

CASE NO.:
Appeal (civil) 5085 of 2000

PETITIONER:
STATE OF RAJASTHAN & ANR.

Vs.

RESPONDENT:
M/S D.P. METALS

DATE OF JUDGMENT: 04/10/2001

BENCH:
B.N. Kirpal, N. Santosh Hegde & B.N. Agrawal

JUDGMENT:

W I T H
C.A. Nos. 5086, 5087, 5088, 5763, 5764 of 2000 and 1321,
1736, 1737, 1738, 1739, 1740, 1741, 1742, 1743, 1744,
1745, 1746, 1747, 1748, 1749, 1750, 1751, 1752, 1753,
1754, 1755, 1756, 1757, 1758, 1759, 2893, 2557, 3424,
3425, 3426, 3427, 3697, 4033 of 2001.

J U D G M E N T

KIRPAL, J.

The State of Rajasthan has filed these appeals against the decision of the High Court which had, while allowing the Writ Petition of the respondents, held that Section 78(5) of the Rajasthan Sales Tax Act, 1994 was unconstitutional and ultra vires.

In order to examine the issues arising in this case, we may briefly refer to the facts of the case of M/s D.P. Metals. M/s D.P. Metals carries on the business of manufacturing stainless steel sheets and had been registered under the provisions of the Rajasthan Sales Tax Act and the Central Sales Tax Act. On 22nd January, 1997 a truck was seized by the Assistant Commercial Taxes Officer, Jodhpur and as the same was found not to be carrying the declaration Form ST 18A, a show cause notice was issued to M/s D.P. Metals. After hearing, a penalty of Rs. 63,200/- was levied under Section 78(5) of the 1994 Act.

M/s D.P. Metals and other dealers, against whom similar action has been taken, filed applications before the Rajasthan Taxation Tribunal, Jaipur, inter alia, impugning the provisions of Section 78 (5) of the 1994 Act and claimed consequential relief of the quashing of the penalty order.

Pursuant to the abolition of the Taxation Tribunal, the applications were transferred to the Rajasthan High Court and they were regarded as writ petitions. The contentions on behalf of the respondents before the High Court were that Section 78 (5) was ultra vires being beyond the legislative competence of the State and also on the ground of being excessive, arbitrary and unreasonable and, therefore, violative of Articles 14, 19(1)(g), 301 and 304 of the

Constitution. The Division Bench of the High Court in relation to the validity of Section 78(5) came to the following conclusion:-

(i) the parent provision of the Section 78 as far as it requires carrying the documents mentioned under sub-section (2) by the transporter whose position ordinarily does not go beyond a witness about goods carried through them, for the purpose of divulging detailed information about the goods carried out by the transporter and about the consignor and the consignee itself at the check post or barrier to any authorised officer under sec. 78 as part of machinery provision for collecting evidence about goods coming in or going out of or moving within the State, can be considered as intended to prevent and check evasion and avoidance of tax and in aid of making effective the levy which has arisen or likely to arise within the State, are provisions incidental and ancillary in aid of main subject levy and collection of sales tax.

(ii) Provision as to notice before imposing penalty is not an empty formality for imposing penalty, for non production of production of incomplete documents, but is intended to give an effective opportunity of hearing to show that no penalty is at all leviable. If it is reasonably established that such default is not with any intention to evade or avoid tax, but is bonafide default, the breach for which it is not compulsory to impose penalty. Such question has to be determined in each case on its own facts and circumstances.

(iii) No opinion is expressed on the validity of requirement to carry declarations in form ST 18 A or ST 18 AA with goods, in view of no challenge made in the petitions.

(iv) The provisions for carrying declaration of the importer in the Form No. ST 18-A and 18 AA by the transporter or carrier is not treated to be mandatorily required and it is held that the production of such declaration later on during the course of enquiry even by the importer is substantial compliance of the provision.

