see no reason to interfere with the judgment and order under appeal which, in turn, has followed an earlier decision of the High Court in *E. K. Hajee Mohammed Meera Sahib & Sons v. Sales Tax Officer, II Circle, Trivandrum* [1992] 86 STC 99 (Ker). We find no merit in the submission that the words "to satisfy himself that there is no evasion of tax" in Section 29-A of the Kerala General Sales Tax Act should be read only in the context of the words "to verify the documents required by Sub-section (2) of Section 29 to be in the possession of the person transporting the goods". That would be to limit the power of the officer to the verification of documents and to render the words "and to satisfy himself that there is no evasion of tax" otiose, which cannot be done.

34. The judgment of the High Court which is also reproduced therein shows the relevant facts which are that the assessee challenged jurisdiction of the Check-post Officer to determine valuation of goods in transit. It was observed as under:

...If the check-post authority prima facie, believe from undervaluation of the goods that the same was done with a view to evade the payment of tax, the goods can be detained. Of course, it does not depend upon the ipse dixit of the check-post authority. It must be on cogent materials to come to the conclusion that there was an attempt to evade tax. The goods are to be detained not for under-valuation, but only when there was an attempt to evade the tax. From undervaluation of the goods, unless there is cogent explanation from the side of the owner of the goods, an inference can be drawn that undervaluation was done in the documents to evade the tax. No doubt, the owner of the goods can explain the under-valuation of the goods. The check-post authority is not supposed to decide conclusively as to what was the correct valuation of the goods. The power to detain the goods in transit can be exercised only when there is an attempt to evade the tax. If the check-post authority can draw a reasonable inference from under-valuation of the goods that there was an attempt to evade the tax, the goods can be detained u/s 29-A(2) of the Act.

4. This is what was precisely held by a division Bench of this Court in E. K. Hajee Mohammed Meera Sahib & Sons v. Sales Tax Officer, II Circle, Trivandrum [1992] 86 STC 99 (Ker). In E. K. Hajee Mohammed Meera Sahib [1992] 86 STC 99 (Ker), this Court clearly held as under:

If a particular movement of goods is inspected in transit and the officer feels genuinely that there is an attempt at evasion of tax, he can search, inspect, detain or seize the goods as per the statutory provisions, but it can be so done only on the basis of some material.

The court also held as under:

Without anything more, if the delivery note contained only a specification of the value of the goods and the bill amount, it cannot be stated that the check-post authorities have no powers to search, inspect and detain the goods if they have material to suspect, that the goods under transport do not possess the required documents, or there is an attempt at evasion of tax.

So, the power to detain the goods in transit can be exercised by the check-post authority only when he has reason to believe that there was an attempt to evade the tax. If such inference can be drawn from under-valuation of the goods, then the power to detain the goods can be exercised by the check-post authorities. Simply because valuation of the goods can be determined by a best judgment assessment u/s 19-B of the Act, it cannot be said that power to detain the goods in transit cannot be exercised u/s 29-A(2) of the Act on the ground of under-valuation. Section 19-B and Section 29-A(2) are mutually exclusive and they operate in two different fields. The matter being already covered by the case of E.K. Hajee Mohammed Meera Sahib [1992] 86 STC 99 (Ker), we hold that the contention raised by the appellants before us cannot be sustained.

35. In Parry and Company Ltd. Vs. Commissioner of Sales Tax, , the Allahabad High Court dealing with the question observed as under:

6. It is settled principle of law that for the purposes of levy of penalty u/s 15A(I)(o) it is necessary to make out a case of an attempt to evade the payment of tax and while levying the penalty the assessing authority must record the finding in this regard. In the case of *Sri Mewa Lal and Sons v. Commissioner of Trade Tax* reported in [2002] STI 79 : [2002] UPTC 165, this Court cancelled the penalty on the ground that in the penalty order there was no finding of any attempt to evade the tax. Similar view was taken in the case of *Bharat Ply-Wood Products Pvt. Ltd. Vs. Commissioner of Sales Tax*, . I have perused the order of penalty. The Sales Tax Officer could not make out any case of an attempt to evade the payment of tax. The levy of penalty only on the ground that from the document, the claim of the applicant u/s 6(2)(b) was not established is not justified. Tribunal has also not made out any case of an attempt to evade the payment of tax and has upheld the order of the penalty only on the ground that the applicant could not make out a case that the transaction was u/s 6(2)(b) of the Central Sales Tax Act. In the present case, it was found that the applicant had made declaration of goods voluntary at the check-post in form XXXV and other documents were also submitted, therefore, there was no scope not to disclose such transaction in the books of account and left no room for any attempt to evade tax.

