REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 2344-2347 OF 2004

COMMISSIONER OF SALES TAX, U.P — APPELLANT

VERSUS

M/S. SANJIV FABRICS — RESPONDENT

WITH

CIVIL APPEAL NOS. 6382-6383 OF 2004

M/S HARI OIL & GENERAL MILLS — APPELLANT

VERSUS

COMMISSIONER OF SALES TAX, U.P. — RESPONDENT

SUPREME COURT OF INDIA
॥ यतो धर्मस्ततो जयः ॥
JUDGMENT

J U D G M E N T

D.K. JAIN, J.:

1.These appeals, by special leave, are directed against the judgments and orders delivered by the High Court of Judicature at Allahabad, reversing the orders passed by the Sales Tax Tribunal, Meerut, (for short "the Tribunal"). In the first set of appeals (No. 2344-2347/2004) the Tribunal had affirmed the levy of penalties on the respondent, under Section 10(b) read with Section 10A of the Central Sales Tax Act, 1956 (for short "the Act")

whereas in the second set (appeals No. 6382-6383/2004), the Tribunal had set aside the levy of penalties under the said Section on the appellant. Since the appeals raise a common question of law, it would be convenient to dispose them of by this single judgment.

2.Shorn of unnecessary details, the facts essential for the adjudication of these appeals are:

C.A. Nos. 2344-2347 of 2004

The respondent (hereinafter referred to as "the dealer") is registered under Section 7(2) of the Act and since the year 1977-78 is engaged in the business of manufacture and sale of Handloom fabrics.

The dealer was authorized to issue Form 'C' on the import of cotton and cotton yarn as raw materials. It is not in dispute that the dealer had imported cotton waste, polythene, sutli and tat against Form 'C' in order to avail the benefit of payment of concessional rate of Central Sales Tax.

On 15th October 1985, the revenue issued a notice to the dealer to show cause as to why penalty under Section 10(b) read with Section 10A of the Act should not be imposed on them for using Form 'C' for the purchase of items which were not covered by their certificate of registration.

Immediately on the issuance of the said notice, dated 15th October 1985, the dealer applied for amendment of the certificate of registration for inclusion of "cotton waste" in the certificate. The said amendment was granted on the same day.

In reply to the show cause notice, the dealer pleaded that they were under a *bona fide* belief that "cotton" included "cotton waste", and thus there was no false representation on their part. However, not being convinced with the reply, sometime in January 1986, the Assessing Authority imposed penalty on the dealer under Section 10(b) read with Section 10A of the Act amounting to Rs.18,840/-; Rs.63,822/-; Rs.55,111/- and Rs.51,141/- for all the four assessment years in question, viz. 1979-80, 1981-82. 1982-83 and 1983-84 respectively, for making false representation in respect of purchase of tat, sutli, polythene, cotton waste, and jute.

The first appeals preferred by the dealer were dismissed by the Assistant Commissioner (Judicial) by two separate orders. Being aggrieved, the dealer filed four separate second appeals before the Tribunal.

It appears that in the meanwhile, by an order dated 30th April 1987, the Tribunal, in Second Appeal Nos. 243 of 1986 for the assessment year 1977-78; 242 of 1986 for assessment year 1978-79 and 550 of 1986 for

assessment year 1980-81, set aside the order of penalty on purchase of cotton waste on the ground that no objection was raised by the revenue for the previous years, and therefore, the issuance of Form ‘C’ for the purchase of said commodity was a *bona fide* error on the part of the dealer and it did not involve false representation. In relation to other commodities, the Tribunal remanded the matters for re-fixation of penalty. However, when appeals for the present assessment years were taken up, notwithstanding its earlier orders, the Tribunal vide order dated 22nd January 1991, affirmed the orders levying penalty, *inter-alia* observing that for the purposes of sales tax, cotton and cotton waste are two different commodities and the fact that the dealer had deliberately used Form ‘C’ to import items like cotton waste, sutli, tat etc., established that the dealer had imported the goods by making a false representation and had taken the benefit of concessional rate of tax unauthorizedly. According to the Tribunal, these circumstances proved the *mala fide* on the part of the dealer. Finally, distinguishing its earlier orders on the ground that in those cases, the matter was remanded and it remained unclear as to how the matter had proceeded further; the Tribunal reduced the amount of penalty imposed.