(v) Lastly, the penalty under section 78(5) linked with value of goods equal to 30% thereof imposable on person incharge of the goods in transit who is not owner of the goods and who is also not a dealer in the goods for breach of obligation of divulging information and particulars relating to goods in his charge and the consignor and the consignee is highly unreasonable having no reasonable and proximate nexus with the obligation cast on transporter and the object of the provision, the same, therefore, is unconstitutional, (Santlals case).

(vi) However a reasonable penalty is imposable on transporter as a consequence for breach of obligation to divulge such information truly and faithfully which is in his possession and can reasonably be required of them to obtain from other sources while booking goods for transport. Until any specific provision for levy of tax is enacted by the legislature, he may be subjected to penalty as envisaged under Section 68 of the Act.

The High Court then held Section 78(5) of the Act to be unconstitutional and ultra vires.

In these appeals, it was contended by learned counsel for the appellants that the High Court erred in coming to the conclusion that Section 78 (5) was ultra vires. It was submitted that the power contained in Section 78 (5) was incidental to the power of levy of sales tax and was within the legislative competence of the State under Entry 54 of List II of the Constitution. It was submitted that Rajasthan as well as other States had enacted provisions in the Sales Tax Acts with a view to check evasion of taxes by transporters who were found

carrying goods with fake bilties, incomplete documents and under suspicious names. Similar provisions had been upheld by this Court and, therefore, the decision of the High Court is not correct.

Mr. Manish Singhvi, counsel appearing for the respondents, submitted that the penalty sought to be imposed under Section 78 (5) had no nexus with the tax evaded. The effect of this provision, it was contended, was that even when there was total absence of mens rea and the breach is unintentional and completely bona fide still an innocent transporter can be subjected to penalty under Section 78 (5) of the 1994 Act. It was submitted that Section 78 (5) was analogous to Section 38 of the Haryana General Sales Tax Act, 1973 which had been held to be ultra vires by this Court in *State of Haryana and Others vs. Sant Lal and Another*. It was urged that the breach of obligation of carrying the documents over which the transporter may have no control cannot be attributed to him and levy of penalty @ 30% merely on account of such breach is harsh and oppressive. Penalty under Section 78 (5) could not be regarded as being linked with evasion of tax. It was further contended that the only way in which the validity of Section 78(5) can be upheld is to read into it the element of mens rea as a precondition for imposition of penalty and mere technical breach without any mens rea should not by itself invite penalty under Section 78 (5). While referring to a decision in the case of *The Check Post Officer and Others vs. K.P. Abdulla and Bros.* it was submitted even in cases like carrying personal goods for consumption penalty under Section 78 (5) would be leviable because of alleged breach of Section 78 (2) even though sale of goods is not involved. Section 78 (5), it was submitted, contained no guidelines saving such bonafide cases from the vice of Section 78 (5) and, therefore, was violative of Article 14 of the Constitution.

The Rajasthan Sales Tax Act, 1954 was a precursor to the 1994 Act. In the 1954 Act, Section 22A(7) was the provision which enabled the appellant to impose penalty in the event of the person in charge of the goods not possessing or producing mandatory documents or if a false declaration was made. Section 22A (7) of the 1954 Act reads as follows:

(7)(a) The Officer incharge of the check-post or barrier or any other officer not below the rank of an Assistant Commercial Taxes Officer, empowered in this behalf may, after giving the owner or person incharge of the goods a reasonable opportunity of being heard and after holding such further enquiry as he may deem fit, impose on him for possession of goods not covered by goods vehicle record, and other documents prescribed under sub-section (3) or for submission of false declaration or documents a penalty (equal to five times of the rate of tax notified under section 5 of the Act, for such goods or) (30%) of the value of such goods, as may be determined by such officer (whichever is less).