7. In my opinion the penalty u/s 15A(I)(o) has been levied on irrelevant consideration. Whether the transaction was the sale in transit by transfer of document and covered u/s 6(2)(b) of the Central Sales Tax Act or not is the matter to be adjudicated in the assessment proceeding and not in the penalty proceeding. I am not expressing any view in respect of the nature of the transaction. On the facts and circumstances stated above, I am of the view, penalty u/s 15A(I)(o) is not justified. The penalty is accordingly set aside.

36. In *United Polymer Industries v. State of Punjab* [2006] 146 STC 571, a division bench of this Court observed as under:

Under the above provision, if there is any reasonable suspicion of evasion of tax, the detaining authority is justified in detaining the goods and holding an enquiry into the matter. Though, this power is necessary to safeguard the interest of Revenue and to check evasion of tax, this provision is not intended to confer any arbitrary power on the detaining officer to detain goods without any rhyme or reason under the colourable exercise of such power. Such abuse of power is required to be checked lest it should become a source of abuse of authority or violation of legitimate rights of citizens.

37. In *Commissioner of Sales Tax and Another Vs. M/s. P.T. Enterprises and Another*, , it was held that a transporter could be required to carry documents in respect of specified goods liable to tax.

38. Vires of provision relating to checking of goods in transit: In *The Check Post Officer and Others Vs. K.P. Abdulla and Bros.*, , the question before the honourable Supreme Court was whether power to seize and confiscate and levy

penalty in respect of goods carried in a vehicle was ancillary to power to levy tax. It was held that power conferred u/s 42 of the Tamil Nadu General Sales Tax Act, 1959 to seize and confiscate goods not covered by a bill, goods vehicle record or other documents was not incidental to power to legislate in respect of taxes on sale or purchase of goods as no conclusive presumption could be drawn merely from absence of specified documents particularly when the goods may be carried as personal luggage and when no tax will be attracted. It was observed in para 4:

... But, in our judgment, the power to confiscate goods carried in a vehicle cannot be said to be fairly and reasonably comprehended in the power to legislate in respect of taxes on sale or purchase of goods. By Sub-section (3) the officer-in-charge of the check-post or barrier has the power to seize and confiscate any goods which are being carried in any vehicle if they are not covered by the documents specified in the three sub-clauses. Sub-section (3) assumes that all goods carried in a vehicle near a check-post are goods which have been sold within the State of Madras and in respect of which liability to pay sales tax has arisen, and authorises the Check-Post Officer, unless the specified documents are produced at the check-post or the barrier, to seize and confiscate the goods and to give an option to the person affected to pay penalty in lieu of confiscation. A provision so enacted on the assumption that goods carried in a vehicle from one State to another must be presumed to be transported after sale within the State is unwarranted. In any event power conferred by Sub-section (3) to seize and confiscate and to levy penalty in respect of all goods which are carried in a vehicle whether the goods are sold or not is not incidental or ancillary to the power to levy sales tax. A person carrying his own goods even as personal luggage from one State to another or for consumption, because he is unable to produce the documents specified in clauses (i), (ii) and (iii) of Sub-section (3) of Section 42, stands in danger of having his goods forfeited. Power under Sub-section (3) of Section 42 cannot be said to be ancillary or incidental to the power to legislate for levy of sales tax.

39. In *Sodhi Transport Co. and others Vs. State of U.P. and others*, , question was considered with reference to Section 28B of the U. P. Sales Tax Act, 1948. It was held that the provisions being machinery provisions enacted to ensure that there was no evasion of tax, were incidental to entry 54, List II of the Seventh Schedule to the Constitution and presumption contained in Section 28B of the Act not being conclusive, merely laid down a rule of evidence, shifting burden of proof on the persons not carrying the documents to show that goods were not sold inside the State. In para 19 STC 392), it was observed as under:

19. The foregoing discussion disposes of the contentions regarding legislative competence or unreasonable character of the provisions contained in Section 28-B of the Act and rule 87 of the Rules. They are introduced, as stated earlier, to check evasion and to provide a machinery for levying tax from persons who dispose of goods inside the State and avoid tax which they are otherwise liable to pay. The law provides enough protection to them and makes provision to enable

them to show that they are in fact not liable to pay any tax. The decision of the High Court upholding the constitutionality of Section 28-B of the Act and rule 87 of the Rules does not call for any interference. We uphold the validity of the said provisions.

