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HIGH COURT OF JUDICATURE AT ALLAHABAD

Court No.40
Neutral Citation No. - 2025:AHC:92242-DB

CORAM : HON'BLE SHEKHAR B. SARAF, J.
HON'BLE VIPIN CHANDRA DIXIT, J.

WRIT-TAX NO. 1603 OF 2024

M/S PATANJALI AYURVED LTD.

v.

UNION OF INDIA AND OTHERS

For the Petitioner : Mr. Arvind P. Datar, learned Senior Advocate assisted by Mr. Ashwarya Sharma, Mr. Nishant Mishra, Mr. Devansh Srivastava, Mr. Kinjal Shrivastava, Ms. Vedika Nath and Mr. Yashonidhi Shukla, Advocates

For the Respondents: Mr. N. Venkatraman, learned Additional Solicitor General of India assisted by Sri Parv Agarwal, Mr. N.C. Gupta and Mr. Gaurav Mahajan, Advocates

Last heard on April 10, 2025
Pronounced on May 29, 2025

HON'BLE SHEKHAR B. SARAF, J.

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Relief Sought

1. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner has prayed for the issuance of a writ of certiorari quashing the impugned Show Cause Notice No.02/2024-25 issued on April 19, 2024 vide Form GST DRC-01 reference No.DGGI/INV/GST/2179/2020/GRU/634(S/L) by Directorate General of Goods and Services Tax Intelligence (DGGI), Ghaziabad Regional Unit, (hereinafter referred to as 'respondent no.2') bearing CBIC DIN-202404DNN40000555A8B, to the extent of exorbitant unexplained penalty of Rs. 2,735,113,681/- proposed to be levied against the petitioner firm under Section 122 (1), clause (ii) and (vii) of the Central Goods and Service Tax, Act 2017 (hereinafter referred to as 'CGST Act') and respective State Statutes namely Uttarakhand Goods and Services Tax Act, 2017, Haryana Goods and Services Tax Act, 2017 and the Maharastra Goods and Services Tax, 2017 read with Integrated Goods and Services Tax Act, 2017.

Factual Background

2. Factual matrix giving rise to the instant petition is delineated below:

   a. In the present *lis,* M/s Patanjali Ayurved limited (hereinafter referred to as 'petitioner') is a private limited company engaged in the manufacturing of Fast-Moving Consumer Goods (FMCG) such as Juices, Candies, Flour, Masala, Hair Oil/Conditioner, Detergent, Handwash, Soaps, Digestive Food items etc. It has three manufacturing units situated at Haridwar (Uttarakhand), Sonipat (Haryana) and Ahmednagar (Maharashtra), which are part of the investigation in the demand-cum-show cause notice. Its principal place of business is in Haridwar, Uttarakhand. Three units of the petitioner are registered at three different locations with same PAN number and distinct GSTIN number under the CGST Act and their respective State Goods and Services Tax Acts. The three units of the petitioner are covered under the common impugned

demand-cum-show cause notice dated April 19, 2024 for the tax period April 2018 to March 2022.

b. An information was received by the respondent authorities relating to M/s S.G Agro India Industry situated at Delhi with GSTIN number (07ASQPG3746B1ZT), that it was having an aggregate liability greater than two crore and Input Tax Credit (ITC) utilization over 99% with no income tax credential. Furthermore, information was also received relating to M/s Magic Traders situated at Delhi with GSTIN number (07MGNPS1227A1ZB), that it had taken recent registration and had issued e-way bills of more than Rs.50 lakhs to various firms.

c. The aforementioned information created a suspicion which resulted in an investigation conducted against various firms/companies including the three aforementioned units of the petitioner which led to the issuance of the impugned demand-cum-show cause notice dated April 19, 2024 under Sections 74, 122 of CGST Act and Section 20 of Integrated Goods and Services Tax Act, 2017 for the tax period April 2018 to March 2022 by the respondent no.2 wherein it was alleged that the petitioner, acting as a main person, indulged in circular trading of tax invoices only on paper without actual supply of goods.

d. A perusal of the impugned show cause notice shows that the three units of petitioner situated at Uttarakhand, Haryana and Maharastra were issued notices under Sections 74 and 122 of the CGST Act. It is to be noted that the show cause notice was cumulatively issued under both the provisions of the CGST Act and jurisdiction of the same lies before the respondent no. 2 in view of Circular No.169/01/2022-GST dated March 12, 2022, wherein the Additional/Joint Commissioners of Central Tax Commissionerate Lucknow has been empowered with All India

jurisdiction vide Notification No. 02/2022-Central Tax dated March 11, 2022 to further adjudicate the matter. As this writ petition is in respect of the petitioner, only the relevant portion of the said show cause notice which runs into more than 150 pages wherein the penalty is imposed upon the petitioner is extracted below:

> *"13. Now, therefore M/s Patanjali Ayurved Ltd. (05AAECP4424C1ZX), Patanjali Food & Herbal Park Pvt. Ltd., Laksar Road, Padartha, Haridwar, Uttarakhand, 249404 is hereby required to show cause to the Additional/Joint Commissioner, Central GST Commissionerate, Office of the Commissioner, 7-A Ashok Marg, Block-E, Hazratganj, Lucknow, Uttar Pradesh-226001 as to why:*
>
> > *i. The IGST amounting to ₹9,08,15,881/- (Rupees Nine Crore Eight Lakh Fifteen Thousand Eight Hundred and Eighty-one only) should not be demanded and recovered under the provision of Section 74(1) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017, as detailed in para 11.4.2;*
> >
> > *ii. Interest under the provision of Section 50(3) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 should not be demanded and recovered from them on the GST amount demanded at Sl.No. i;*
> >
> > *iii. Penalty should not be imposed upon them in terms of Section 74(1) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 for wilful suppression of facts with intent to evade payment of GST on the amount demanded at Sl. No. i;*
> >
> > *iv. Penalty should not be imposed upon them in terms of Section 122(1)(ii) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 for issuance of tax invoices or bills for passing on irregular ITC amounting to ₹38,57,21,402/- (IGST ₹38,57,21,402/-) without concomitant supply of goods as detailed in para 11.4.2;*
> >
> > *v. Penalty should not be imposed upon them in terms of Section 122(1)(vii) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 for taking or utilizing Input Tax Credit amounting to ₹38,57,21,402/- (IGST*

₹38,57,21,402/-) without actual receipt of goods as detailed in para 11.4.2;

vi. Penalty should not be imposed upon them in terms of Section 122(1)(x) and (xvi) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017.

13.1 Now, therefore M/s Patanjali Ayurved Ltd. (06AAECP4424C1ZV), G.T. Road, Unit-6, Rice Plant, 42-43 Km, Bahalgarh, Sonipat, Haryana, 131001 is hereby required to show cause to the Additional/Joint Commissioner, Central GST Commissionerate, Office of the Commissioner, 7-A Ashok Marg, Block-E, Hazratganj, Lucknow, Uttar Pradesh-226001 as to why:

i. Penalty should not be imposed upon them in terms of Section 122(1)(ii) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 for issuance of tax invoices or bills for passing on irregular ITC amounting to ₹88,77,08,723/- (IGST ₹88,77,08,723/-) without concomitant supply of goods as detailed in para 11.4.3:

ii. Penalty should not be imposed upon them in terms of Section 122(1)(vii) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 for taking or utilizing Input Tax Credit amounting to ₹86,26,05,155/- (IGST ₹86,26,05,155/-). without actual receipt of goods as detailed in para 11.4.3:

iii. Penalty should not be imposed upon them in terms of Section 122(1)(x) and (xvi) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017.

13.2 Now, therefore M/s Patanjali Ayurved Ltd. (27AAECP4424C1ZR), G.N.5. Khadaka, Tal, Newasa, Ahmednagar, Maharashtra, 414603 is hereby required to show cause to the Additional/Joint Commissioner, Central GST Commissionerate, Office of the Commissioner, 7-A Ashok Marg, Block-E. Hazratganj, Lucknow, Uttar Pradesh-226001 as to why:

i. Penalty should not be imposed upon them in terms of Section 122(1)(ii) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 for issuance of tax invoices or bills for passing on irregular ITC amounting to ₹11,26,67,999/- (IGST ₹11,26,67,999/-) without concomitant supply of goods as detailed in para 11.4.4;

ii. Penalty should not be imposed upon them in terms of Section 122(1)(vii) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 for taking or utilizing Input Tax Credit amounting to ₹10,06,89,000/- (IGST ₹10,06,89,000/-) without actual receipt of goods as detailed in para 11.4.4;

iii. Penalty should not be imposed upon them in terms of Section 122(1)(x) and (xvi) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017."

e. With regard to the show cause notice, the petitioner is aggrieved in the present writ petition only with the imposition of exorbitant penalty of Rs.2,735,113,681/- under Section 122 (1), clause (ii) and (vii) of the CGST Act.

f. This Court on October 18, 2024 had granted an interim stay to proceedings under Section 122 of the CGST Act and had given time to the petitioner to file its reply with regard to impugned show cause notice issued under Section 74 of the CGST Act.

g. In the meantime, respondent authority vide adjudication order dated January 10, 2025 has set aside the demands and dropped the proceedings under Section 74 of the CGST Act against the petitioner. The department vide adjudication order dated January 10, 2025, at the very outset, decided to proceed under Section 74 of the CGST Act only with the unit of the petitioner situated at Uttarakhand for the reason that it had availed total ineligible ITC of IGST to the tune of Rs.47,65,37,283/- out of which it has passed on the ineligible ITC to the tune of Rs.38,57,21,402/- and exonerated the other two firms situated at Haryana which has availed ITC of Rs.86,26,05,155/- against which it has passed on ITC of Rs.88,77,08,723/- and Maharashtra which has availed ITC of Rs.10,06,89,000/- against which it has passed on ITC of Rs.11,26,67,999/-. Therefore, only penal action was proposed by the department against the two entities situated in Haryana and Maharashtra

under Section 122 of the CGST Act.

h. The department while deciding on the issue of proceedings under Section 74 of the CGST Act for the unit of the petitioner situated at Uttarakhand has taken into consideration the product wise books of accounts of the petitioner showing details of purchased and sold quantities of the goods during the impugned period wherein it was observed by the department that for all the commodities, the quantities sold were always more than the quantities purchased from the suppliers, thereby making the observation that all the ITC which was availed in the impugned goods was further passed on by the petitioner. The department, with regard to show cause notice issued under Section 74 of the CGST Act, has decided to exonerate the petitioner's unit situated at Uttarakhand on various other grounds such as:

   i. Show cause notice did not specify consignment of particular suppliers as fake, therefore, in absence of any physical verification report of particular stocks and the said irregular ITC cannot be attributed to a particular supplier in absence of which a demand of differential ITC is not legally sustainable.

   ii. All goods received from the suppliers have been accounted for by the petitioner and supplied in payment of GST thereby implying the passing on irregular ITC and the department has relied on a circular no. 171/03/2022-GST dated July 6, 2022 wherein it was clarified that proceedings under Section 74 cannot be initiated against taxpayers, if it has merely passed on irregular ITC on the outward supply and only penalty under Section 122 of the CGST Act, if any, could be imposed.

   iii. There is no any shortage and mismatch in stock of

packing materials and the actual physical quantity of stocks in addition to the raw materials available. Furthermore, there is no adverse remark on any shortage or excess of stock packing materials found at the premises of the petitioner.

iv. This is not a case of receiving supplies from a non-existent suppliers as if this would have been the case, the department ought to have cancelled the registration of such fake firms and blocked the ITC immediately.

v. Show cause notice has placed reliance on third party data like RTO records which is not in conformity with the mandatory procedure prescribed under Section 145 of the CGST Act, which requires a certificate to authenticate the documents which are to be relied upon in departmental proceedings thereby making the said evidence as inadmissible.

vi. On the issue of transportation, it was observed that it is not a requirement under the law that the vehicles should take only a fixed toll route and any route may be chosen to reach a destination.

vii. Upon a request of cross examination by the petitioner, of persons on whose testimony reliance was placed upon in the show cause notice, all the suppliers have clearly declared on affidavit that they have made supplies to the petitioner based on genuine business transactions.

i. The relevant concluding part of the adjudication order dated January 10, 2025 is provided herein below:

> *"6.21 As already discussed in the earlier part of this order, the facts are going in favor of the Noticee, in as much as, no findings as to the shortage of raw materials are there, proper consumption of packing materials is shown, CA has furnished certificate*

regarding further supply of goods on payment of taxes, favourable declaration of the L1 suppliers in favor of the Noticee, payment of tax in cash portion on value addition during the relevant period and quantitative co-relation between the inputs received and inputs supplied, evidencing that ITC has not been retained but passed on further. In view of this, I am left with no option except to hold that there can be no demand against the Main Noticee under Section 74(1) of the Act. Since demand of tax is not sustainable, question of charging of interest and imposition of penalty also does not arise.

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6.26 Accordingly, I pass the following order:

ORDER

(1) I drop the demand of ₹9,08,15,881/- proposed under the provision of Section 74(1) of the CGST Act, 2017 read with Section 20 of the IGST Act, 2017 against M/s Patanjali Ayurved Ltd, Uttarakhand."