(Provided that where the goods are being carried without proper documents as required by sub-section (3) or with any false declaration or statements and the owner or the incharge or the driver of the vehicle, boat, or animal carrying such goods is found in collusion for such carrying of goods, the vehicle, boat or animal shall also be seized by the officer empowered under sub-section (7), and such officer, after affording an opportunity of being heard to such owner, incharge or driver may impose a penalty not exceeding 30% of the value of the goods carried and shall release the vehicle, boat or animal on the payment of the said penalty or on furnishing such security in such form as prescribed under clause (b) of sub-section (7):

Provided further that when an owner, incharge or driver of a vehicle, boat or animal is found guilty second time of the offence

mentioned in the preceding proviso, he shall be liable to a maximum penalty as mentioned in the preceding proviso and the vehicle, boat or animal carrying the goods may be kept seized and detained for a period not exceeding 30 days after the date of the payment of the penalty or furnishing of the security.

(Provided also that where a transporter is found to be in collusion with a trader to avoid or evade tax during the course of movement of the goods through his vehicle, such vehicle may, after an opportunity of being heard has been afforded, be confiscated by the Commercial Taxes Officer of the area in whose jurisdiction the case was detected with the prior approval in writing of the Deputy Commissioner (Administration) having jurisdiction and in case of confiscation of the vehicle no penalty shall be imposed in the preceding first proviso)

(b) Such officer may release any of the goods seized under sub-section (5) or sub-section (6) on payment of the penalty under clause (a) or on furnishing such security in such form as may be prescribed for the payment thereof, as he may consider necessary.

[(c) Such officer may, for sufficient reasons, release any of the goods seized as aforesaid even before proceeding under clause (a) or during the course of proceeding under that clause, on furnishing of security of an amount equal to the estimated value of the goods to be released if he considers it necessary so to release the goods.]

With the repeal of the 1954 Act, a provision similar to Section 22A (7) of the old Act was incorporated as Section 78(5). It will, however, be appropriate to refer to Section 78. Section 78 provides for establishment of check-post and inspection of goods while in movement. The said section, along with incorporation of sub-sections (11) and (12) in 1999 reads as follows:

78. Establishment of check-post and inspection of goods while in movement.- (1) The Commissioner may, with a view to prevent or check avoidance or evasion of tax, by notification in the Official Gazette, direct the setting up of a check-post at such place and for such period as may be specified in the notification, and every officer or official who exercises his powers and discharges his duties at such check-post by way of inspection of documents produced and goods being moved, shall be its Incharge.

(2) The driver or the person incharge of a vehicle or carrier or of goods in movement shall-

- (a) carry with him a goods vehicle record including challans and bilties, bills of sale or despatch memos and prescribed declaration forms;
- (b) stop the vehicle or carrier at every check-post set up under sub-section (1);
- (c) produce all the documents including prescribed declaration forms relating to the goods before the Incharge of the check-post;
- (d) give all the information in his possession relating to the goods; and
- (e) allow the inspection of the goods by the Incharge of the check-post or any other person authorised by such Incharge.

Explanation-For the purposes of this Chapter-

- (i) vehicle or carrier shall include any means of transportation including an animal to carry goods from one point to another point;
- (ii) goods shall include animals also, and
- (iii) goods in movement shall means-

- (a) the goods which are in the possession or control of a transporting agency or person or other such bailee;
- (b) the goods which are being carried in a vehicle or carrier belonging to the owner of such goods; and
- (c) the goods which are being carried by a person.

(3) Where any goods are in movement within the territory of the State of Rajasthan, an officer empowered by the State Government in this behalf may stop the vehicle or the carrier or the person carrying such goods, for inspection, at any place within his jurisdiction and the provisions of sub-section (2) shall mutatis mutandis apply.