40. Following judgments in Sodhi Transport Co. and others Vs. State of U.P. and others, , the honourable Supreme Court upheld the provisions of Section 37 of the Haryana General Sales Tax Act in Delite Carriers (Regd.) Vs. State of Haryana and Others, .

41. Learned Counsel for the State relied upon judgments of this Court in Mool Chand Chuni Lal Vs. Manmohan Singh and Another, and Amrit Banaspati Company Ltd. v. State of Punjab [2001] 122 STC 323 (P&H). The said judgment also primarily deal with the validity of the provision, which is not the issue raised, however the same is concluded by the judgements of the honourable Supreme Court referred to above.

42. In State of Haryana and Others Vs. Sant Lal and Another, , provisions of Section 38 of the Haryana General Sales Tax Act, 1973 were held to be unconstitutional as therein, every clearing and forwarding agent or person transporting goods was required to furnish information in respect of consignments to the assessing authority. It was held that presumption of evasion of tax could not be raised against such an agent.

43. In Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others, , provisions of Tripura Sales Tax-Act, 1976 and Rules framed thereunder requiring transporters to obtain certificate of registration and to maintain accounts and also making a declaration in prescribed form, were upheld on the ground that the said provisions were incidental to evasion of tax.

44. In Saral Kumar Vs. State of Haryana and Others, , it was observed that while goods carrier record was obligatory, person-in-charge of goods was at liberty to show that he was not in a position to produce any of the three documents, i.e., challan, cash memo or bill as the said documents were in the alternative and any one of the said documents could be produced.

45. In State of Rajasthan and Another Vs. M/s D.P. Metals, , following judgment in Sodhi Transport Co. and others Vs. State of U.P. and others, , provisions of Section 78 of the Rajasthan Sales Tax Act, 1994 were upheld.

46. In Commercial Tax Officer and Others Vs. Swastik Roadways and Another, , provisions of sections 57 and 58 of the Madhya Pradesh Commercial Tax Act, 1994 requiring furnishing of information by clearing and forwarding agents regarding details of consignors, consignees, quantity of goods carried and value thereof were upheld on the ground that the same were intended to prevent/check evasion.

47. In A.B.C. (India) Ltd. Vs. State of Assam and Another, , provisions of sections 42 and 44 of the Assam General Sales Tax Act, 1993 were upheld following

judgment in Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others, and distinguishing judgment in State of Haryana and Others Vs. Sant Lal and Another, .

48. The above judgments relate to validity of statutory provisions requiring a transporter or owner to carry relevant documents and to give information at the check-post and in absence thereof, inference of evasion could be raised in which case, the transporter or owner of the goods was required to show that there was no attempt at evasion.

49. Reference may also be made to the judgement of the honourable Supreme Court in Krishna Bus Service Pvt. Ltd. Vs. State of Haryana and Others, . Dealing with power of detention of a vehicle under the provisions of the Motor Vehicles Act, 1939, it was observed as under:

The powers of stopping the motor vehicles and the powers of inspection, search, seizure and detention exercised under the Act are serious restrictions on the fundamental right of the operators of motor vehicles guaranteed under article 19(1)(g) of the Constitution. These powers can be considered as reasonable restrictions only when they are exercised properly in the interests of the general public. They should be reasonable both from the substantive as well as the procedural standpoint....

50. Dealing with the exercise of power of search and seizure under the Customs Act, 1962, this Court observed in C. W. P. No. 6022 of 2005, MAPSA Tapes Pvt. Ltd. Vs. Union of India (UOI), :

It is well-settled that power of search and seizure has to be conceded in the larger interest of the society and to check evasion of tax. The same has been upheld by the honourable Supreme Court in M.P. Sharma v. Satish Chandra AIR 1954 SC 300. It was observed at pages 306-307:

A power of search and seizure is in any system of jurisprudence an overriding power of the state for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under article 20(3) would be defeated by the statutory provisions for searches.