Contentions of The Petitioner

3. Mr. Arvind Datar, Senior Advocate appearing on behalf of the petitioner has made the following submissions:

a. There are various indicia to point out that Section 122 of the CGST Act is criminal in nature and accordingly attracts criminal liability.

b. Penalty for offences under Section 122 of the CGST Act states that a taxable person who commits any of the offences mentioned in its clause (i) to (xxi) shall be liable to penalty of ten thousand rupees or an amount equivalent to the tax evaded or ITC availed of or passed on or distributed irregularly whichever is higher. This imputes that first there has to be determination of tax under Section 73/74 of the CGST Act prior to invoking penal provision under Section 122 of the CGST Act. Moreover, heading to Section 122 of the CGST Act itself states 'Penalty for certain offences' that implies that there has

to be a predicate offence of tax evasion for which demand of tax had to be made under Section 73/74 of the CGST Act. In this regard, reliance has been placed upon ***NC Dhondial v. Union of India*** reported in AIR 2004 SC 1272 and ***Ramanna Dayaram Shetty v. International Airport Authority of India*** reported in (1979) 3 SCC 489.

c. Heading to Section 122 of the CGST Act reads as ‘Penalty for certain offences’. The word ‘offence’ has not been defined in CGST Act, 2017 or under any other GST laws, therefore, General Clauses Act, 1897 should be looked into. The word ‘offence’ is defined under Section 2(38) of the General Clauses Act, 1897 as "*any act or omission made punishable by any law for the time being in force*". Moreover, ‘offence’ has also been defined in Section 2(n) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'CrPC') and under Section 2(q) of Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as ‘BNSS’) as "*any act or omission made punishable by any law for the time being in force*." Section 4(2) of the CrPC/BNSS states that all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions under the CrPC, if no separate provisions are envisaged in such other laws. Therefore, the offences under the CGST Act also necessarily need to be governed by Section 4(2) of the CrPC. In this regard, reliance has been placed on ***Pradeep S. Wodeyar v. State of Karnataka*** reported in (2021) 19 SCC 62.

d. The mere fact that the fine is termed as ‘penalty’ will not ipso facto indicate that it is a civil wrong as even in IPC as well as CrPC, the word penalty had often been interchangeably used as fine which can be illustrated from the following examples:

i. Section 136 of CrPC prescribes that if a person fails to obey

or show cause in response to an order under Section 135, he/ she shall be liable to 'penalty' prescribed under Section 188 of the IPC. Section 188 IPC, however, imposes a fine.

ii. Section 141 of the CrPC uses the word ‘penalty’ while describing fine under Section 188 of the IPC.

iii. The interchangeable use of penalty and fine is also evident from a perusal of Section 136 and Section 137 of the IPC.

iv. Even a perusal of prescribed acts under Section 122 of the CGST Act indicate that penalty is envisaged to be levied for actions which are criminal in nature; and therefore, to arrive at a determination of whether or not the constituent elements of such provisions has occurred, a trial and due application of judicial mind is needed. This is most evident from the following sub-sections which indicate that prescribed acts are criminal in nature. A comparison is also drawn with similar sections in other penal legislations which further indicates that the prescribed acts under Section 122 of the CGST Act are identical to penal provisions under other statues further necessitating a trial.

e. Section 74 of the CGST Act is already there to compensate for the loss of revenue under the head ‘Demands and Recovery’ which also contains reference to ‘penalty’ which is adjudicated by the proper officer and states that penalty payable is equivalent to tax payable under the notice. The purpose of framing Section 122 of the CGST Act by Parliament would not have been the same as for Section 74 of the CGST Act. It is contended that since penalty has already been dealt by the Parliament in Section 74 of the CGST Act there was no need to bring Section 122 of the CGST Act in the Statute for imposing penalty once again. Therefore, Section 122 of the CGST Act is for more serious offences and attracts criminal proceedings.

f. A comparison between Section 122 (Penalty for certain offences) and 132 (Punishment for certain offences) of the CGST Act would reveal that several sub-sections are identical, which implies that a penalty under Section 122 can only be imposed after a conviction under Section 132. In relation to Section 132(6) which provides for sanction to be taken from Commissioner prior to prosecution (whereas there is no such reference in Section 122 as to who will adjudicate the matter under the said provision), it is submitted that the absence of a similar provision such as Section 132(6) in Section 122 will not convert Section 122 into a civil liability due to the presence of Section 134 that acts as a safeguard which applies to the whole Act, and therefore, also to Section 122.

g. Sections 122 and 132 of the CGST Act are kept in the same chapter, that is, 'Chapter XIX: Offences and Penalties'. Before proceeding for the offences mentioned under Sections 122, 132 and 134 of the CGST Act has to be followed being in the same chapter that requires prior sanction from the Commissioner and states that the same will be triable by a Court not inferior to that of a Magistrate of the First Class. Hence, it is submitted that a penalty envisaged under Section 122 of the CGST Act can only be imposed pursuant to a trial under Section 134 of the CGST Act.

h. Notes on clause of Section 122 of the CGST Act also makes it clear that this clause provides for a list of 'offences' and the definition of word 'offences' has to be as provided in General Clauses Act, 1897 and CrPC/BNSS. The notes on clause of Section 122 of the CGST Act is reproduced herein below:

> *"This clause provides for a list of offences such as supply of goods without invoice, issue of invoice without supply etc. which shall be liable to penalty. The clause also provides for offences such as aiding or abetting*

offences specified, fails to appear on a summons etc will be liable of a penalty of twenty-five thousand rupees."

i. The use of the phrase ‘wilful misstatement or suppression of facts to evade tax’ is clearly indicative of existence of mens rea requirement which implies that the proceedings ought to undergo a process of criminal trial. The doctrine of Mens rea serves as a crucial factor in establishing criminal culpability and indispensable in criminal law jurisprudence. Wilful misstatement has also been used in Section 122 and therefore, this proceeding has to undergo a criminal trial. Though Section 74 also requires mens rea but that is adjudicated by proper officer.

j. In the CBIC Circular No.3/3/2017-GST dated July 7, 2017, the Board, assigns the proper officers for adjudication in relation to the various sections of the CGST Act but has intentionally excluded the proceedings under Section 122 for prosecution by criminal courts. Moreover, Section 122 of the CGST Act also does not contain any reference to proper officer; therefore it is implied that these proceedings ought to undergo prosecution by criminal courts.

k. Petitioner’s argument does not solely hinge on heading to Section 122 but also its substantive and operative part. Word ‘aiding and abetting’ is only found in criminal statutes. Sub-section 3 of Section 122 of the CGST Act explicitly uses the word ‘aiding and abetting’, for offences therefore, these words used in the section makes the provision criminal in nature.

l. The word ‘penalty’ has been used in the context of offence, even in the IPC and CrPC and does not automatically indicate that it is in the nature of civil liability. There is nothing in “tax jurisprudence” or any case law which specifically states, as a rule of law, that ‘penalty’ must necessarily relate to a civil

liability. The character of the penalty, whether civil or criminal, will depend on the context, language, legislative intent and statutory structure. Penalty also has been defined in sixth edition of Pramanatha Aiyar's Law Lexicon which states that penalty can be punishment in taxation matters as it may attract civil liability or criminal liability. It is open to Parliament to prescribe punishment by way of imprisonment or fine or even a penalty, but whether its levy is in consequence either of a prescribed offence or of breach of other provisions that are not characterized as offences. A breach of law can attract both penalty by the adjudicated mechanism, that is, the department and imposition by the prosecution mechanism, that is, criminal courts. Learned Senior Advocate submitted that penalty means punishment and also drew the attention of this Court towards the definition of 'Penalty' as cited in Corpus Juris Secundum (Volume 85, para 580, para 1023) which is reproduced herein below as:

> *"A 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 or penal laws."*

m. There are 21 types of offences mentioned in Section 122 of the CGST Act that provide for 100% penalty and out of the same 11 attract punishment by way of imprisonment and fine under Section 132. This overlap is irrelevant, as the department has the option to launch prosecution under Sections 122 or 132, depending on the facts of each case. The exclusion of proceedings under Section 132 of the CGST Act cannot lead to an inference that proceedings under Section 122 of the CGST Act are relatable to civil penalty. Parliament could have intended that some of the offences mentioned under Section

122 need harsh punishment, and therefore, the punishment can be a traditional method of imprisonment subsequent to a criminal trial.

n. Explanation 1(ii) to Section 74 of the CGST Act provides that if penalty proceedings under Section 74 stand concluded against the ‘main person’, criminal penalty under Section 122 and the general civil penalty under Sections 125 of the CGST Act should also stand concluded against ‘all the persons’. Furthermore, closure of civil proceedings automatically results in closure of the criminal proceedings initiated for the same violation. Explanation 1(i) to Section 74 marks a departure from this general rule, by stating that closure of penalty under Section 74 will not result in abatement of the proceedings under Section 132. However, proceedings under Section 122 even though criminal, will stand concluded in consonance with the general rule. Proceedings under Sections 73 and 74 are different from Sections 122 and 132 of the CGST Act and, therefore, can never be clubbed together.

o. There are 17 provisions in chapter XIX titled as ‘Offences and Penalty’ and there is reference to a proper officer in some of the provisions. Section 124 of the CGST Act is also a "criminal" provision, as it provides for punishment and refers to a continuing offence. Section 126 gives general guidelines relating to penalty and is intended to ensure that the penalty imposed by the Department officers is not disproportionate and unduly harsh. Section 127 also refers to 'proper officers'. Only Section 125 does not refer to 'proper officer' and is titled 'General Penalty'. It applies only where no specific penalty is provided for in the Act. However, it does not relate to any "offence" but only refers to "contravention" under the Act. The absence of any reference to 'proper officer' in Section 122 is

deliberate, because the levy of penalty by way of "punishment" can only be done by the jurisdictional magistrate. Thus, Section 122 and Section 132 also do not refer to a 'proper officer' as these are criminal provisions. On the other hand, other sections like Section 129 (seizure of goods), Section 130 (confiscation) refer to 'officer' or 'proper officer'.

p. It is also essential that the civil and criminal jurisdictions are to be kept separate under the principle of separation of powers, which are set out in Article 50 of the Constitution of India and also construed to be part of the basic structure of our Constitution.

q. There is a constitutional convention that all offences are tried only by the established criminal courts which are part of the judiciary whereas the adjudication of penalty will be part of quasi-judicial proceedings. Thus penalty under Section 74 and other provisions can be levied by the appropriate officer. However, any penalty for offences can only be levied by the criminal courts.

r. To buttress his arguments, counsel has placed reliance on the following cases:

i. ***Shiv Dutt Rai Fateh Chand & Others v. Union of India & Another*** reported in (1983) 3 SCC 529 [para 34].

ii. ***Gujarat Travancore Agency, Coachin v. Commissioner of Income Tax, Kerela, Ernakulam*** reported in (1989) 3 SCC 52 [para 4].

iii. ***Directorate of Enforcement v. MCTM Corporation Pvt. Ltd.*** reported in (1996) 2 SCC 471 [para 7,8,13]

iv. ***Chairman SEBI v. Shriram Mutual funds and Another*** reported in (2006) 5 SCC 361. [para 17, 19, 29, 33, 35].

v. ***Union of India v. Dharmendra Textile Processors & Others*** reported in (2008) 13 SCC 369 [para 15,17,19].

vi. ***Tata Power Company Ltd. & Ors Vs Maharashtra***

Electricity Regulatory Commission & Ors. reported in MANU/SC/0932/2009 [para 122,123] regarding interpretation of headings to section.

vii. ***N.C. Dhoundial Vs UoI & Ors.*** reported in MANU/SC/1027/2003 [para 15]

viii. ***Standard Chartered Bank v. Directorate of Enforcement*** reported in (2006) 4 SCC 278 [para 29]

Contentions of Respondents

4. Mr. N. Venkatraman, learned Additional Solicitor General of India appearing on behalf of department has made the following submissions:

a. Section 122(1) is for offences committed by a taxable person, and the penalty prescribed in Section 122(1) are different from the penalty prescribed under the Chapter XV Demands and Recovery that is Sections 73/74. Section 74 of the CGST Act deals with the determination of tax on account of fraud, wilful misstatement, or suppression of facts. On the other hand, Section 122(1) enumerates specific offences and penalties for various violations.

b. Section 74 of the CGST Act are the outcomes resulting from the commission of the offences listed under Section 122 of the CGST Act. Therefore, the offences listed under Section 122 of the CGST Act need not necessarily cover the cases as those are covered under Sections 73, or 74 of the CGST Act.

c. Tax Demand of Rs.9,08,15,881/- was issued under the provisions of Section 74 of the CGST Act as petitioner had wrongly availed or utilized ITC and penalty amounting to Rs.2,735,113,681/- under Section 122(i)(ii) and (vii) of CGST Act proposed in the notice, is not related with this demand but for issuing tax invoices without any actual supply of goods, and also for taxing/utilizing input tax credit without actual receipt of goods. Therefore, the demand invoked in the notice under the provisions of Section 74 of the CGST Act and penalty proposed

under the provisions of Section 122 is for two separate offences and not interrelated.

d. Penalty in taxation matters is only a civil liability and not a criminal liability and heading of section alone can not control the whole section. Section 122 of the CGST Act purports to preventing loss of revenue and imposes penalty whereas Section 132 of the CGST Act purports to impose punishment as a criminal offence. Mere addition of mens rea would not make the provision criminal in nature. If the Parliament chooses to add mens rea to the penalty in tax law, it will still be a civil liability read with mens rea. For criminal trial prosecution, there is no dilution in law, mens rea is indispensable. Therefore, Section 122 is a basket of both mens rea and non-mens rea contraventions.