Being dissatisfied with the order of the Tribunal, dated 22nd January 1991, the dealer filed Sales Tax Revisions before the High Court of

Allahabad. The only dispute which was put in issue in these revisions was with regard to the levy of penalty for use of Form 'C' on the purchases of cotton waste.

As stated above, by the impugned judgment the High Court has allowed the revision petitions, *inter alia,* observing:

> "Cotton" and "Cotton Waste" are two different commodities known to Sales Tax Laws. However, there is not much distinction from the point of view of ordinary people. The applicant is a registered dealer since the assessment year 1977-78 and has been making purchases of "Cotton waste" and issuing Form-C thereof since then. The department earlier than 15th October, 1985 raised no objection. This as was submitted by the learned counsel for the applicant is very relevant circumstance for determination of the question "false representation" occurring in Section 10(b) of the Act…………
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> When Tax Laws are so complex the administration should proceed specially in the penalty matter from the view of ordinary citizen who is always willing to comply with the conditions of law. The assessee as soon as it came to know about its (sic) fault filed application for amendment of registration certificate. Some fault was on the part of the department also for maintaining silence over the period of about eight years."

<u>C.A.Nos.6382-6383 of 2004</u>

The appellant herein (hereinafter again referred to as "the dealer") was carrying on the business of manufacture and sale of oil and oil cakes and

was registered under Section 7 of the Act. It appears that during the assessment proceedings relating to the assessment years 1985-86 and 1986-87, the Assessing Authority found that the dealer had issued Form 'C' for the import of oil seeds from outside the State and had availed of the benefit of concessional rate of tax by issuing Form 'C' in respect of the said item, which was not included in their registration certificate. Accordingly, a notice was issued to the dealer under Section 10(b) read with Section 10A of the Act to show-cause as to why penalty under the said provisions should not be levied on them.

Not being satisfied with the reply furnished by the dealer, the Assessing Authority levied penalty in the sum of Rs.73298.60p. and Rs.2,08,064/- for the assessment years 1985-86 and 1986-87 respectively.

Dealer's first appeal to the Deputy Commissioner (Appeals) pertaining to the assessment years 1985-86 was partly allowed in as much as the quantum of penalty was reduced to Rs.1075/- but on merits, appeals for both the assessment years were rejected. Being aggrieved, the dealer preferred two second appeals before the Tribunal. *Inter alia,* observing that apart from the fact that in the application under Section 7(1) and 7(2) of the Act in Form 'A', the word 'oil seed', mentioned in an inappropriate column-

16-GHA was deleted, the dealer was also under a *bona fide* belief that they were authorized to purchase oil seeds against Form 'C' as the department had been regularly issuing Form 'C' to them for the purchase of oil seeds, the Tribunal set aside the penalty levied on the dealer under Section 10(b) of the Act.

Not being satisfied with the order passed by the Tribunal, the revenue took the matter in revision to the High Court. As afore-stated, the High Court came to the conclusion that the order of the Tribunal deleting the penalty was erroneous. However, having regard to the facts and circumstances of the case, the High Court held that since the revenue had been regularly issuing Form 'C' in spite of details being furnished by the dealer, penalty only to the extent of benefit availed by the dealer i.e. @ 4% should be levied. Accordingly, the High Court reduced the penalty to Rs.27,275/- and Rs.66,955/- in respect of assessment years 1985-86 and 1986-87 respectively.

3.Hence both the revenue and the dealer are before us in these appeals.