At page 302 of the said judgment, it was observed:

A search and seizure is, therefore, only a temporary interference with the right to hold the premises searched and the articles seized. Statutory regulation in this behalf is a necessary and reasonable restriction and cannot per se be considered to be unconstitutional. The damage, if any, caused by such temporary interference if found to be in excess of legal authority is a matter for redress in

other proceedings. We are unable to see how any question of violation of article 19(1)(f) is involved in this case in respect of the warrant in question which purport to be under the first alternative of Section 96(1) of the Criminal Procedure Code.

The said view has been reiterated in several decisions of the honourable Supreme Court.

At the same time, power of search and seizure affects not only right of possession and enjoyment of property but also privacy of a citizen. It also affects right of personal liberty under article 21 of the Constitution. Procedure for affecting such a right itself has to be fair and reasonable, as held by the honourable Supreme Court in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, . Referring to this aspect, in a recent decision in *Distt. Registrar and Collector, Hyderabad and Another Vs. Canara Bank Etc.*, , it was observed in para 55:

55. In *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, - a 7 Judge Bench decision, P. N. Bhagwati, J. (as His Lordship then was) held that the expression "personal liberty" in article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status distinguishing as fundamental rights and give additional protection under Article 19. Any law interfering with personal liberty of a person must satisfy a triple test : (i) it must prescribe a procedure; (ii) the procedure must withstand the test of one or more of the fundamental rights conferred under article 19 which may be applicable in a given situation ; and (iii) it must also be liable to be tested with reference to article 14. As the test propounded by article 14 pervades article 21 as well, the law and procedure authorising interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of article 14 it would be no procedure at all within the meaning of article 21.

In the same decision, issue of right of privacy, has also been dealt with in paras 17 to 39. In the said decision, development in law after judgment of honourable the Supreme Court in *M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others*, has also been discussed, particularly in the light of subsequent judgments in *Kharak Singh Vs. The State of U.P. and Others*, and *Gobind Vs. State of Madhya Pradesh and Another*, and it was concluded that right of the State has to be exercised on reasonable basis or on reasonable material. It was further observed in para 33 of judgment in *Canara Bank*:

33. Intrusion into privacy may be by-(1) legislative provisions, (2) administrative/executive orders, and (3) judicial orders. The legislative intrusions must be tested on the touchstone of reasonableness as guaranteed by the Constitution and for that purpose the court can go into the proportionality of the intrusion vis-a-vis the purpose sought to be achieved. (2) So far as administrative or

executive action is concerned, it has again to be reasonable having regard to the facts and circumstances of the case. (3) As to judicial warrants, the court must have sufficient reason to believe that the search or seizure is warranted and it must keep in mind the extent of search or seizure necessary for the protection of the particular State interest. In addition, as stated earlier, common law recognised rare exceptions such as where warrantless searches could be conducted but these must be in good faith, intended to preserve evidence or intended to prevent sudden danger to person or property.

(underlining supplied).

Judicial review:

51. It is well-settled that wherever exercise of power by any public authority is arbitrary, the same will be open to judicial review and will be liable to be quashed. Reference may be made to judgment of the honourable Supreme Court in *Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another*, wherein it was observed:

20. There is thus no doubt that the High Courts in India exercising their jurisdiction under article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion.

52. In *Lucknow Development Authority Vs. M.K. Gupta*, dealing with the question of accountability of a public authority while exercising its power, it was observed as under:

11... The authority empowered to function under a statute while exercising power discharges public duty. It has to act to subserve general welfare and common good. In discharging this duty honestly and bona fide, loss may accrue to any person. And he may claim compensation which may in circumstances be payable. But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility to pay the loss determined should be whose? In a modern society no authority can arrogate to

itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority. But where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same ?. It was never more necessary than today when even social obligations are regulated by grant of statutory powers. The test of permissive form of grant are over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. When the court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax-payers, money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries.

53. The above observations were also relied upon by the honourable Supreme Court in its judgment in Union of India (UOI) and Another Vs. S.B. Vohra and Others, , para 25 and after discussing the case law on the point, it was observed:

30. Judicial review is a highly complex and developing subject. It has its roots long back and its scope and extent varies from case to case. It is considered to be the basic feature of the Constitution. The court in exercise of its power of judicial review would jealously guard the human rights, fundamental rights and the citizens' right of life and liberty as also many non-statutory powers of Governmental bodies as regards their control over property and assets of various kinds which could be expended on building hospitals, roads and the like, or overseas aid, or compensating victims of crime (see for example, R v. Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] 2 WLR 1).