(4) Where any goods in movement, other than exempted goods, are without documents, or are not supported by documents as referred to in sub-section (2), or documents produced appear false or forged, the Incharge of the check-post or the officer empowered under sub-section (3), may

(a) direct the driver or the person incharge of the vehicle or carrier or of the goods not to part with the goods in any manner including by retransporting or rebooking, till a verification is done or an enquiry is made, which shall not take more than seven days;

(b) seize the goods for reasons to be recorded in writing and shall give a receipt of the goods to the person from whose possession or control they are seized;

(c) release the goods seized in clause (b) to the owner of the good or to anybody else duly authorised by such owner, during the course of the proceeding if the adequate security of the amount equal to the estimated value of the goods is furnished.

(5) The Incharge of the check-post or the officer empowered under sub-section (3), after having given the person incharge of the goods a reasonable opportunity of being heard and after having held such enquiry as he may deem fit, shall impose on him for possession or movement of goods, whether seized or not, in violation of the provisions of clause (a) of sub-section (2) or for submission of false or forged documents or declaration, a penalty equal to thirty percent of the value of such goods.

(6) During the pendency of the proceeding under sub-section (5), if anybody appears before the Incharge of the check-post or the officer empowered under sub-section (3) and prays for being impleaded as a party to the case on the ground of involvement of his interest therein, the said incharge or the officer on being satisfied may permit him to be impleaded as a party to the case; and thereafter, all the provisions of this section shall mutatis mutandis apply to him.

(7) The incharge of the check-post or the officer empowered under sub-section (3) may release the goods to the owner of the goods or to anybody else duly authorised by such owner, if seized and not already released under clause (c) of sub-section (4), on payment of the penalty imposed under sub-section (5) or on furnishing such security for the payment thereof, as such incharge or officer may consider necessary.

(8) Where the driver or the person incharge of the vehicle or the carrier is found guilty for violation of the provisions of sub-section (2), subject to the provisions of sub-section (10), the incharge of the check-post or the officer empowered under sub-section (3) may detain such vehicle or carrier and after affording an opportunity of

being heard to such driver or person incharge of the vehicle or the carrier, may impose a penalty on him as provided in sub-section (5).

(9) The incharge of the check-post or the officer empowered under sub-section (3) may release the vehicle or the carrier on the payment of the amount of penalty imposed under sub-section (8) or on furnishing such security as may be directed by such Incharge or Officer.

(10) Where a transporter, while transporting goods, is found to be in collusion with a trader to avoid or evade tax, the Incharge of the check-post or the officer empowered under sub-section (3) shall detain the vehicle or carrier of such transporter and after affording him an opportunity of being heard and with the prior approval in writing of the Deputy Commissioner (Administration) having jurisdiction, may confiscate such vehicle or carrier.

(11) If a transporter fails to give information as required from him under clause (d) of sub-section (2) about the consignor, consignee or the goods within such time as may be specified or transports the goods with forged documents, besides imposing the penalty under sub-section (5), it shall be presumed that the goods so transported have been sold in the State of Rajasthan by him and he shall be deemed to be a dealer for those goods under this Act.

(12) The provisions of this Act shall, for the purpose of levy, collection and assessment of tax, determination of interest, payment and recovery of tax and interest, appeal, review or revision, apply to the transporter deemed to be a dealer under sub-section (11).

The scheme of Section 78 is that sub-section (1) authorises the Commissioner to set up check-posts with a view to prevent or check avoidance or evasion of tax. These check-posts are to be set up by issuance of a notification in that behalf and every officer appointed at the check-post shall be the in charge of the check-post.

Sub-section (2) of Section 78 imposes an obligation on (a) driver; or (b) person in charge of a vehicle or carrier (compendiously referred to as the person in charge of the vehicle) and (c) person in charge of the goods in movement. Persons so named in sub-section (2) then have an obligation to comply with sub-clauses (a) to (e) of Section 78(2). Such a person under Section 78(2)(a) is required to carry with him (a) goods vehicle record including challans and bilties; (b) bills of sale or despatch memos and (c) prescribed declaration forms.