e. This is an anti-evasion section and should not be pushed to an interpretation to make it difficult to implement and promote evasion. This provision provides for 100% penalty as it aims to curb the practice of illegal trading by creation of fake invoices without actual and physical supply of goods.

f. Jurisprudence in tax law says that penalty is nothing but civil liability. Sections 121, 122 and 132 are parallel provisions that talk about civil liability. The burden of proof as required in Section 122 is preponderance of probability and not beyond reasonable doubt. Whereas in Section 132 of the CGST Act for the criminal offence it has to be beyond reasonable doubt. Therefore, the texture of the whole case under Section 122 of the CGST Act is proving a civil liability based on the evidence, burden of which is preponderance of probability. In criminal courts for prosecution, the criminal court will put the benchmark beyond reasonable doubt. A criminal court in a criminal offence as set in criminal law would always requires

proof of evidence that proves the guilt beyond reasonable doubt.

g. Section 122 has twenty-one sub-clauses, wherein eleven sub-clauses have intention and ten sub-clauses do not have intention. Even for a civil liability/penalty one can require intention/mens rea. But sub-sections which do not contain elements of intention/mens rea cannot be given criminal motive to it (the vice-versa is also not applicable). Section 132 contains eleven offences, wherein mens rea is present which is a permanent and indispensable feature under criminal law. Whereas, *mens rea* is not always needed when it comes to civil liability under tax law. Consequently, Section 122 does not suffer from any unconstitutionality, it can have ten offences without *mens rea* and eleven with *mens rea*, it will still amount to penalty as a civil liability. Therefore, Section 122 and its sub-sections, is a basket which is a mixture of non-mens rea and mens rea offences. *Mens rea* is permissible under tax statute for penalty, but it is impermissible for criminal trial wherein all sub-sections require *mens rea*. It is settled law in taxing statue that one can have civil liability/penalty with mens rea, it will still be considered as a penalty.

h. Attention is drawn to the Explanation 1 to Section 74 of the CGST Act. The said provision is for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or wilful misstatement or suppression of facts. Explanation 1 to Section 74 is as under:

> *"Explanation 1.- For the purposes of section 73 and this section,-*
>
> *(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;*
>
> *(ii) where the notice under the same proceedings is issued to*

the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under Sections 122 and 125 are deemed to be concluded."

Explanation 1(i) makes it clear that the expression "all proceedings in respect of the said notice" shall not include proceedings under Section 132 of the CGST Act for the only reason that Section 132 is criminal in nature and deals with punishment for offences. If the legislative intent to Section 122 was also envisioned to be criminal, then Explanation 1(i) would have also contained Section 122 and the same would also have been benchmarked along with Section 132 in the said provision.

i. Explanation 1(i) to Section 74 deems closure of all proceedings against all persons liable to penalty under Section 122 and Section 125, if the proceedings against the main person stands concluded under Section 73 or 74 of the CGST Act. Herein, Section 122 has been benchmarked with Section 125 and not with Section 132, and Section 125 deals with general penalty, which may extend to twenty five thousand rupees. The legislative intent of Section 122 is evident one more time that it is merely a penalty in the nature of civil liability and not a criminal offence as contended by the petitioner. Since, Sections 122 and 125 deal with penalty, the same have been equated together. It is well settled principle of law that closure of civil proceedings/civil liability does not result in automatic closure of criminal proceedings and this intention is reflected one more time vide Explanation 1 to Section 74 wherein it clearly conveys that the purpose of Section 122 is only a penalty in the nature of civil liability. Furthermore, in relation to explanation 1 to Section 74 of the CGST Act it is submitted that these provisions shall apply in the situations where main persons to whom demand was made under the provisions of Section 74 of

the CGST Act have deposited due tax along with applicable interest and penalty, and the proceedings against the main person have been concluded.

j. With regard to the argument of the petitioner that there is no reference to "proper officer" under Section 122 of the CGST Act and it is therefore indicative of the fact that the provision is only criminal in nature and that in terms of Section 74, the proper officer is entitled to issue show-cause notice both for non-payment of taxes and also for wrong availment of input tax credit and its utilization, therefore the safeguard being available under Section 74, a penalty under Section 122 as a civil liability is misconceived and should therefore be held to be only criminal in nature. Counsel on behalf of respondent has rebutted the assumption of the petitioner as both factually and legally incorrect and which was demonstrated by an illustration:

> *"A, a taxable person supplies goods worth Rs. 100 crores and issues valid invoices of Input Tax Credit (ITC) worth Rs. 20 crores. B receives the goods and accounts the entire value and the ITC.*
>
> *However, B chooses to use only goods worth Rs. 50 crores and illicitly removes the balance quantity of goods to the tune of Rs. 50 crores in the grey market to C and collects cash. B also issues a fake invoice for Rs 50 crores value and Rs 10 crores ITC to yet another person D.*
>
> *Section 74 would apply not to A, for A has paid the taxes, not to B who does not pay any taxes, but to D who had availed input tax credit wrongly and utilized. But on the other hand Section 122(1) would apply to B for having supplied goods without invoice to C and for issuing fake invoices to D."*

The other persons besides the main person in the transactions would not be governed by any proceedings under Section 74 but once proceedings are initiated under Section 74, the rest of the proceedings under Section 122 would arise as connected or consequential proceedings and therefore there was no need to refer to a 'proper officer' under Section 122. It is equally for the

same reason that Explanation 1(ii) gives a deemed closure to the proceedings under Section 122, if proceedings under Section 73 and 74 gets concluded against the main person.

k. Furthermore, the aforesaid contention of the petitioner that since there is no reference to a proper officer in Section 122, the same should be construed as criminal in nature should also fail for the following reasons:

(i) Explanation 1(ii) to Section 74 makes the statutory intention very clear that the proper officer who initiates proceedings under Sections 73 and 74 can also initiate proceedings under Sections 122 and 125 thus, making it clear that once the proceedings gets concluded against the main person under Sections 73 or 74, the proceedings against all the persons liable to pay penalty under Sections 122 or 125 are deemed to be concluded. Consequently, whenever there is a need to invoke Section 74 along with Section 122, the proper officer under Section 74 can issue show cause notice and also adjudicate.

(ii) Section 122 to 127 of the CGST Act deals with various types of penalties. These sections are general layout sections as to when a penalty can be imposed. In some of these sections there is a reference to proper officers or officers and it cannot therefore mean that absence of any reference will make the provision criminal in nature. Penalties are generally collateral or co-noticee proceedings and would therefore link or hook itself with the main adjudication and hence there is no separate reference or mention of a proper officer. The proper officer who adjudicates the main matter would also adjudicate the penal consequences.

(iii) Without prejudice to the above, even assuming penalty proceedings are stand alone, a reference or non-reference to a proper officer cannot decide whether a provision is a civil liability or criminal in nature. For example; Section 123 deals with failure to furnish information and the penalty is one hundred rupees a day and shall not exceed five thousand rupees. Section 125 deals with a general penalty of twenty-five thousand rupees. Merely because there is no reference to a proper officer, cannot be construed as making the provision criminal in nature.

l. To buttress his arguments, counsel has placed reliance on the following cases:

(i) ***Shiv Dutt Rai Fatehchand (supra)*** [para 30,31]

(ii) ***Gujarat Travancore Agency (supra)*** [para 4]

(iii) ***M.C.T.M. Corporation Pvt. Limited (supra)*** [para 7,8,12]

(iv) ***Chairman SEBI (supra)*** [para 29,33,52]

(v) ***SEBI v. Cabot International Capital Corporation*** reported in 2004 SCC OnLine Bom 180 [para 47]

(vi) ***Dharmendra Textile Processors (supra)*** [para 18]

(vi) ***M/s Raghunandan Prasad Mohal Lal, Bareilly v. The Income Tax Appellate Tribunal and Others*** reported in 1969 SCC Online All 286 [para 9, 10, 11]

(vii) ***NHPC Ltd. v. State of Himachal Pradesh, Secretary and Others*** reported in 2023 SCC Online SC 1137 [para 35, 36, 37]

(viii) ***State of Tamil Nadu and Others v. K. Shyam Sunder and Others*** reported in (2011) 8 SCC 737

m. In the light of the above, the respondents reiterate their prayer before this Court that the writ petition has to be dismissed in toto.

Issues

5. Considering the contentions canvassed by both the sides, the following issues arise for consideration before this Court, which are as follows:

(I) Whether the "Proper Officer/Adjudicating Officer" has the power to adjudicate on the penalty provision provided under Section 122 of the CGST Act?

(II) Whether dropping of proceedings under Section 74 of the CGST Act, 2017 will ipso facto abate the proceedings under Section 122 of the CGST Act?

Relevant Provisions

6. Before we assess the rival submissions canvassed by both the parties, it becomes necessary at the outset to refer to the relevant provisions of the CGST Act. They are delineated below:

> *"**Section 2**: **Definitions.**—In this Act, unless the context otherwise requires,–*
>
> *(107) "taxable person" means a person who is registered or liable to be registered under section 22 or section 24;*
>
> ***Section 74:** Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts.*
>
> *(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest*

payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of

annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Explanation 1.—For the purposes of section 73 and this section,—

(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122 and 125 are deemed to be concluded.

Explanation 2.—For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer."

Section 83. Provisional attachment to protect revenue in certain cases.—

(1) Where, after the initiation of any proceeding under Chapter XII, Chapter XIV or Chapter XV, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue it is necessary so to do, he may, by order in writing, attach provisionally, any property, including bank account, belonging to the taxable person or any person specified in sub-section (1A) of section 122, in such manner as may be prescribed."

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1).

Section 122 : Penalty for certain offences.—*(1) Where a taxable person who—*

(i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;

(ii) issues any invoice or bill without supply of goods or

services or both in violation of the provisions of this Act or the rules made thereunder;

(iii) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(v) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;

(vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;

(vii) takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;

(viii) fraudulently obtains refund of tax under this Act;

(ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;

(x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;

(xi) is liable to be registered under this Act but fails to obtain registration;

(xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;

(xiii) obstructs or prevents any officer in discharge of his duties under this Act;

(xiv) transports any taxable goods without the cover of documents as may be specified in this behalf;

(xv) suppresses his turnover leading to evasion of tax under

this Act;

(xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;

(xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;

(xviii) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;

(xix) issues any invoice or document by using the registration number of another registered person;

(xx) tampers with, or destroys any material evidence or document;

(xxi) disposes of or tampers with any goods that have been detained, seized, or attached under this Act,

shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher.

(1A) Any person who retains the benefit of a transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on.

(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised,—

(a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent. of the tax due from such person, whichever is higher;

(b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

(3) Any person who—

(a) aids or abets any of the offences specified in clauses (i) to (xxi) of sub-section (1);

(b) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(c) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(d) fails to appear before the officer of central tax, when issued with a summons for appearance to give evidence or produce a document in an inquiry;

(e) fails to issue invoice in accordance with the provisions of this Act or the rules made thereunder or fails to account for an invoice in his books of account,

shall be liable to a penalty which may extend to twenty-five thousand rupees.

(1B) Any electronic commerce operator who—

(i) allows a supply of goods or services or both through it by an unregistered person other than a person exempted from registration by a notification issued under this Act to make such supply;

(ii) allows an inter-State supply of goods or services or both through it by a person who is not eligible to make such inter-State supply; or

(iii) fails to furnish the correct details in the statement to be furnished under sub-section (4) of section 52 of any outward supply of goods effected through it by a person exempted from obtaining registration under this Act,

shall be liable to pay a penalty of ten thousand rupees, or an amount equivalent to the amount of tax involved had such supply been made by a registered person other than a person paying tax under section 10, whichever is higher."

***Section 124: Fine for failure to furnish statistics**—If any person required to furnish any information or return under section 151,—*

(a) without reasonable cause fails to furnish such information or return as may be required under that section, or

(b) wilfully furnishes or causes to furnish any information or return which he knows to be false,

he shall be punishable with a fine which may extend to ten thousand rupees and in case of a continuing offence to a further fine which may extend to one hundred rupees for each day after the first day during which the offence continues subject to a maximum limit of twenty-five thousand rupees."

***Section 125. General penalty**—Any person, who contravenes any of the provisions of this Act or any rules made thereunder for which no penalty is separately provided for in this Act, shall be liable to a penalty which may extend to twenty-five thousand rupees.*

***Section 128: Power to waive penalty or fee or both.**—The Government may, by notification, waive in part or full, any penalty referred to in section 122 or section 123 or section 125 or any late fee referred to in section 47 for such class of taxpayers and under such mitigating circumstances as may be specified therein on the recommendations of the Council.*

***Section 131: Confiscation or penalty not to interfere with other punishments.---** Without prejudice to the provisions contained in the Code of Criminal Procedure, 1973 (2 of 1974), no confiscation made or penalty imposed under the provisions of this Act or the rules made thereunder shall prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of this Act or under any other law for the time being in force.*

***Section 132 : Punishment for certain offences**.—(1) Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences, namely:—*

(a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;

(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;

(c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill;

(d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(e) evades tax or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);

(f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;

* * * * *

(h) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

* * * * *

(l) attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (f) and clauses (h) and (i) of this section, shall be punishable—

(i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;

(ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;

(iii) in the case of an offence specified in clause (b) where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;

(iv) in cases where he commits or abets the commission of an offence specified in clause (f), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with

fine.

(3) The imprisonment referred to in clauses (i), (ii) and (iii) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

(5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable.