54. In Tata Cellular Vs. Union of India, , dealing with the question of judicial review, the honourable Supreme Court observed:

86. Judicial quest in administrative matters has been to find the right balance

between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy ; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

93. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers ?
2. Committed an error of law.
3. Committed a breach of the rules of natural justice,
4. Reached a decision which no reasonable tribunal would have reached or,
5. Abused its powers.

98. At this stage, the Supreme Court Practice 1993, volume 1, pages 849-850, may be quoted:

4. Wednesbury principle-A decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it." {Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223 : [1947] 2 ALL ER 680, per Lord Greene, M. R.)

99. Two other facets of irrationality may be mentioned.

(1) it is open to the court to review the decision-makers evaluation of the facts. The court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld. Thus, in *Emma Hotels Ltd. v. Secretary of the State of Environment* [1980] 41 CVR 255, the Secretary of State referred to a number of factors which led him to the conclusion that a non-resident bar in a hotel was operated in such a way that the bar was not an incident of the hotel use for planning purposes, but constituted a separate use. The Divisional Court analysed the factors which led the Secretary of State to that conclusion and, having done so, set it aside. Donaldson, L.J. said that he could not see on what basis the Secretary of State had reached his conclusion.

(2) A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. On this basis in *R v. Barnet London Borough Council, ex p Johnson* [1989] 88 LGR 73, the condition imposed by a local authority prohibiting participation by those affiliated with political parties at events to be held in the authority's parks was struck down.

101. A modern comprehensive statement about judicial review by Lord Denning is very apposite; it is perhaps worthwhile noting that stresses the supervisory

nature of the jurisdiction:

Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final. At other times it says nothing about it. In all these cases the courts will not themselves take the place of the body of whom Parliament has entrusted the decision. The courts will not themselves embark on a rehearing of the matter. See *Healey v. Minister of Health* [1955] 1 QB 221. But nevertheless, the courts will, if called upon, act in a supervisory capacity. They will see that the decision-making body acts fairly. See *In re H. K. (An Infant)* [1967] 1 QB 617 at 630 and *Reg. v. Gaming Board for Great Britain, ex parte Beniam and Khaida* [1970] 2 QB 417. The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation. See *Punton v. Ministry of Pensions and National Insurance* [1963] 1 WLR 186. And if the decision-making body has gone wrong in its interpretation they can set its order aside. See *Ashbridge Investment Ltd. v. Minister of Housing and Local Government* [1965] 1 WLR 1320. (I know of some expressions to the contrary but they are not correct). If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere. See *Padfield v. Minister of Agriculture, Fisheries and Food* 1968 AC 997. If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding - so unreasonable that a reasonable person would not have come to it - then again the courts will interfere. See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223. If the decision-making body goes outside its powers or misconstrues the extent of its powers, then, too the courts can interfere. See *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147. And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside. See *Sydney Municipal Council v. Campbell* 1925 AC 338. In exercising these powers, the courts will take into account any reasons which the body may give for its decisions. If it gives no reasons - in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion, and act accordingly. See *Padfield*'s (1968 AC 997, 1007 & 1061).

55. Reference may also be made to judgment of the honourable Supreme Court in *Common Cause, A Registered Society Vs. Union of India and Others*, , wherein, it was observed:

39. Essentially, under public law, it is the dispute between the citizen or a group of citizens on the one hand and the State or other public bodies on the other, which is resolved. This is done to maintain the rule of law and to prevent the State or the public bodies from acting in an arbitrary manner or in violation of that rule. The exercise of constitutional powers by the High Court and the

Supreme Court under articles 226 and 32 has been categorised as power of "judicial review". Every executive or administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of fundamental rights guaranteed by the Constitution. With the expanding horizon of article 14 read with other articles dealing with fundamental rights, every executive action of Government or other public bodies, including instrumentalities of the Government, or those which can be legally treated as "Authority" within the meaning of article 12, if arbitrary, unreasonable or contrary to law, is now amenable to the writ jurisdiction of this Court under article 32 or the High Courts under article 226 and can be validly scrutinised on the touchstone of the constitutional mandates.

56. Questions still remains - if all documents are carried and there is neither any concealment nor any mis-declaration but a bona fide contention is raised which requires adjudication, - can an inference of attempt at evasion be raised ?