4.We have heard learned counsel for the parties.

5.Mr. Aarohi Bhalla, learned counsel appearing for the revenue contended that the judgment of the High Court deleting the penalty is erroneous in as

much as the revisionary jurisdiction of the High Court under Section 11 of the UP Trade Tax Act, 1948 is very limited and confined only to an examination of the question of law. Section 11 of the UP Trade Tax Act does not contemplate re-evaluation of the evidence by the High Court and, therefore, the High Court cannot interfere with a finding of fact as has been done in the present case. In support of the contention, learned counsel relied on the decision of this Court in ***Commissioner of Sales Tax, U.P.*** *Vs.* ***Kumaon Tractors & Motors***[1].

6. Learned counsel also submitted that *mens rea* is not an essential ingredient of the offence under Section 10(b) of the Act, as penalty under the said provision is in the nature of a civil liability. According to the learned counsel, it is only when the prosecution is launched pursuant to a sanction under Section 11 of the Act, the requirement of *mens rea* assumes importance as the "offence" comes into existence only when a sanction is received. To buttress his argument, learned counsel commended us to the decision of this Court in ***R.S. Joshi, Sales Tax Officer, Gujarat & Ors.*** *Vs.* ***Ajit Mills Ltd. & Anr.***[2], in particular to the following observation:

> "The classical view that 'no mens rea, no crime' has long ago been eroded and several laws in India and abroad, especially

[1] (2002) 9 SCC 379
[2] (1977) 4 SCC 98

> regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea."

Reliance was also placed on the decisions of the High Courts in ***Dyer Meakins Breweries Ltd.*** *Vs.* ***U.P.***[3]; ***CST*** *Vs.* ***M/S Rama & Sons***[4]; ***Vijaya Electricals*** *Vs.* ***State of Tamil Nadu***[5] and ***Integrated Enterprises*** *Vs.* ***State of Kerala***[6] in support of the same proposition. It was asserted that in the present cases the items which were included in the Registration Certificate were clearly different and distinct from the items for which Form 'C' were issued and therefore, the dealers could not claim that it was a *bona fide* omission on their part.

7. Mr. Dhruv Agarwal, learned senior counsel appearing for the dealers in both the cases, on the other hand, submitted that since under Section 10A of the Act, in case of offence under Section 10(b) of the Act, discretion is conferred on the Assessing Authority to levy penalty in lieu of the prosecution of the dealer, the requirement of *mens rea* would be *sine qua non* for attracting the said penal provision. In support, learned counsel relied on the decision of this Court in ***Bharjatiya Steel Industries*** *Vs.*

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[3] [1974 UPTC 566 (All)]
[4] [1999 UPTC 425 (All)]
[5] [1991] 82 STC 268 (Mad.)
[6] [1980] 46 STC 103 (Ker.)

Commissioner, Sales Tax, Uttar Pradesh[7]**.** Learned counsel argued that since in both the cases, the dealers had been issued Form 'C' in respect of the same very items in the previous years regularly without any objection by the revenue, the dealers entertained a *bona fide* belief that these items were covered under the Registration Certificate, penalties under the said provision were not leviable on the dealers. Relying on the decision of this Court in ***Commissioner of Sales Tax*** *Vs.* ***Govind Ram Bhagat Ram***[8], learned counsel submitted that in the case of M/s Hari Oil & General Mills (C.A.Nos.6382-6383 of 2004), the High Court should not have interfered with the findings of fact recorded by the Tribunal to the effect that since Form 'C' were being issued regularly by the revenue for the purchase of oil seeds without any objection for the last five years and the accounts rendered in that behalf had been verified and accepted by the Assessing Authority, it could not be held that the dealer had made false representation while making purchases of oil seeds against the said forms.

8.Thus, the first and the foremost issue arising for our consideration is whether the requirement of *mens rea* is an essential ingredient for the levy of penalty under Section 10(b) read with Section 10A of the Act?