(6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

Explanation.—For the purposes of this section, the term "tax" shall include the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or refund wrongly taken under the provisions of this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act and cess levied under the Goods and Services Tax (Compensation to States) Act.

***Section 134: Cognizance of offences**.—No court shall take cognizance of any offence punishable under this Act or the rules made thereunder except with the previous sanction of the Commissioner, and no court inferior to that of a Magistrate of the First Class, shall try any such offence.*

***Section 138. Compounding of offences.**—(1) Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner on payment, by the person accused of the offence, to the Central Government or the State Government, as the case may be, of such compounding amount in such manner as may be prescribed:*

Provided that nothing contained in this section shall apply to—

(a) a person who has been allowed to compound once in respect of any of the offences specified in clauses (a) to (f), (h), (i) and (l) of sub-section (1) of section 132;

(b) [Omitted]

(c) a person who has been accused of committing an offence under clause (b) of sub-section (1) of section 132;

(d) a person who has been convicted for an offence under this Act by a court;

(e) [Omitted]

(f) any other class of persons or offences as may be prescribed:

Provided further that any compounding allowed under the provisions of this section shall not affect the proceedings, if any, instituted under any other law:

Provided also that compounding shall be allowed only after making payment of tax, interest and penalty involved in such offences.

(2) The amount for compounding of offences under this section shall be such as may be prescribed, subject to the minimum amount not being less than twenty-five per cent. of the tax involved and the maximum amount not being more than one hundred per cent. of the tax involved.

(3) On payment of such compounding amount as may be determined by the Commissioner, no further proceedings shall be initiated under this Act against the accused person in respect of the same offence and any criminal proceedings, if already initiated in respect of the said offence, shall stand abated.

Rule 142 of the CGST Rules. Notice and order for demand of amounts payable under the Act. -*(1) The proper officer shall serve, along with the*

(a) Notice issued under section 52 or section 73 or section 74 or section 74A or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130, a summary thereof electronically in FORM GST DRC-01,

***

(5) A summary of the order issued under section 52 or section 62 or section 63 or section 64 or section 73 or section 74 or section 74A or section 75 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130 shall be uploaded electronically in FORM GST DRC-07, specifying therein the amount of tax, interest and penalty, as the case may be, payable by the person concerned."

Analysis

7. We have considered the rival submissions and have perused the materials placed on record. Mr. Arvind Datar, learned Senior Advocate, appearing on behalf of petitioner has addressed his arguments meticulously before us and Mr. Venkataraman, learned ASGI has vehemently debunked the arguments placed by the counsel appearing on behalf of the petitioner.

8. The arguments canvassed by the learned Senior Advocate appearing on behalf of the petitioner is mainly based on two pillars. Firstly, he submits that levy of penalty under Section 122 of the CGST Act attracts criminal

liability and does not impose civil liability. To buttress his arguments he has pointed out various indicia to depict the same and secondly, he submits that proceedings under Section 122 cannot uphold its integrity subsequent to dropping of proceedings against the same person, that is, the petitioner under Section 74 of the CGST Act in view of Explanation 1(ii) to Section 74.

9. Per contra, the learned ASGI appearing on behalf of the respondents confutes the aforesaid arguments of the petitioner mainly on two-fold points. Firstly, Section 122 of the CGST Act attracts civil liability and not criminal as penalty in taxation matters subsumes civil liability. Furthermore, penalty provision prescribed under Section 122(1) is for offences committed by a taxable person and is different from penalty prescribed under the head 'Chapter XV: Demand and Recovery' that includes Sections 73/74. Issuance of tax invoice without actual supply of goods and utilisation of input tax credit without actual receipt of goods are different acts of omission and commission and hence penalty provisions under Section 122(1) of the CGST Act would be attracted. Secondly, with regard to abatement of proceedings under Section 122 in view of the explanation (1)(ii) to Section 74, it is submitted that a taxable person is liable for penalty under Section 122(1), if it violates the provisions of the CGST Act. Merely because no tax is demanded subsequent to dropping of proceedings under Section 74 by the department, it cannot exonerate the taxable person from the penalty for the wrongs committed by it under any of the sub-sections in Section 122(1), and therefore, Section 122(1) can very well be imposed.

Meaning of 'Offence' and 'Penalty'

10. For the purpose of understanding, it is necessary to first deal with regard to the meaning of the words 'offence' and 'penalty' as used in Section 122 of the CGST Act. The myriad definitions of the words 'offence' and 'penalty' as given in Black's law dictionary, P Ramanatha Aiyar's, The Law Lexicon are quoted herein below:

Definition of 'Offence'

(i) Definition of '*Offence*' as per Black's Law Dictionary (*9th*

Edition, page 1186) is quoted in verbatim as under:

> "*A violation of the law; a crime, often a minor one.*
>
> *The terms 'crime', 'offence' and 'criminal offence' are all said to be synonymous, and ordinarily used interchangeably. 'Offense' may comprehend every crime and misdemeanor, or may be used in a specific sense as synonymous with 'felony' or with 'misdemeanor' as the case may be, or as signifying a crime of lesser grade, or an act not indictable, but punishable summarily or by the forfeiture of a penalty."*

(ii) The word 'Offence' as has been defined in P Ramanatha Aiyar's 'The Law Lexicon' (4th Edition, page 1316) is quoted in verbatim as:

> *"OFFENCE, is an act committed against law, or omitted where the law requires it, and punishable by it. (Tomlin) 'Offence' is generally equivalent to a Crime (per COLLINS, J., Derbyshire Co., v. Derby, 65 LJQB 488). In its legal signification an offence is the transgression of a law; a breach of the laws established for the protection of the public as distinguished from an infringement of mere private rights; a punishable violation of law, a crime, the doing that which a penal law forbids to be done or omitting to do what it commands."*
>
> ***
>
> *"Offence: Crime. The word "offence" is another name for crime. Crimes in the broad sense include not only the major crime (indictable offences) but also summary offences. The Latter regulate many trades and special activities (the so-called "regulatory offences"), as well as the conduct of ordinary people in their daily life."*

Definition of 'Penalty'

(iii) The word 'Penalty' as has been defined in Black's Law Dictionary (*9th Edition, page 1247*) is quoted in verbatim herein below:

> *"Punishment imposed on a wrongdoer, usu. In the form of imprisonment or fine; esp., a sum of money exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party's loss). Though usu. for crimes, penalties are also sometimes imposed for civil wrongs."*

(iv) The word ‘Penalty’ as has been defined in P Ramanatha Aiyar’s, ‘The Law Lexicon’ (*4th Edition, page 1404*) is quoted in verbatim as herein below:

> *“The term 'penalty' is used very loosely in statutes in some cases, and might, without being much strained from its ordinary meaning, be held to embrace all the consequences visited by law on the heads of those who violate police requirements.”*
>
> ***
>
> *“A punishment imposed for any breach of law, rule or contract a sum named in a bond as the amount to be forfeited by the obligor in case he does not comply with the conditions of the bond; money recoverable by virtue of a penal statute; a sum agreed to be paid on breach of an agreement or some stipulation in it.”*
>
> ***
>
> *“The expression 'penalty' is a word of wide significance. Sometimes, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not compensatory in character is also termed as a penalty. When penalty is imposed by an adjudicating officer, it is done so in ‘adjudicatory proceedings’ and not by way of fine as a result of prosecution of an accused for commission of an offence in a criminal Court. Director of Enforcement v. M/s MCTM Corpn. Pvt. Ltd., AIR 1996 SC 1100,1104, [Foreign Exchange Regulation Act (7 of 1947), S. 23(1)(a)]”*
>
> ***
>
> *“Penalty and prosecution distinction. There is a marked distinction between prosecution for an offence punishable under the Act and proceedings to impose penalties under Chapter XXI. Penalty proceedings are not criminal proceedings in the strict sense. In a criminal charge, unless the prosecution proves beyond reasonable doubt the offence committed by the assessee under the Act, the delinquent is entitled to the benefit of doubt and thereby goes scot free. The acquittal is on the technical rule of presumed innocence. The standard of proof for imposition of penalty is not as rigorous as that for prosecution of an offence. The test in the case of penalty is totality of circumstances. Evidence may be oral, documentary or circumstantial.”*
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> ***

"Penalty and punishment. 'Penalty is synonymous with 'punishment, in connection with crimes and is fixed by the law defining the criminal act."

(v) The word 'Penalty' as has been defined in P Ramanatha Aiyar's, 'The Law Lexicon' (*6th Edition, Volume 3, page 4112- 4114*) is quoted in verbatim as herein below:

"Whether or not a statute creates a criminal offence is a question of interpretation, e.g., if the word "penalty" as distinct from the word "fine" is used the general rule is that the penalty must be recovered as a debt in a civil Court. HALSBURY, 4th Edition, Vol. 11, para 2, p. 12, F.N. 5.

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"A penalty is a punishment inflicted by a law for its violation."

"A penalty is defined as a temporary punishment or sum of money imposed by statute, to be paid as a punishment for the commission of a certain offence."

"A penalty is a punishment imposed by law or contract for doing or failing to do something that it was the duty of a party to do."

"A penalty is in the nature of a punishment for the non-performance of an act, or the performance of an unlawful act, and in the former case stands in lieu of the act to be performed."

"The words 'penal' and 'penalty' strictly and primarily denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offence against its laws."

***

"Penalty' ordinarily becomes payable when it is found that an assesse has wilfully violated any of the provisions of the taxing statute. [Associated Cement Co Ltd. v Commercial Tax Officer, (1981) 4 SCC 578, 600, para 23]"

"Penalty is ordinarily levied on an assesse for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. (Pratibha Processors v UOI, AIR 1997 SC 138)."

"Penalty' is a liability imposed as a punishment on the party committing the breach of contract. Karnataka Rare Earth v Senior Geologist, Deptt. of Mines & Geology, (2004) 2 SCC 783, 791, para 13."

***

"Creating circumstances for compelling the assesse to discharge his statutory obligation cannot be termed to be a 'penalty'. The collection of tax being an act of the State for providing protection, security and other amenities to the society, cannot, in all circumstances, be termed to be a 'penalty' or 'punishment [S. Reddappa v UOI, (1998) 232 ITR 62 (Kar.)]"

"The 'penalty' is a punishment imposed on a wrongdoer. [Amin Chand Payarelal v Inspecting Asstt. CIT, (2006) 7 SCC 483, 486, para 9]. [Income-tax Act 43 of 1961), section 27(1)(a)]"

"The word 'Penalty' for the purpose of section 288(4) contemplates a penalty imposed for an actual infringement and not deemed infringement."

"'Penalty' is always imposed on account of personal fault of the person concerned. It is always relatable to an offender. It is a personal liability and it cannot be imposed on any person other then the offender. Tax and penalty are different concepts. [Bachan Singh v Road Transport Officer, Rourkela, AIR 2009 Ori 185, 188, para 9] [Orissa Motor Vehicles Taxation Act (39 of 1975), section 20]"

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"'"Penalty" is a slippery word and it has to be understood in the context in which it is used in a given statute. A penalty may be the subject-matter of a breach of statutory duty or it may be the subject-matter of a complaint. In ordinary parlance, the proceedings may cover penalties for avoidance of civil liabilities which do not constitute offences against the State. This distinction is responsible for any enactment intended to protect public revenue. Thus, all penalties do not flow from an offence as is commonly understood but all offences lead to a penalty. Whereas the former is a penalty which flows from a disregard of statutory provisions, the latter is entailed where there is mens rea and is made the subject-matter of adjudication. Penalty under Section 10(3) of the Act is compensatory. It is levied for breach of a statutory duty for non-payment of tax under the Act. [State of UP v Sukhpal Singh Bal, (2005) 7 SCC 615, 622, para 15] [UP Motor Vehicles Taxation Act (21 of 1997), section 10(3)]"

11. The Supreme Court judgment in ***Standard Chartered Bank (supra)***

relied upon by the petitioner has defined 'o*ffences*' which is quoted verbatim as follows:

> *"29. Both, Section 50 providing for imposition of penalty and Section 56 providing for prosecution, speak of contravention of the provisions of the Act. Contravention is the basic element. The contravention makes a person liable both for penalty and for prosecution. Even though the heading to Section 56 refers to offences and prosecutions, what is made punishable by the section is the contravention of the provisions of the Act and the prosecution is without prejudice to any award of penalty. The award of penalty is also based on the same contravention. Section 63 confers the power of confiscation of currency, security or any other money or property in respect of which a contravention of the provisions of the Act has taken place conferred equally on the adjudicating authority and the court, whether it be during an adjudication of the penalty or during a prosecution. Whereas Section 64(1) relating to preparation or attempt at contravention is confined to Section 56, the provision for prosecution, sub-section (2) of Section 64 makes the attempt to contravene or abetment of contravention, itself a contravention, for the purposes of the Act including an adjudication of penalty under the Act. Section 68 relating to offences by companies, by sub-section (1) introduces a deeming provision that the person who was in charge of and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty along with the company of the contravention of the provisions of the Act and liable to be proceeded against and punished accordingly. The proviso, no doubt, indicates that a person liable to punishment could prove that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. Sub-section (2) again speaks only of a contravention of the provisions of the Act and the persons referred to in that sub-section are also to be deemed to be guilty of the contravention and liable to be proceeded against and punished accordingly. The word "offence" is not defined in the Act. According to Concise Oxford English Dictionary, it means, "an act or instance of offending". Offend means, "commit an illegal act" and illegal means, "contrary to or forbidden by law". According to New Shorter Oxford English Dictionary, an offence is "a breach of law, rules, duty, propriety, etiquette, an illegal act, a transgression, sin, wrong, misdemeanour, misdeed, fault". Thus, an offence only means the commission of an act contrary to or forbidden by law. It is not confined to the commission of a crime alone. It is an act committed against law or omitted where the law requires it and punishable by it. In its legal signification, an offence is the transgression of a law; a breach of the laws established for the protection of the public as distinguished from an infringement of mere private rights; a punishable violation of law, a crime, the doing that which a penal law forbids to be done or omitting to do what*

it commands (see P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edn., 2005, p. 3302). This Court in Depot Manager, A.P. SRTC v. Mohd. Yousuf Miya [(1997) 2 SCC 699 : 1997 SCC (L&S) 548] stated that the word "offence" generally implies infringement of a public duty, as distinguished from mere private rights punishable under criminal law. In Brown v. Allweather Mechanical Co. [(1954) 2 QB 443 : (1953) 1 All ER 474 : (1953) 2 WLR 402 (DC)] it was described as: (All ER p. 476 A-B)

A failure to do something prescribed by a statute may be described as an offence, though no criminal sanction is imposed but merely a pecuniary sanction recoverable as a civil debt.