Sub-section (3) of Section 78 permits an officer empowered by the State Government to stop the vehicle or the carrier or the person for inspection of the goods in movement within the territory of the State of Rajasthan. In case of goods, other than exempted goods, which are in movement are found to be without documents or are not supported by documents referred to in Sub-section (2) or the documents produced are false or forged, then under Section 78(4) the in charge of the check-post or the empowered officer may direct non-parting of the goods till the verification is done or an enquiry made or seize the goods after recording reasons for doing so or release the seized goods to the owner or anybody authorised by him if adequate security of the amount equal to the estimated value of the goods is furnished.

Sub-section (5) enables the levy of penalty equal to 30% of the value of the goods being imposed for possession or movement of goods only if there is violation of clause (a) of sub-section (2) or for

submission of false or forged documents or declaration. Such penalty is to be levied only after giving a reasonable opportunity of being heard and holding such enquiry as the in charge officer empowered may deem fit. During the pendency of the enquiry a person having interest therein can get himself impleaded under sub-section (6). On payment of penalty imposed under sub-section (5) or on furnishing security for payment thereof, goods can be released under sub-section (7). As sub-section (5) expressly contemplates giving a hearing to the person incharge of the goods before imposing penalty this means that action under Section 78(5) can only be taken on the person incharge of the goods. He may, in a given case, be the driver or any other person, if any, accompanying the goods as the incharge thereof.

Whereas movement of goods in violation of sub-section (2) (a) attract the provisions of sub-section 5 in respect of vehicle or carrier which is found guilty or violating the provisions of sub-section (2) of Section 78, Sub-section (8) allows the detention of such vehicle or carrier. Penalty as provided under sub-section (5) can be imposed after hearing the driver or the person in charge of the vehicle. Release of the vehicle is provided for by sub-section (9) and if the transporter is found to be guilty of collusion with the trader to avoid or evade tax, power is given under sub-section (10) for confiscation of such vehicle or carrier.

In K.P. Abdullas case (supra) this Court considered the validity of Section 42 (3) of the Madras General Sales Tax Act, 1959 which gave the power to the officer in charge of the check-post or barrier or any other duly authorised officer to seize and confiscate the goods which were not covered by the documents specified therein. It was held that the power to confiscate the goods carried in a vehicle cannot be said to be fairly and reasonably comprehended in the power to legislate under Entry 54 of List II in respect of taxes on sale or purchase of goods. The reason for this conclusion was that sub-section (3) assumed all goods carried in the vehicle as been those which had been sold within the State and authorised the check-post officer to seize them unless the specified documents were produced at the check-post or the barrier. A provision so enacted on the assumption that goods carried in a vehicle from one State to another must be presumed to have been transported after sale within the State was held to be unwarranted and, therefore, the power to seize and confiscate was struck down and was held not to be ancillary or incidental with the power to legislate for levy of sales tax. The aforesaid decision can be of little assistance because the provisions of Section 78(5) are radically different from Section 42(3) of the Madras Act with which this Court was concerned in K.P. Abdullas case (supra). Section 78(5) does not contain any power of confiscation of goods and the levy of penalty is for carrying the goods or for submitting false or forged documents or declaration. The Madras Act, on the other hand contemplated seizure and confiscation of goods if they were transported without proper documentation. In Sodhi Transport Co. and Others vs. State of U.P. and Others this Court was required to adjudicate upon the validity of Section 28-B of the U.P. Sales Tax Act, 1948 and U.P. Sales Tax Rules, 1948. Section 28 of the U.P. Act contemplated establishment of check-posts and barriers while Section 28-B made a provision for the procedure to be followed by persons who intend to transport goods by road into the State of U.P. from places outside the State but for the purpose of transporting them to places situated outside that State. A vehicle at the time of entry was required under Rule 87 to obtain transit pass which was to be delivered to the officer in charge of the check-post or barrier before the exit from the State. If the driver or the person in charge failed to do so Section 28-B presumed that the goods carried thereby had been sold within the State by the owner or the person in charge of the vehicle and all the liabilities under the Act regarding the levy of sales tax etc. were to arise. While analysing the