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[7] (2008) 11 SCC 617
[8] (1996) 7 SCC 92

9.In order to answer the point formulated for consideration, it would be necessary to refer to the relevant provisions of the Act. Section 10 of the Act deals with penalties. It reads as under:

> "**10. Penalties.**—If any person—
>
> (a) furnishes a declaration under sub-section (2) of section 6 or sub-section (1) of section 6A or sub-section (4) or sub-section (8) of section 8, which he knows, or has reason to believe, to be false; or
>
> (aa) fails to get himself registered as required by section 7 or fails to comply with an order under sub-section (3A) or with he requirements of sub-section 3(C) or sub-section (3E) of that section;
>
> (b) being a registered dealer, falsely represents when purchasing any class of goods that goods of such class are covered by his certificate of registration; or
>
> (c) not being a registered dealer, falsely represents when purchasing goods in the course of inter-State trade or commerce that he is a registered dealer; or
>
> (d) after purchasing any goods for any of the purposes specified in clause (b) or clause (c) or clause (d) of sub-section (3) or sub-section (6) of section 8 fails, without reasonable excuse, to make use of the goods for any such purpose;
>
> (e) has in his possession any form prescribed for the purpose of sub-section (4) or sub-section (8) of section 8 which has not been obtained by him or by his principal or by his agent in accordance with the provisions of this Act or any rules made thereunder;
>
> (f) collects any amount by way of tax in contravention of the provisions contained in section 9A,

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

Section 10A of the Act provides for the imposition of penalty in lieu of prosecution. Sub-section (1) of the said Section, relevant for our purpose, reads as follows:

> "**10A. Imposition of penalty in lieu of prosecution**— (1) If any person purchasing goods is guilty of an offence under clause (b) or clause (c) or clause (d) of section 10, the authority who granted to him or, as the case may be, is competent to grant to him a certificate of registration under this Act may, after giving him a reasonable opportunity of being heard, by order in writing, impose upon him by way of penalty a sum not exceeding one and a half times the tax which would have been levied under sub-section (2) of section 8 in respect of the sale to him of the goods, if the sale had been a sale falling within that sub-section:
>
> Provided that no prosecution for an offence under section 10 shall be instituted in respect of the same facts on which a penalty has been imposed under this section."

10. Section 10 of the Act not only enumerates seven types of violations of the provisions of the Act which constitute an "offence", it also makes them punishable by prosecution and punishment, which ranges from simple imprisonment for a period, which may extend to six months, or fine or both and in a case of continuous offence, the Section provides for a daily fine.

Section 10A of the Act provides for the imposition of penalty in lieu of prosecution. It provides that if any person purchasing goods is guilty of an offence under clause (b) or clause (c) or clause (d) of Section 10 of the Act, a penalty of fine may be imposed. Thus, the violations enumerated in clause (b), clause (c) and clause (d) of Section 10 may not necessarily result in prosecution with the possible imposition of sentence of imprisonment as an alternative is provided in respect of these violations.

11. Therefore, what we are required to construe is whether the words "falsely represents" would cover a mere incorrect representation or would embrace only such representations which have been made knowingly, wilfully and intentionally.

12. Whether an offence can be said to have been committed without the necessary *mens rea* is a vexed question. However, the broad principle applied by the courts to answer the said question is that there is a presumption that *mens rea* is an essential ingredient in every offence but the presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals and both must be considered. (See: ***Sherras*** *Vs.* ***De Rutzen***[9] and ***State of Maharashtra*** *Vs.* ***Mayer Hans George***[10]).