The expression "offence" as defined in Section 3(38) of the General Clauses Act means an act or omission made punishable by any law for the time being in force. "Punishable" as noticed by this Court in Sube Singh v. State of Haryana [(1989) 1 SCC 235 : 1989 SCC (Cri) 101] is ordinarily defined as deserving of, or capable or liable to punishment. According to Concise Oxford English Dictionary, "punish" means, "inflict a penalty on as retribution for an offence, inflict a penalty on someone for (an offence)". In New Shorter Oxford English Dictionary (Vol. 2, 3rd Edn., reprint 1993), the meaning of punishment is given as, "infliction of a penalty in retribution for an offence; penalty imposed to ensure application and enforcement of a law". Going by Black's Law Dictionary (8th Edn.) it is:

"A sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law."

According to Jowitts Dictionary of English Law, Vol. 2, (2nd Edn. by John Burke), punishment is the penalty for transgressing the law. It is significant to notice that Section 68, both in sub-section (1) and in sub-section (2) uses the expression, shall be liable to be proceeded against and punished accordingly. There does not appear to be any reason to confine the operation of Section 68 only to a prosecution and to exclude its operation from a penalty proceeding under Section 50 of the Act, since the essential ingredient of both is the contravention of the provisions of the Act. A company is liable to be proceeded against under both the provisions. Section 68 is only a provision indicating who all in addition can be proceeded against when the contravention is by a company or who all should or could be roped in, in a contravention by a company. Section 68 only clarifies the nature and mode of proceeding when the contravention of any of the provisions of the Act is by a company, whether it be by way of adjudication to impose a penalty or by way of prosecution leading to imprisonment and a fine. "

(Emphasis added)

12. The Supreme Court in ***Shiv Dutt Rai Fateh Chand (supra)*** relied upon by counsel appearing on behalf of both the parties has defined 'penalty' which is quoted verbatim as hereinbelow:

> *"25. ....The word "penalty" is a word of wide significance. Sometimes it means recovery of an amount as a penal measure even in a civil proceeding. An exaction which is not of compensatory character is also termed as a penalty even though it is not being recovered pursuant to an order finding the person concerned guilty of a crime...."*
>
> (Emphasis added)

13. The Supreme Court in ***State of U.P. v. Sukhpal Singh Bal*** reported in 7 SCC 615, 622 with regard to the term 'penalty' has held that penalty does not precede offences but offences precede penalty. The relevant paragraph of the judgment is quoted herein below:

> *"15. In the light of the above judgments as applicable to the provisions of the said 1997 Act, we are of the view that the High Court had erred in striking down Section 10(3) as ultra vires Articles 14 and 19(1)(g) of the Constitution. "Penalty" is a slippery word and it has to be understood in the context in which it is used in a given statute. A penalty may be the subject-matter of a breach of statutory duty or it may be the subject-matter of a complaint. In ordinary parlance, the proceedings may cover penalties for avoidance of civil liabilities which do not constitute offences against the State. This distinction is responsible for any enactment intended to protect public revenue. Thus, all penalties do not flow from an offence as is commonly understood but all offences lead to a penalty. Whereas the former is a penalty which flows from a disregard of statutory provisions, the latter is entailed where there is mens rea and is made the subject-matter of adjudication. In our view, penalty under Section 10(3) of the Act is compensatory. It is levied for breach of a statutory duty for non-payment of tax under the Act. Section 10(3) is enacted to protect public revenue. It is enacted as a deterrent for tax evasion. If the statutory dues of the State are paid, there is no question of imposition of heavy penalty. Everything which is incidental to the main purpose of a power is contained within the power itself. The power to impose penalty is for the purpose of vindicating the main power which is conferred by the statute in question. Deterrence is the main theme or object behind the imposition of penalty under Section 10(3)."*
>
> (Emphasis added)

14. Upon a careful perusal of the multifarious definitions in the legal dictionaries and judgments noted herein above, one would come to the

following conclusions:

(a) The term ‘offence’ may have several meanings. It may be used in a statute to indicate a crime, a misdemeanour, felony or may be signifying a crime of lesser grade, or an act not indictable, but punishable summarily or by the imposition of a penalty. Any act committed against the law or any omission where the law requires a particular action would be equivalent to an offence.

(b) An offence is the transgression of a law or provision of law established for the protection of the public as distinguished from an infringement of mere private rights.

(c) The Supreme Court has also given a wide meaning to the term ‘offence’ and in ***Standard Chartered Bank (supra)*** affirmed the definition provided in earlier judgments of the Supreme Court by stating that the word “offence” generally implies infringement of a public duty, as distinguished from mere private rights punishable under criminal law. Furthermore, a failure to do something may be described as an offence, though no criminal sanction is imposed but merely a pecuniary sanction recoverable as a civil debt.

(d) The term ‘penalty’ has also been given a broad definition by the law dictionaries and the Supreme Court judgments wherein it is stated that the term ‘penalty’ is used very loosely in statutes in some cases and may be held to embrace all the consequences visited by law for an infringement of the law.

(e) Penalty ordinarily becomes payable in a taxing statutes when it is found that an assessee has wilfully violated any of the provisions of the taxing statute ***(Associated Cement Co Ltd. v Commercial Tax Officer****, (1981) 4 SCC 578)*. Furthermore, penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the

provisions of the particular statute (***Pratibha Processors v UOI,*** *AIR 1997 SC 138)*.

(f) "Penalty" is a slippery word and it has to be understood in the context in which it is used in a given statute. A penalty may be the subject-matter of a breach of statutory duty or it may be the subject-matter of a complaint. In ordinary parlance, the proceedings may cover penalties for avoidance of civil liabilities which do not constitute offences against the State. This distinction is responsible for any enactment intended to protect public revenue. Thus, all penalties do not flow from an offence as is commonly understood but all offences lead to a penalty. Whereas the former is a penalty which flows from a disregard of statutory provisions, the latter is entailed where there is mens rea and is made the subject-matter of adjudication.

15. Principles enunciated above clearly indicate that the word 'offence' does not necessarily under all circumstances mean a crime that is required to be tried by the criminal court. A contravention of a rule/law wherein criminal proceedings are not initiated but only penalty is imposed for the purpose of deterrence would also amount to an offence. Similarly, 'penalty' is a slippery word and the same has to be understood in the context in which it is used in a given statute. In ordinary parlance, the proceedings may cover penalties for avoidance of civil liabilities which do not constitute offences against the State. However, there would be circumstances for certain offences, penalty may not be imposed and the same may be punishable by incarceration. Penalty may be imposed in cases where there is a simple violation of a law or for omission to do a particular act without there being any mens rea. On the other hand, penalty may also be imposed for serious contravention of the law with or without mens rea that may amount to an offence for the purpose of deterrence and punishment. A statute may provide for further punishment by prosecution for the same offence/contravention, if

the legislature deems it necessary.

Interpretation of Statutes

16. Now, we will deal with the interpretation of the relevant provisions involved in the present case, specially Sections 74 and 122 of the CGST Act. Before interpreting a taxing statute, it is necessary to quote the observation of Justice Das in ***Nalinakhya Bysack v. Shyam Sundar Haldar*** reported in AIR 1953 SC 148 that in construing a statutory or constitutional provision, the Court should not presume that the legislature has either committed a mistake or has omitted something which was very necessary and there should be no presumption of mistake of the legislature. The relevant extract from the judgement is quoted herein below:-

> *"It must always be borne in mind, as said by Lord Halsbury in Commissioner for Special Purposes of Income-tax v. Pemsel, that it is not competent to any Court to proceed upon the assumption that the Legislature has made a mistake. The Court must proceed on the footing that the Legislature intended what it has said. Even if there is some defect in the phraseology used by the Legislature, the Court cannot, as pointed out in Crawford v. Spooner, aid the Legislature's defective phrasing or add and amend or, by construction, make up deficiencies which are left in the Act. Even where there is a casus omissus, it is, as said by Lord Russel of JKillowen in Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co. Ltd., for other than the Courts to remedy the defect."*

17. A taxing statute consists of three stages, firstly, charging provision to ascertain the subject upon whom tax is to be imposed; secondly, machinery provision for assessment or quantification of the tax, interest and penalty to be imposed and thirdly, provisions for recovery of tax, interest and penalty assessed in the previous stage. Lord Dunedin in ***Whitney v. Inland Revenue Commissioners*** reported in (1926) AC 37 in this regard has made the observations, which are quoted as under:

> *"..... A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment*

particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

18. Section 74 of the CGST Act provides for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or wilful mis-statement or suppression of facts to evade tax. Section 74 in its characterization is an anti-evasion provision in nature as it is aimed at curbing evasion of tax. This is a provision which in itself consists of two stages of taxing statute. It is a charging provision for the reason, it fixes the liability upon the person chargeable with tax. It is a machinery provision as it provides for determination/quantification of tax and penalty. Ergo, Section 74 at once is a charging and a machinery provision for the recovery of tax assessed and imposition of penalty.

19. Section 122 of the CGST Act provides for penalty on taxable persons for committing offences as mentioned in twenty-one sub clauses. It is aimed at discouraging tax payers from indulging in unlawful activities with regard to supplying goods without invoice, issuing fake invoices, non payment of tax to Government after collection, non deduction or non remittance of tax, claiming wrongful input tax credits, fraudulently obtaining tax refunds, inter alia. Ergo, Section 122 is a penal provision aimed at curbing evasion of taxes.

20. For construing fiscal statutes, one must have regard to the letter of the law as the subject cannot be taxed by inference and analogy. Taxing statute aimed at exaction of any money should contain specific provisions for the same and there is no room for intendment. Nothing is to be read and nothing is to be implied and one should look fairly at the language used. It has to be construed strictly as it is. Rowlatt, J. in ***Cape Brandy Syndicate v. Commissioner of Inland Revenue*** reported in (1921) 2 KB 403 has observed as quoted herein:

"*In a taxing Act one has to look merely at what is clearly said. There is no room for intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

21. In ***Film Exhibitors, Guild v. State of A.P.*** reported in AIR 1987 AP 110, with regard to the charging provision of a taxing statute, the Court held that it must be strictly interpreted and laid down following principles for interpretation of taxing statutes:

> *"9. In the light of the above discussion in interpretation of the taxing provision, the following principles would emerge:*
>
> > *(1) A taxing statute, if it professes to impose a charge, its intention must be expressed in clear, unequivocal and unambiguous language. The Court has to look at the language couched. Hunt into intention to find a charge is impermissible. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in and nothing is to be implied. No equitable construction of a charging section is to be applied. The charging section is to be construed strictly regardless of its consequences that may appear to the judicial mind to be. The burden is on the State to show that the subject is within the provisions of the Act.*
> >
> > *(2) But in construing the machinery provisions for assessment and collection of the tax to make the machinery workable ut res valeat potius quam pereat, i.e., the Court would avoid that construction which would fail to relieve the manifest purpose of the legislation of the presumption that the legislature would enact only for the purpose of bringing about an effective result. It is not the function of the Court to hunt out ambiguities by strained and unnatural meaning; close reasoning is to be adopted; harmonious construction is to be adhered to; all the relevant provisions are to be read together to gather the intention from the language employed, its context, and give effect to the intention of the legislature. Ingenious attempt to avoid tax is to be thwarted."*
>
> (Emphasis added)

22. The Supreme Court in ***CST v. Shri Krishna Engg. Co***. reported in (2005) 2 SCC 692 further held as follows:

> "*35. This Court in A.V. Fernandez v. State of Kerala [1957 SCR 837 : AIR 1957 SC 657] opined that, however great the hardship may appear to the judicial mind, (SCR p. 847)*
>
> > *"In construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed."*

A few years later another Constitution Bench in the case of CST v. Modi Sugar Mills Ltd. [(1961) 2 SCR 189 : AIR 1961 SC 1047] observed thus: (SCR p. 198)

> *"In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency."*

(Emphasis added)