57. Resume of case-law referred to above leads to the conclusion that exercise of power at the check-post should have nexus with attempt at evasion. The power conferred on a check-post officer is a drastic power necessary to check attempts at evasion but the same cannot be exercised arbitrarily. Wherever the action of check-post officer smacks of arbitrariness, the power of judicial review is available with this Court under article 226 of the Constitution of India even if alternative remedy of appeal is available. Whether exercise of power in a given situation was called for or not, is a question which has to be decided from case to case and no principle of universal application could be laid down. If no inference of attempt at evasion can be drawn, exercise of power will not be called for. On the other hand, if attempt at evasion can be reasonably inferred from the given facts, exercise of such power may be justified. Normally, statutory remedies being available, writ court will not examine whether exercise of power at check-post was called for or not but in an appropriate case, writ court is not debarred from doing so to prevent injustice or uncalled for harassment, which may be patent and which may not require ascertainment of any disputed facts or if the exercise of power is mala fide.

58. As seen from the above case law, there are instances of interference by the writ court with the exercise of power where there was no nexus with the attempt at evasion, such as in *Utkal Galvanisers Limited* [1997] 104 STC 222 (Ori), *Automobile Products of India* [1991] 81 STC 414 (Karn), *Parry and Company Ltd. Vs. Commissioner of Sales Tax*, , *Orient Paper & Industries Ltd.* [1995] 97 STC 490 (Ori) and *United Polymer Industries Vs. State of Punjab and Others*, . Similarly, the writ court refused to interfere and rejected contention that exercise of power by check-post authority was not called for or was overlapping with the power of assessment, in cases such as *Shahnas Trading Co.* [2002] 127 STC 1 and *The Transport Corporation of India Ltd. Vs. State of Andhra Pradesh* and

Others, .

59. Observations in the decisions referred to above are on individual facts and can be read as neither restricting the exercise of power for checking attempt at evasion wherever necessary nor can be read as extending exercise of power to an area where there is no attempt at evasion. We are of the view that straight-jacket approach is not called for in the matter. Sometimes, new means are required to be adopted to check evasion by the evaders who are out of invent, still, newer ways to hoodwink the revenue. Reference of the case to the assessing authority in each case will also not be a safe method as the officers at the check-post cannot be held to be mere receipt clerks for collection of data and papers.

60. The position can be summed up as under:

(1) Exercise of power at the check-post to be valid, should have reasonable nexus with the attempt at evasion.

(2) Straight-jacket approach is not called for and each instance of exercise of power has to be seen in the light of individual facts. Neither exercise of power can be restricted, wherever required for checking attempt at evasion nor can be extended to areas where there was no attempt at evasion.

(3) In an appropriate case, the writ court may examine the exercise of power and interfere if exercise of power is found to be arbitrary, mala fide and without nexus with attempt at evasion on the face of it.

(4) If there are disputed questions and there is reasonable nexus of exercise of power with attempt at evasion, writ petition against imposition of penalty at the check-post cannot be entertained.

(5) Where relevant documents are duly produced but a bona fide plea against taxability is raised and there is neither mis-declaration nor concealment, exercise of power of imposing penalty at the check-post on the ground of attempt at evasion may not be called for.

61. In the present case, contention raised by the assessee that the "cast iron castings" carried by it were not "cast iron" liable to tax at the first stage, could not be held to be requiring no adjudication or frivolous or mala fide. It is not relevant as to what is the interpretation finally taken on this subject and we do not express any conclusive opinion at this stage but having not concealed any information, having furnished all the information, having placed reliance on the judgments of the honourable Supreme Court and since the matter did require serious consideration, adjudication by the check-post officer was not called for. Invocation of jurisdiction for imposing penalty on the allegation of attempt at tax evasion in such a situation was not permissible.

62. Question No. (ii) is, thus, answered in favour of the petitioner and assumption of jurisdiction by the check-post officer is held to be without

jurisdiction.

Re : Q. No. (Hi)

63. We find that order annexure P 6 and order annexure R 1 are different orders and order annexure P 6 carries a reference to release of goods on March 1, 2005, though purported to have been passed on February 28, 2005. The same is obviously ante-dated. Explanation for the discrepancy does not appeal to us. We, however, do not express any final view in the matter and direct that matter be looked into by the Financial Commissioner-cum-Secretary, Government of Punjab, Department of Excise and Taxation, respondent No. 1 and such decision may be taken as may be considered appropriate.

64. Question No. (iii) is answered accordingly.

65. In view of the above, the writ petition is allowed and impugned order, annexure P 6 dated February 28, 2005 is set aside with no order as to costs.