[9] [1895] 1 QB 918
[10] AIR 1965 SC 722

13. Although in relation to the taxing statutes, this Court has, on various occasions, examined the requirement of *mens rea* but it has not been possible to evolve an abstract principle of law which could be applied to determine the question. As already stated, answer to the question depends on the object of the statute and the language employed in the provision of the statute creating the offence. There is no gain saying that a penal provision has to be strictly construed on its own language. In ***Nathulal** Vs.* ***State of Madhya Pradesh***[11]*,* while dealing with the question whether to constitute an offence under Section 7 of the Essential Commodities Act, 1955 which provides for levy of penalty for contravention of any order made under Section 3 of the State Act *mens rea* is an essential ingredient, a three-Judge Bench of this Court observed as follows:

> "Mens rea is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of mens rea, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The nature of the mens rea that would be implied in a statute

[11] AIR 1966 SC 43

> creating an offence depends on the object of the Act and the provisions thereof."

14. In ***Union of India & Ors.*** *Vs.* ***Dharamendra Textile Processors & Ors.***[12], while examining the scope of Section 11-AC of the of the Central Excise Act, 1944, a three judge Bench of this Court, observed 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 forfeiture provided as punishment for the violation of criminal or penal laws.*"*

15. However, in ***Union of India*** *Vs.* ***Rajasthan Spinning & Weaving Mills***[13], this Court observed that:

> "We fail to see how the decision in *Dharamendra Textile* can be said to hold that Section 11-AC would apply to every case of non-payment or short-payment of duty regardless of the conditions expressly mentioned in the section for its application…The decision in *Dharamendra Textile* must, therefore, be understood to mean that though the application of Section 11-AC would depend upon the existence or otherwise of the conditions expressly stated in the section."
>
> (Emphasis supplied by us)

16. In ***M/s Gujarat Travancore Agency, Cochin*** *Vs.* ***Commissioner of Income Tax, Kerala, Ernakulam***[14], the question that arose for consideration was whether Section 271(1)(a) of the Income Tax Act, 1961 required the

[12] (2008) 13 SCC 369
[13] (2009) 13 SCC 448
[14] (1989) 3 SCC 52

existence of *mens rea*. While holding that the said Section dealt merely with a failure to file return, and hence no *mens rea* was required, this Court observed thus:

> "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."
>
> (Emphasis supplied by us)

17. To put it succinctly, in examining whether *mens rea* is an essential element of an offence created under a taxing statute, regard must be had to the following factors: (i) the object and scheme of the statute; (ii) the language of the section and; (iii) the nature of penalty.

18. It is true that the object of Section 10(b) of the Act is to prevent any misuse of the registration certificate but the legislature has, in the said Section, used the expression "falsely represents" in contradistinction to "wrongly represents." Therefore, what we are required to construe is

whether the words "falsely represents" would cover a mere incorrect representation or would embrace only such representations which are knowingly, wilfully and intentionally false.

19. According to the Black's Law Dictionary (6th Edition), the word "false" has two distinct and well-recognized meanings: (1) intentionally or knowingly or negligently untrue; (2) untrue by mistake or accident, or honestly after the exercise of reasonable care. A thing is called "false" when it is done, or made, with knowledge, actual or constructive, that it is untrue or illegal, or is said to be done falsely when the meaning is that the party is in fault for its error.

20. Likewise, P. Ramanatha Aiyar in Advance Law Lexicon (3rd Edition, 2005) explains the word "false" as:

> "In the more important uses in jurisprudence the word implies something more than a mere untruth; it is an untruth coupled with a lying intent……or an intent to deceive or to perpetrate some treachery or fraud. The true meaning of the term must, as in other instances, often be determined by the context'."

21. In ***Cement Marketing Co. of India Ltd.*** *Vs.* ***Assistant Commissioner of Sales Tax, Indore & Ors.***[15], a similar question fell for consideration of this Court. In that case, a penalty under Section 43 of the Madhya Pradesh

[15] (1980) 1 SCC 71

General Sales Tax Act, 1958 and Section 9(2) of the Act was imposed on the dealer on the ground that he had furnished false returns by not including the amount of freight in the taxable turnover disclosed in the returns. Allowing the appeal of the dealer, this Court had observed as under:

> "What Section 43 of the Madhya Pradesh General Sales Tax Act, 1958 requires is that the assessee should have filed a 'false' return and a return cannot be said to be 'false' unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the Court may, in a given case, infer deliberations and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to condemn the return as a 'false' return inviting imposition of penalty."