23. The Supreme Court in ***State of Tamil Nadu v. M.K. Kandaswami*** reported in (1975) 4 SCC 745 has held as follows:

> *"26. It may be remembered that Section 7-A is at once a charging as well as a remedial provision. Its main object is to plug leakage and prevent evasion of tax. In interpreting such a provision, a construction which would defeat its purpose and, in effect, obliterate it from the statute book, should be eschewed. If more than one construction is possible, that which preserves its workability, and efficacy is to be preferred to the one which would render it otiose or sterile. The view taken by the High Court is repugnant to this cardinal canon of interpretation."*

(Emphasis added)

24. The Court while interpreting a taxing statute in ***Sheffield City Council v. Yorkshire Water Services Ltd.*** reported in (1979) 2 All ER 91 held as under:

> *"Parliament is taken not to intend the carrying out of its enactments to be unworkable or impracticable, so the Court will be slow to find in favour of a construction that leads to these consequences. This follows the path taken by Judges in developing the common law..... the common law of England has not always developed on strictly logical lines, and where the logic leads down a path that is beset with practical difficulties the Courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society."*

25. The Supreme Court in ***Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd***. reported in 1983 (1) SCC 147, relied upon by the petitioner, has held that once the statute leaves the parliament, Court is the sole authority to interpret what the parliament intends through the language of the statute and other permissible aids. The relevant paragraph of the judgment is quoted

herein below:

> *"25. Shri Ashoke Sen drew pointed attention to the earlier affidavits filed on behalf of Bharat Coking Coal Limited and commented severely on the alleged contradictory reasons given therein for the exclusion of certain coke oven plants from the Coking Coal Mines (Nationalisation) Act. But, in the ultimate analysis, we are not really to concern ourselves with the hollowness or the self-condemnatory nature of the statements made in the affidavits filed by the respondents to justify and sustain the legislation. The deponents of the affidavits filed into court may speak for the parties on whose behalf they swear to the statements. They do not speak for the Parliament. No one may speak for the Parliament and Parliament is never before the court. After Parliament has said what it intends to say, only the court may say what the Parliament meant to say. None else. Once a statute leaves Parliament House, the Court is the only authentic voice which may echo (interpret) the Parliament. This the court will do with reference to the language of the statute and other permissible aids. The executive Government may place before the court their understanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do so, they do not speak for Parliament. No Act of Parliament may be struck down because of the understanding or misunderstanding of parliamentary intention by the executive Government or because their (the Government's) spokesmen do not bring out relevant circumstances but indulge in empty and self-defeating affidavits. They do not and they cannot bind Parliament. Validity of legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the court may ultimately find and more especially by what may be gathered from what the legislature has itself said. We have mentioned the facts as found by us and we do not think that there has been any infringement of the right guaranteed by Article 14."*
>
> *(Emphasis added)*

26. Upon sifting through the various judgments quoted above, one may pen down the salient rules to be applied for interpretation of all statutes especially taxing statutes:

(a) A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable.

(b) In a taxing Act one has to look merely at what is clearly said. There is no room for intendment. There is no equity about a tax.

There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. A taxing statute, if it professes to impose a charge, its intention must be expressed in clear, unequivocal and unambiguous language. The charging section is to be construed strictly regardless of its consequences that may appear to the judicial mind.

(c) However, in construing the machinery provisions for assessment and collection of the tax to make the machinery workable *ut res valeat potius quam pereat*, that is, the Court should avoid construction that would defeat the purpose of legislature behind enacting the particular legislation on the presumption that it was to bring about an effective result.

(d) Even while applying the strict rules of interpretation, the Court may interpret the construction of a provision in a harmonious manner by reading all the provisions together to gather the intention from the language employed, its context, and give effect to the intention of the legislature. Ingenious attempt to avoid tax is to be thwarted. The Supreme Court in ***State of Tamil Nadu v. M.K. Kandaswami*** reported in (1975) 4 SCC 745 has categorically stated that where a particular section is a charging as well as a remedial provision, its main object is to plug leakage and prevent evasion of tax and in such circumstances in interpreting such a provision, a construction which would defeat its purpose and, in effect, obliterate it from the statute book, should be eschewed.

27. Section 74 is clearly a charging and machinery provision for determination/quantification of tax and penalty while Section 122 is a penal provision in discouraging the tax payers from indulging in unlawful activities of various kinds, and accordingly, is a penal provision for deterring evasion of taxes.

28. Upon perusal of the various judgments and interpretation of statute, one may conclude that both Sections 74 and 122 being charging sections are required to be interpreted strictly and plain meaning to the word used therein should be provided by the courts. An absurd interpretation that makes the charging sections unworkable should be avoided. This does not mean that a person who is not liable to tax or to penalty should be roped into the charging provision simpliciter to curb evasion of taxes. However, the court is allowed to look at all the provision of the statute to bring about a harmonious construction and come to an interpretation which could make the statute workable. A word may have several meanings and the court may choose the meaning that could harmonise the entire statute instead of putting a meaning that would be contrary to the intention of the Legislature. ***At this stage, one is reminded of the famous quotation of Justice Oliver Wendell Holmes Jr., who aptly stated – a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and time in which it is used***.

Penalty in Tax Delinquency Cases

29. The Supreme Court in ***Shiv Dutt Rai Fateh Chand (supra)*** relied upon by both the parties while dealing with legal scrutiny of a retrospective amendment made to Section 9(2)(A) of the Central Sales Tax Act has held with regard to taxation matters in relation to penalty proceedings under the Income Tax Act that it attracts civil liability. The relevant paragraph of the judgment is quoted herein below:

> *"30. On the other hand, a Full Bench of the High Court of Allahabad has held in Raghunandan Prasad Mohan Lal v. ITAT [AIR 1970 All 620 : (1970) 75 ITR 741 : (1970) 1 ITJ 195] that Article 20 of the Constitution contemplates proceedings in the nature of criminal proceedings and it does not apply to penalty proceedings under the Income Tax Act, 1961 which have a civil sanction and are revenue in nature. The High Court of Madhya Pradesh has held in Central India Motors v. Asst. CST [(1980) 46 STC 379 (MP).] that Article 20(1) is not attracted to the case of a levy of penalty made with retrospective effect under the Madhya Pradesh General Sales Tax Act, 1958.*

31. After giving an anxious consideration to the points urged before us, we feel that the word 'penalty' used in Article 20(1) cannot be construed as including a 'penalty' levied under the sales tax laws by the departmental authorities for violation of statutory provisions. A penalty imposed by the Sales Tax Authorities is only a civil liability, though penal in character. It may be relevant to notice that sub-section (2-A) of Section 9 of the Act specifically refers to certain acts and omissions which are offences for which a criminal prosecution would lie and the provisions relating to offences have not been given retrospective effect by Section 9 of the Amending Act. The argument based on Article 20(1) of the Constitution is, therefore, rejected."

(Emphasis added)

30. In ***Sukhpal Singh Bal (supra)***, the Supreme Court while pondering the vires of penalty imposed under Section 10(3) of the Uttar Pradesh Motor Vehicles Taxation Act, 1997, in relation to the object behind imposing penalty in tax statutes has held that the penalty provision is enacted to protect public revenue and deter tax evasion while serving a compensatory role for breaches of statutory tax duties. The relevant paragraph of the judgment is quoted herein below:

"18. In the case of Rahimbhai Karimbhai Nagriwala v. B.B. Patel [(1974) 97 ITR 660 (Guj)] penalty under Section 271(1)(c) of the IT Act, as it stood at the relevant time, was levied on the assessee at Rs 13,854, equal to 100 per cent of the alleged concealed income. The assessee challenged the constitutional validity of Section 271(1)(c) on the ground that the provision was violative of Article 14 of the Constitution in as much as there was no classification at all though there was a difference between various types of tax evasions. It was urged that such a severe penalty of concealment of income was confiscatory in nature. It was urged that under Section 271(1)(a)(i) of the IT Act, the penalty for not filing a return was correlated to the amount of the tax evaded as against the correlation of penalty to concealed income under the impugned provisions of Section 271(1)(c)(iii) was totally arbitrary because so far as concealed income was concerned, the penalty for concealed income proceeded on a different footing from penalty for omission to file a return in time. It was also contended that the impugned penalty was disproportionate as there was no nexus between penalty imposed and the tax evaded and under the circumstances, it was urged that Section 271(1)(c)(iii) was violative of Articles 14 and 19(1)(g) of the Constitution. This challenge was rejected by the Gujarat High Court observing that everything which is incidental to the main purpose of a power is contained within the power itself so that it extends to matters which are necessary for the reasonable fulfilment of the legislative power

over the subject-matter and, therefore, the power to impose penalty is for the purpose of vindicating the main power, which is conferred by the Act. The object of the legislature in levying such penalty is to provide deterrence against tax evasion and to put a stop to a practice which the legislature considers to be against the public interest. It has been further observed that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. The Supreme Court has permitted a very wide latitude in classification for taxation. The object of the legislature in enacting the impugned provision is not to provide for confiscation but to provide a penalty for concealment of income and that too by providing a deterrent penalty."

19. In our view, the judgment of the Gujarat High Court in the case of Rahimbhai Karimbhai Nagriwala[(1974) 97 ITR 660 (Guj)] is squarely applicable to the present case. Deterrence is the main theme or object behind the imposition of penalty and, therefore, it is not possible to say that in the instant case the provision of Section 10(3) infringes Articles 14 and 19(1)(g) of the Constitution, as held in the impugned judgment.

(Emphasis added)

31. The Supreme Court in ***Gujarat Travancore Agency (supra)***, relied upon by both the parties while distinguishing between imposition of civil penalty under Section 271 (1)(a) and criminal penalty under Section 276-C of the Income Tax Act, 1961 has essentially held in relation to penalty in tax delinquency matters that such penalty is a civil liability being remedial and coercive in character and far distinct from the penalty imposed in criminal or penal laws. The Supreme Court has heavily relied on the definition of penalty as given in *Corpus Juris Secundum*. The relevant paragraph of the judgment is quoted herein below:

"4. Learned counsel for the assessee has addressed an exhaustive argument before us on the question whether a penalty imposed under Section 271(1)(a) of the Act involves the element of mens rea and in support of his submission that it does he has placed before us several cases decided by this Court and the High Courts in order to demonstrate that the proceedings by way of penalty under Section 271(1)(a) of the Act are quasi-criminal in nature and that therefore the element of mens rea is a mandatory requirement before a penalty can be imposed under Section 271(1)(a). We are relieved of the necessity of referring to all those decisions. Indeed, many of them were considered by the High Court and are referred to in the judgment under appeal. It is sufficient for us to refer to Section 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable

cause failed to furnish the return of total income, and to Section 276-C which provides that if a person wilfully fails to furnish in due time the return of income required under Section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what is intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276-C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the legislature is that the penalty should serve as a deterrent. The creation of an offence by statute proceeds on the assumption that society suffers injury by the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum, Vol. 85, p. 580, para 1023:

"A 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 or penal laws."

(Emphasis added)

32. The Supreme Court in ***M.C.T. M. Corpn. (P) Ltd. (supra)*** relied upon by both the parties has held that *mens rea* is an essential element in criminal law for prosecuting an accused whereas in civil matters such as taxation mens rea is irrelevant for imposing civil liability. The Court while dealing with civil liabilities imposed under Section 14B of the Foreign Exchange Regulation Act, 1947 has held that imposition of penalty does not require the traditional proof of mens rea, only the breach of statutory provision or blameworthy conduct of the recalcitrant tax payers is enough to trigger the penalty in such matters The relevant paragraphs of the judgment are quoted

in verbatim herein below:

> *"7. "Mens rea" is a state of mind. Under the criminal law, mens rea is considered as the "guilty intention" and unless it is found that the 'accused' had the guilty intention to commit the 'crime' he cannot be held 'guilty' of committing the crime. An 'offence' under Criminal Procedure Code and the General Clauses Act, 1897 is defined as any act or omission "made punishable by any law for the time being in force". The proceedings under Section 23(1)(a) of FERA, 1947 are 'adjudicatory' in nature and character and are not "criminal proceedings". The officers of the Enforcement Directorate and other administrative authorities are expressly empowered by the Act to 'adjudicate' only. Indeed they have to act 'judicially' and follow the rules of natural justice to the extent applicable but, they are not 'Judges' of the "Criminal Courts" trying an 'accused' for commission of an offence, as understood in the general context. They perform quasi-judicial functions and do not act as 'courts' but only as 'administrators' and 'adjudicators'. In the proceedings before them, they do not try 'an accused' for commission of "any crime" (not merely an offence) but determine the liability of the contravenor for the breach of his 'obligations' imposed under the Act. They impose 'penalty' for the breach of the "civil obligations" laid down under the Act and not impose any 'sentence' for the commission of an offence. The expression 'penalty' is a word of wide significance. Sometimes, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not compensatory in character is also termed as a 'penalty'. When penalty is imposed by an adjudicating officer, it is done so in "adjudicatory proceedings" and not by way of fine as a result of 'prosecution' of an 'accused' for commission of an 'offence' in a criminal court. Therefore, merely because 'penalty' clause exists in Section 23(1)(a), the nature of the proceedings under that section is not changed from 'adjudicatory' to 'criminal' prosecution. An order made by an adjudicating authority under the Act is not that of conviction but of determination of the breach of the civil obligation by the offender.*
>
> *8. It is thus the breach of a "civil obligation" which attracts 'penalty' under Section 23(1)(a), FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10, FERA, 1947 that would immediately attract the levy of 'penalty' under Section 23, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the 'prosecution' to establish that the 'accused' had the necessary guilty intention or in other words the requisite "mens rea" to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the "blameworthy conduct" of the*

delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA, 1947. It is the delinquency of the defaulter itself which establishes his 'blameworthy' conduct, attracting the provisions of Section 23(1)(a) of FERA, 1947 without any further proof of the existence of "mens rea". Even after an adjudication by the authorities and levy of penalty under Section 23(1)(a) of FERA, 1947, the defaulter can still be tried and punished for the commission of an offence under the penal law, where the act of the defaulter also amounts to an offence under the penal law and the bar under Article 20(2) of the Constitution of India in such a case would not be attracted. The failure to pay the penalty by itself attracts 'prosecution' under Section 23-F and on conviction by the 'court' for the said offence imprisonment may follow.

***

12. In Corpus Juris Secundum, Vol. 85, at p. 580, para 1023, it is stated thus:

"A 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 or penal laws."

13. We are in agreement with the aforesaid view and in our opinion, what applies to "tax delinquency" equally holds good for the 'blameworthy' conduct for contravention of the provisions of FERA, 1947. We, therefore, hold that mens rea (as is understood in criminal law) is not an essential ingredient for holding a delinquent liable to pay penalty under Section 23(1)(a) of FERA, 1947 for contravention of the provisions of Section 10 of FERA, 1947 and that penalty is attracted under Section 23(1)(a) as soon as contravention of the statutory obligation contemplated by Section 10(1)(a) is established. The High Court apparently fell in error in treating the "blameworthy conduct" under the Act as equivalent to the commission of a "criminal offence", overlooking the position that the "blameworthy conduct" in the adjudicatory proceedings is established by proof only of the breach of a civil obligation under the Act, for which the defaulter is obliged to make amends by payment of the penalty imposed under Section 23(1)(a) of the Act irrespective of the fact whether he committed the breach with or without any guilty intention. Our answer to the first question formulated by us above is, therefore in the negative."

(Emphasis added)

33. The Supreme Court has affirmed the view taken by the Bombay High Court in ***Cabot International Capital Corporation (supra)***, in its various judgments. The Bombay High Court in the said judgment has laid down the canons of interpretation. The relevant paragraph of the said judgment is

quoted as under:

> *"47. Thus, the following extracted principles are summarised:*
>
> *(A) Mens rea is an essential or sine qua non for criminal offence.*
>
> *(B) A straitjacket formula of mens rea cannot be blindly followed in each and every case. The scheme of a particular statute may be diluted in a given case.*
>
> *(C) If, from the scheme, object and words used in the statute, it appears that the proceedings for imposition of the penalty are adjudicatory in nature, in contradistinction to criminal or quasi-criminal proceedings, the determination is of the breach of the civil obligation by the offender. The word 'penalty' by itself will not be determinative to conclude the nature of proceedings being criminal or quasi-criminal. The relevant considerations being the nature of the functions being discharged by the authority and the determination of the liability of the contravenor and the delinquency.*
>
> *(D) Mens rea is not essential element for imposing penalty for breach of civil obligations or liabilities.*
>
> *(E) There can be two distinct liabilities, civil and criminal, under the same Act."*

34. This Court in ***M/s Hindustan Herbal Cosmetics vs State Of U.P*** (Neutral Citation No. - 2024:AHC:209) has held that penalty in tax matters in some cases may require an element of mens rea. The relevant paragraph of the judgment is quoted hereinbelow:

> *"8. Upon perusal of the judgments, the principle that emerges is that presence of mens rea for evasion of tax is a sine qua non for imposition of penalty. A typographical error in the e-way bill without any further material to substantiate the intention to evade tax should not and cannot lead to imposition of penalty. In the case of M/s. Varun Beverages Limited (supra) there was a typographical error in the e-way bill of 4 letters (HR - 73). In the present case, instead of '5332', '3552' was incorrectly entered into the e-way bill which clearly appears to be a typographical error. In certain cases where lapses by the dealers are major, it may be deemed that there is an intention to evade tax but not so in every case. Typically when the error is a minor error of the nature found in this particular case, I am of the view that imposition of penalty under Section 129 of the Act is without jurisdiction and illegal in law."*

35. The Supreme Court in ***CST v. Satyam Shivam Papers (P) Ltd.***

reported in (2022) 14 SCC 157 has upheld the judgment of Telangana High Court wherein the Court has held in favour of assessee and underscored that authorities must not presume evasion of tax solely on procedural lapses such as expiry of an e-way bill, specially when valid reasons are provided. It is implied by the Court that penalty by the Assessing Officer under Section 129 of Telangana Goods and Services Tax cannot be imposed in absence of mens rea. The relevant paragraphs of the judgment are quoted herein below:

> *"7. The analysis and reasoning of the High Court commends to us, when it is noticed that the High Court has meticulously examined and correctly found that no fault or intent to evade tax could have been inferred against the writ petitioner. However, as commented at the outset, the amount of costs as awarded by the High Court in this matter is rather on the lower side. Considering the overall conduct of Petitioner 2 and the corresponding harassment faced by the writ petitioner we find it rather necessary to enhance the amount of costs.*
>
> *8. Upon our having made these observations, the learned counsel for the petitioners has attempted to submit that the questions of law in this case, as regards the operation and effect of Section 129 of the Telangana Goods and Services Tax Act, 2017 and violation by the writ petitioner, may be kept open. The submissions sought to be made do not give rise to even a question of fact what to say of a question of law. As noticed hereinabove, on the facts of this case, it has precisely been found that there was no intent on the part of the writ petitioner to evade tax and rather, the goods in question could not be taken to the destination within time for the reasons beyond the control of the writ petitioner. When the undeniable facts, including the traffic blockage due to agitation, are taken into consideration, the State alone remains responsible for not providing smooth passage of traffic."*

36. In ***Veena Estate (P.) Limited v. Commissioner of Income Tax*** reported in [2024] 461 ITR 483 (Bombay), the Bombay High Court while dealing with the procedural defects in furnishing notice under Section 274 of Income Tax Act, 1961 has upheld the view of Tribunal in imposing penalty against assessee for concealment of his income due to presence of mens rea.

37. In ***Chemmancherry Estate Co. v. Income Tax Officer Ward VIII (2)*** reported in (2020) 268 Taxmann 29 (Madras), the Madras High Court has upheld the findings of Tribunal wherein the Tribunal has imposed penalty upon the assessee under Section 271(1)(c) for concealment of non-

agricultural land and knowingly furnishing inaccurate particulars of income in return that the land sold was an agricultural land. The Court held that there was wilful concealment and penalty was appositely levied by the Tribunal under the said provision.

38. Upon perusal of the various judgments which have dealt with penalty in tax delinquency cases, one may summarise the same as follows:

a. The object of the legislature in levying a severe penalty is to provide deterrence against tax evasion and to put a stop to a practice which the legislature considers to be against the public interest. The object of the legislature in enacting a penalty provision is not to provide for punishment under criminal law but to provide a penalty for concealment of income and that too by providing a deterrent penalty.

b. Deterrence is the main theme of object behind the imposition of penalty.

c. *Corpus Juris Secundum* states that ‘a 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 a forfeiture provided as punishment for violation of criminal and penal laws’.

d. An order made by an adjudicating authority under the statute with regard to penalty is not that of conviction but of determination of the breach of the civil obligation by the offender [see ***M.C.T.M Corp. (P.) Ltd. (supra)***].

e. Blameworthy conduct in adjudicatory proceedings is established by proof only of a breach of the civil obligation under the statute, for which the defaulters are obliged to make amends by payment of the penalty imposed.

f. As per ***Cabot International Capital Corporation (supra)*** the following principles are summarised:

(i) Mens rea is an essential or sine qua non for criminal offence.

(ii) A straitjacket formula of mens rea cannot be blindly followed in each and every case. The scheme of a particular statute may be diluted in a given case.

(iii) If, from the scheme, object and words used in the statute, it appears that the proceedings for imposition of the penalty are adjudicatory in nature, in contradistinction to criminal or quasi-criminal proceedings, the determination is of the breach of the civil obligation by the offender. The word 'penalty' by itself will not be determinative to conclude the nature of proceedings being criminal or quasi-criminal. The relevant considerations being the nature of the functions being discharged by the authority and the determination of the liability of the contravenor and the delinquency.

(iv) Mens rea is not an essential element for imposing a penalty for breach of civil obligations or liabilities.

(v) There can be two distinct liabilities, civil and criminal, under the same Act.

g. In relation to Section 129 of the CGST Act, this court in ***M/s Hindustan Herbal Cosmetics (supra)*** has held that the principle that emerges is that in certain cases the presence of mens rea for evasion of tax is a *sine qua non* for imposing of penalty.

39. Upon a perusal of the above principles, it is blatant that penalty may be imposed in cases where men rea is a requirement. It is the scheme of a particular statute that shall determine whether for imposition of penalty there is a requirement for men rea or not. However, when a taxing statute speaks of prosecution, for those offences mens rea or guilty intent is a *sine qua non*.

As held in ***Cabot International Capital Corporation (supra)***, if from the scheme, objects and words used in the statute, it appears that the proceedings for imposition of penalty are adjudicatory in nature, in contradistinction to criminal and quasi-criminal proceedings, the determination is of the breach of civil obligation by the offender. The word penalty by itself will not be determinative to conclude the nature of proceedings being criminal or quasi-criminal. It is crystal clear that in a particular statute penalty may be imposed for certain contraventions that do not require mens rea and in the same statute penalty may be imposed for contraventions which are far more serious in nature wherein mens rea would be a desideratum.

Dealing With The Submissions of The Petitioner

40. Keeping in mind the principles that have been culled out in the previous section with regard to the meaning of the words ‘offence’ and ‘penalty’, the manner of interpretation of taxing statutes specifically imposition of penalty in taxing delinquency cases, I shall proceed to examine the umpteen contentions raised by the counsel appearing on behalf of petitioner.

41. The crux of the argument of Mr. Arvind Datar on Issue (I) is that Section 122 of the CGST Act, 2017 specifically deals with ‘offences’ and therefore the same has to be read with Section 134 of the CGST Act. Hence, he argues that penalty for such offences would have to be imposed by the criminal courts and cannot be adjudicated by the proper officer. To support his arguments he submits that unless there is determination of tax under Section 73 and Section 74 of the CGST Act, no penal provision can be invoked under Section 122 of the CGST Act as there is a requirement for a predicate offence of tax evasion before any penal action can be taken under Section 122. Upon a reading of Section 2(107) of the CGST Act, it is clear that a taxable person means a person who is registered or liable to be registered under Section 22 and Section 24 of the CGST Act. Upon perusal of Section 22 and Section 24, it is clear that persons liable for registration would include persons who are exclusively in the supply of goods even if

the same are exempted. Section 24, in fact provides for compulsory registration in certain cases. Accordingly, since the petitioner is registered under the CGST Act, he would fall under the definition of taxable person as mentioned in the very opening sentence of Section 122 of the CGST Act. The argument that one would have to be first taxed under Sections 73/74 and only thereafter penalty can be imposed is fallacious in nature and is accordingly rejected. Under the present GST regime, persons who are not liable to pay tax under Sections 73/74 of the CGST Act may very well be liable for penalties as described in the twenty-one sub-sections of Section 122(1) and under sub-sections 122(2) and 122(3).

42. The second argument raised by Mr. Datar is that, Section 122 of the CGST Act falls under the Chapter XIX: 'Offences and Penalties' and the very heading of Section 122 reads 'Penalty for certain offences'. He argues that the definition of offences is not made available in the CGST Act and therefore has to be imported from either the General Clauses Act, 1897 or the Code of Criminal Procedure, 1973. Upon a plain reading of Section 2(38) of the General Clauses Act, 1897, and Section 2(n) of CrPC it is clear that an offence is any act or omission made punishable by law for the time being in force. Punishment need not always be imposed by way of a criminal trial and it could very well be imposed by way of penalty.

43. Moreover, Section 4(2) of CrPC states that all offences under any law shall be investigated, inquired into, tried, and otherwise dealt with, according to the provisions under the CrPC, if no separate provisions are envisaged in other laws. In the present case we find that for the offences enumerated under Section 122 of the CGST Act, punishment has been imposed in the form of penalty. Ergo, Section 4(2) of CrPC would not apply in the present case as a separate provision has been envisaged for the offences under Section 122 of the CGST Act by way of imposition of a penalty. Furthermore, if one were to give a plain meaning to the word 'penalty', the same normally refers to a civil liability and not a criminal liability. Various statutes like the Income Tax Act,1961 the erstwhile Central

Excise Act, the Customs Act, all use the word penalty for imposition of a civil liability. The argument of Mr. Datar that penalty and fine are interchangeably used by giving reference to the two sections of CrPC, that is, Sections 136 and 141 which culminates in fines provided under Section 188 of the IPC do not assist his argument.

44. The next argument raised by Mr. Datar is that penalty is also being imposed under Section 74 of the CGST Act and therefore imposing a further penalty under Section 122 of the CGST Act for the same contravention would not have been the intention of the legislature. Upon a perusal of Section 74, it is crystal clear that the penalty imposed under this section is for non payment of tax or where tax had been short paid or erroneously refunded or where ITC has been wrongly availed of or utilised. Ergo, this penalty is very specific in nature in contradistinction to the penalties envisaged under Section 122 of the CGST Act that are far broader and for different actions/omissions that amount to contraventions, not necessarily covered under Section 74 of the CGST Act .