The Court finally held that it was elementary that Section 43 of the State Act which provided for imposition of penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, the section cannot be invoked for imposing penalty. It was emphasised that if the view canvassed by the Revenue were to be accepted, the result would be that even if a dealer raises a *bona fide* contention that a particular item was not liable to be included in the taxable turnover, he will have to show it as forming part of the taxable turnover in his return and pay taxes upon it on pain of

being held liable for penalty in case his contention is ultimately found by the Court to be not acceptable. That surely could never have been the intention of the Legislature.

22. In view of the above, we are of the considered opinion that the use of the expression "falsely represents" is indicative of the fact that the offence under Section 10(b) of the Act comes into existence only where a dealer acts deliberately in defiance of law or is guilty of contumacious or dishonest conduct. Therefore, in proceedings for levy of penalty under Section 10A of the Act, burden would be on the revenue to prove the existence of circumstances constituting the said offence. Furthermore, it is evident from the heading of Section 10A of the Act that for breach of any provision of the Act, constituting an offence under Section 10 of the Act, ordinary remedy is prosecution which may entail a sentence of imprisonment and the penalty under Section 10A of the Act is only in lieu of prosecution. In light of the language employed in the Section and the nature of penalty contemplated therein, we find it difficult to hold that all types of omissions or commissions in the use of Form 'C' will be embraced in the expression "false representation". In our opinion, therefore, a finding of *mens rea* is a condition precedent for levying penalty under Section 10(b) read with Section 10A of the Act.

23. That takes us to the next question viz. whether on the facts of the two cases before us it could be said that the dealers had purchased the goods in question and furnished Form 'C' in respect of those goods knowing that the said goods were not covered by their certificates of registration and, therefore, the requirement of *mens rea* was satisfied.

24. As regards, the first set of appeals, as afore-stated, the High Court has deleted the penalty on the ground that apart from the fact that on earlier occasions the department had not raised any objection while issuing Form 'C' to the dealer, the dealer filed an application for amendment of the registration certificate as soon as he learnt about his fault. It is evident from the impugned judgment that the High Court has lost sight of the fact that the dealer had used Form 'C' to import items like sutli, tat, etc., in addition to the cotton waste. Assuming that the dealer was of the *bona fide* belief that cotton included the cotton waste, it is hard to believe that there was some confusion in the mind of the dealer in so far as other items were concerned. Similarly, in the second set of appeals, it is evident from the impugned judgment that the High Court has not examined the explanation furnished by the dealer that they were under a *bona fide* belief that they were authorized to purchase oil seeds against Form 'C' issued to them regularly by the department without any objection. It is manifest that the High Court

proceeded to examine the case of the dealer on the premise that offence under Section 10(b) of the Act was an absolute offence.

25. Under the given circumstances, we are of the opinion that the explanations furnished by the dealers in both the cases require a fresh look by the authority competent to levy penalty under Section 10A of the Act, in light of the aforesaid enunciation of law.

26. Resultantly, both the appeals are allowed; the impugned judgments are set aside and all the appeals in both the cases are remitted back to the adjudicating authority for fresh consideration as to whether on the facts and circumstances of both the cases, penalties under Section 10(b) read with Section 10A of the Act are leviable. Needless to add that the said authority shall take fresh decisions on the merits of each case untrammelled by any observation in the impugned orders or by us in this judgment. There shall, however, be no order as to costs.

…..…………………………….J.
(D.K. JAIN)

..……………………………….J.
(H.L. DATTU)

NEW DELHI;

SEPTEMBER 10, 2010.