45. The next argument raised by Mr. Datar is that Section 122 (penalty for certain offences) and Section 132 (punishment for certain offences) of the CGST Act reveal that several sub-sections are identical and therefore the same can only be done by way of conviction under Section 122 of the CGST Act read with Section 134 of the CGST Act. At this stage, one may look at the scheme of the CGST Act and specifically Chapter XIX that starts from 122 and ends with Section 138. To give a purposeful meaning and interpretation to the various sections provided herein one finds that Section 122 to Section 130 deal with levy of penalty for various contraventions. Thereafter, Section 131, categorically states that without prejudice to the provisions contained in CrPC, no confiscation made or penalty imposed under the provisions of this Act or the rules made thereunder shall prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of this Act or under any other law for the time being in force. Subsequent to this, is Section 132 of the CGST Act which

relates to punishment for certain offences. The section that follows Section 132, all deal with punishments that are for serious offences enumerated under Section 132. Notably, Section 132 lists out only nine offences in contradiction to Section 122 of the CGST Act that enumerates twenty-one offences. Upon a perusal of these offences under Section 132, it is patently clear that these offences are far more serious in nature and therefore the legislature has chosen to impose criminal punishment for the same. One may also note that before imposing any such punishment, Section 132(6) specifically states that a person shall not be prosecuted for any of the offences provided in the section except with the previous sanction of the Commissioner. One may mark that this requirement is clearly absent in Section 122 of the CGST Act. Upon a further reading of the chapter, one finds Section 138 of the CGST Act relating to compounding of offences, which deals with offences that may be compounded but provides for a proviso that is delineated below:

> *"**Section 138. Compounding of offences**.-*
>
> *(1) Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner on payment, by the person accused of the offence, to the Central Government or the State Government, as the case be, of such compounding amount in such manner as may be prescribed:*
>
> *Provided that nothing contained in this section shall apply to-*
>
> > *(a) a person who has been allowed to compound once in respect of any of the offences specified in clauses (a) to (f), (h), (i) and (l) of sub-section (1) of section 132;*
> >
> > *(b) [Omitted]*
> >
> > *(c) a person who has been accused of committing an offence under clause (b) of sub-section (1) of section 132;*
> >
> > *(d) a person who has been convicted for an offence under this Act by a court;*
> >
> > *(e) [Omitted] and*
> >
> > *(f) any other class of persons or offences as may be prescribed:*
> >
> > *Provided further that any compounding allowed under the provisions of this section shall not affect the proceedings, if any, instituted under any other law:*

Provided also that compounding shall be allowed only after making payment of tax, interest and penalty involved in such offences."

The above proviso is an indication that the legislature never intended to treat Section 122 as an offence prosecutable and punishable by way of a criminal trial.

46. The argument of Mr. Datar that Section 134 of the CGST Act envisages that no court shall take cognizance of any offence punishable under this Act without the previous sanction of the Commissioner and no court inferior to that of Magistrate of the First Class shall try any such offence would obviously include Section 122 as the word offence is used in the heading of the section as well as in Section 122(3)(a) is a plausible argument that we would have to reject with great humility for the reason that the words used in Section 134 are 'offence punishable under this Act'. On a proper interpretation of the heading of Section 122 of the CGST Act it is clear that penalty is being imposed for the offences enumerated therein whereas in Section 132 of the CGST Act punishment is being imposed for the offences enumerated therein. Coupled with the fact that Section 132 categorically states that previous sanction of the Commissioner is required which is once again reiterated in Section 134 that further clarifies that criminal court that shall try the offences under Sections 132 to 138.

47. Mr. Datar has further relied on the notes on clauses of Section 122 of the CGST Act to submit that the word 'offence' has been used in the said notes on clauses. However, the notes on clauses make it categorically clear that for the list of offences enumerated under Section 122, the same shall only be liable to penalty. There is a stark omission in the notes on clauses with regard to any trial to be carried out before coming to the imposition of such a penalty. On a further reading of the sections provided in chapter XIX one may look at Section 128 of the CGST Act that provides for power provided to the Government to waive penalty or fees or both. It is seen that this provision empowers the GST Council to recommend waiver of any penalty referred to in Section 122, 123 and 125 or any late fee referred to in Section 147 of the CGST Act and upon such recommendation the

Government may by notifications waive these penalties and late fees. Ergo, one would come to the conclusion that the above sections are clubbed in the same bracket and are of the same specie/genus and are clearly civil in nature and on these only penalty or late fees is leviable.

48. In fact the definition of 'penalty' as cited in *Corpus Juris Secundum (Volume 85, page 580, para 1023)* relied upon by the petitioner specifically states that a penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in nature. In a taxing statute, one has to give the plain meaning to a particular word and in a catena of judgments of the Supreme Court referred above it has been clarified that penalty for contravention/offences is distinct from prosecution for the same contravention/offences.

49. The argument of Mr. Datar that the exclusion of certain proceedings/offences under Section 132 of the CGST Act cannot lead to the inference that proceedings under Section 122 of the CGST Act are relatable to a civil liability only for the reason that Parliament could have intended that some of the offences mentioned under Section 122 needed harsher punishment is not acceptable as this submission appears to be contrary to the scheme of the Act. In fact culling out nine offences from Section 122 and creating a separate section for criminal prosecution with the heading punishment for offences itself leads to the inference that Section 122 relates to imposition of a civil liability by way of penalty by the department while for the chosen nine offences criminal proceedings with prior sanction from the Commissioner is contemplated under Section 132(6) of the CGST Act.

50. The final argument of Mr. Datar on this particular issue is that Section 122 of the CGST Act cannot be adjudicated by department and has to undergo prosecution as it nowhere refers to the word proper officer, and therefore, it has to be concluded that Section 122 is required to be read with Section 134 of the CGST Act and such penalty can only be imposed by way of a criminal trial. He has further referred to CBIC Circular No.3/3/2017-GST dated July 7, 2022 wherein the Board has assigned the proper officer

for adjudication in relation to various sections of the CGST Act but has intentionally excluded the proceedings under Section 122 for prosecution by criminal courts. He has further submitted that Section 122 does not contain any reference to proper officer and therefore it implies these proceedings can only be carried out in a criminal court. This argument would have to be rejected on the following grounds:

a. Powers under Section 74 of the CGST Act are undoubtedly exercised by a proper officer. Explanation 1(ii) to Section 74 of the CGST Act clearly indicates that it is the proper officer who initiates the proceedings under Sections 73 and 74 is also the person who is initiating the proceedings under Sections 122 and 125 as the explanation provides for proceedings against the persons liable to pay penalty under Sections 122 and 125 are deemed to be concluded when the proceedings against the main person charged under Sections 73 and 74 are concluded.

   It may further be noted that Explanation 1(i) to Section 74 of the CGST Act categorically states that the expression “all proceedings in respect of the said notice” shall not include proceedings under Section 132 of the CGST Act. Inclusion of this particular sub-clause can only be interpreted to mean that the legislature’s intention was to exclude the criminal proceedings which dealt with punishment for offences. On the other hand, it is an indication that a penalty under Section 122 of the CGST Act would fall within the proceedings in respect of a notice issued under Section 74, if so desired by the proper officer. Sub-clause (ii) of the explanation further buttresses the argument of the respondent that conclusion of a proceedings under Sections 73 or 74 against the main person would conclude proceedings against all other persons liable to pay penalty under Section 122 of the CGST Act.

b. Furthermore, upon sifting through the various sections of the

CGST Act and the Rules framed thereunder the picture becomes absolutely transparent. Section 83 of the CGST Act which categorically states that in certain events provisional attachment may be made by the revenue if the Commissioner is of the opinion that for the purpose of protecting the government revenue, he may by order in writing attach provisionally any property including bank accounts belonging to the taxable person or any person specified in Section 122(1A). Section 122(1A) provides that any person who retains the benefit of the transaction covered under clauses (i), (ii), (vii) or clause(ix) of sub-section (1) and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on. In light of the same, it is clear that the penalty imposed under Section 122 is being imposed by the department as provisional attachment can be done for the same which would not have been possible if Section 122 was to be tried by the criminal courts.

c. Rule 142(1)(a) of CGST Rules categorically states that a proper officer shall serve along with the notice issued under Sections 52/73/74/76/122/123/124/125/127/129/130, a summary thereof electronically in form GST DRC-01. Furthermore, Rule 142(5) provides that the summary of the order under Sections 52/62/63/64/73/76/122/123/124/125/127/129/130 shall be uploaded electronically in form GST DRC-07, specifying therein the amount of tax, interest and penalty, as the case may be, payable by the person concerned. The above clearly indicates the intention of the legislature that the proper officer is required to issue show cause and thereafter adjudicate and pass order under Section 122 of the CGST Act and nothing further remains in doubt. The arguments placed by Mr. Datar with regard to the above issue, though very eloquently

presented do not seem to hold any water when one looks at the entire scheme of the Act as indicated above. In light of the same, one may conclude that a proper officer/adjudicating officer has the power to adjudicate on the penalty provision provided under Section 122 of the CGST Act.

51. With reference to the issue (II), it is submitted by the petitioner that if the proceedings under Section 74 of the CGST Act is dropped/concluded against the main person, the proceedings under Section 122 of the CGST Act shall also abate against the main person. The petitioner had relied on the explanation 1(ii) to Section 74 in support of this argument. However, from a reading of the circular no. 171/03/2022-GST dated July 6, 2022, it is clear that the contravention under Section 73/74 need not necessarily be a contravention covered under Section 122 of the CGST Act. Explanation 1(ii) of Section 74 categorically states that when the proceedings against the main person under Section 73/74 are dropped then the proceedings under Section 122 against the other persons would also abate. However, in a particular case when a show cause notice is issued against the main person under Section 73/74 and also against the main person under Section 122, dropping of proceedings under Section 73/74 would not automatically result in dropping of proceedings under Section 122 against the main person as the proceedings are with respect to contravention of two different offences. One may explain this by way of the following example:

A sells goods to B, for a sum of Rs. 100 along with input tax credit of Rs.18. A however issues a tax invoice for a sum for a sum of Rs. 200 along with GST of Rs. 36. B thereafter supplies goods to C for a sum of Rs. 50 along with proper tax invoice. B further issues tax invoice with Rs. 50 to D without supply of any goods. In the said invoice, B passes on Rs.9 as GST. B further supplies goods worth Rs.100 to E but issues tax invoice for a sum of Rs.150 alongwith GST for the same.

a. In the above example, A would be liable for issuance of fake

invoices for the sum of Rs. 100 along with GST that has been passed on. So, A would be liable under Section 122(1)(ii) and B would be liable under Section 74 for improper utilization of ITC.

b. With regard to transaction between B and C, no offence has been committed by either B or C as tax invoice is for the amount of goods supplied by B to C as B has supplied goods to C and issued invoice for the same amount.

c. When B issues fake invoices of Rs.50 with Rs.9 as GST to D without any supply of goods, B would be liable under Section 122(1)(ii) for issuance of fake invoices and D would be liable under Section 74 for improper utilization of ITC without receiving goods.

d. With regard to transaction between B and E, B has supplied goods of 100 and shows the supplies of 150, therefore, B is liable for issuance of fake invoices without supply of goods worth Rs.50 and therefore penalty would be imposed under Section 122(1)(ii) and E would be liable under Section 74 for utilization of ITC worth Rs.9 without receipt of goods.

52. In light of the above example, it is clear that there may be scenarios where a proceeding under Section 73/74 of the CGST Act may get concluded against the main person but the penalty proceedings under Section 122 of the CGST Act for issue of fake invoices by the main person may stand independent of the proceedings under Section 74, and therefore, those proceedings under Section 122 would not abate as per the explanation 1(ii) of Section 74.

Conclusion

53. After detailed analysis, it is clear that the proceeding under Section 122 of the CGST Act is to be adjudicated by the adjudicating officer and is not required to undergo prosecution and also abatement of proceedings under Section 74 of the CGST Act does not ipso facto abate the proceedings under Section 122 which are for completely different offences.

54. In light of the above discussions, one would come to the inexorable conclusion that Section 122 of the CGST Act is a provision specifically for imposition of penalty to be adjudicated by the proper officer while the provisions from Sections 132 to 138 deal with prosecution to be done by the criminal courts. Moreover, as discussed above, conclusion of proceedings on the main person under Section 74 of the CGST Act shall not ipso facto abate the proceedings under Section 122 of the CGST Act proposed to be imposed on the main person. The scheme of the CGST Act read with CGST Rules lead one to the inescapable conclusion that the arguments raised by the petitioner, though innovative and thought provoking, are fallacious as the interpretation given by the petitioner would lead to obfuscation of the very purpose and objective of the CGST Act. In light of the same, the contentions of the petitioner cannot be countenanced and, are accordingly, rejected.

55. The writ petition is dismissed. The respondent authorities are directed to continue with the proceedings under Section 122 of the CGST Act in line with the show cause notice issued.

56. I would like to acknowledge the consummate arguments made by counsel appearing on behalf of both the parties and thank the juniors appearing in the matter for the diligent spadework in preparation of the notes of arguments submitted by both sides. I would also go amiss if I did not appreciate my Research Associates Ms. Saumya Patel and Mr. Ashutosh Srivastava for their in depth research and assistance provided to me.

29.05.2025
Kuldeep

(Shekhar B. Saraf, J.)

I agree

(Vipin Chandra Dixit, J.)

Digitally signed by :-
KULDEEP SINGH
High Court of Judicature at Allahabad