provisions this Court held that the presumption under Section 28-B was a rebuttable one and if it was not rebutted it was to be presumed that the goods had been sold in the State of U.P. While upholding the validity of Section 28-B and Rule 87 it was held that these were machinery provisions, which did not levy any charge by themselves, but were enacted to ensure that there was no evasion of tax. It was noticed that these provisions are enacted to make the law workable and to prevent evasion. Such provisions fall within the ambit and scope of the power to levy the tax itself. Thus it was by reference to Entry 54 of List II that the validity of the impugned provisions were upheld.

In *Delite Carriers (Regd.) vs. State of Haryana and Others* validity of Section 37 of the Haryana General Sales Tax Act, 1973 was challenged on the ground of lack of legislative competence. The said Section 37 reads as follows:

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

(2) The owner or person in charge of the goods and, when the goods are carried by a goods carrier, the driver or any other person in charge of the goods carrier, shall carry with him a goods carrier record, a trip sheet or log-book, as the case may be, along with a bill of sale in respect of the goods meant for the purpose of trade and are carried by him or in the goods carrier and produce the same before an officer-in-charge of a check-post or barrier or any officer of the department not below the rank of an Assistant Excise and Taxation Officer or such other officer, as the State Government may, by notification, appoint, for checking the goods carrier at any place.

(3) At every check-post or barrier or at any other place, when so required by any officer referred to in sub-section (2) in this behalf, the owner or person in charge of the goods shall stop and the driver or any other person in charge of the goods carrier, entering or leaving the limits of the State, shall stop the goods carrier and keep it stationary, as long as may reasonably be necessary, and allow the officer-in-charge of the check-post or barrier, or the officer as aforesaid to examine the goods carried by him or in the goods carrier, by breaking open the package or packages, if necessary, and inspect all records relating to the goods carried which are in the possession of such owner or person in charge of the goods or the driver or other person in charge of the goods carrier, who shall also furnish such other information, as may be required by the aforesaid officer, who, if considered necessary, may also search the goods carrier and the driver or other person in charge of the goods carrier or of the goods.

(4) The owner or person in charge of the goods or goods carrier, entering or leaving the limits of the State, shall furnish in duplicate a declaration containing such particulars, as may be prescribed, of the goods carried by him or in such carrier, as the case may be, before the officer-in-charge of the check-post or barrier and shall produce the copy of the said declaration duly verified and returned to him by the officer-in-charge of the check-post or barrier before any other officer as mentioned in sub-section (2).

Where it is contended by the owner of the goods that the goods were not sold within the State after their import and were either consumed or exported by him or were sold in the course of inter-State trade or commerce or in the course of export out of the

territory of India, the Assessing Authority may call for such other information and documents as he thinks fit:

Provided that where the owner or person in charge of the goods or the driver or the person in charge of the goods carrier bound for any place outside the State passes through the State, such owner or person in charge of the goods or the driver or other person in charge of such carrier shall furnish, in duplicate, to the officer-in-charge of the check-post or barrier of his entry into the State, a declaration in the prescribed form and obtain from him a copy thereof duly verified. The owner or person in charge of the goods carrier or the driver or other person in charge of the goods carrier shall deliver within twenty-four hours the said copy to the officer-in-charge of the check-post or barrier at the point of his exit from the State, failing which he shall be liable to pay a penalty, to be imposed by the officer-in-charge of the check-post or barrier of the entry, not exceeding two thousand rupees or twenty per centum of the value of the goods, whichever is greater:

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

Provided further that where the owner or person in charge of the goods or the driver or other person in charge of the goods or carrier bound for any place inside the State has to pass through another State, such owner or person or the driver or other person shall furnish, in duplicate, to the officer-in-charge of the check-post or barrier of his exit from the State, a declaration in the prescribed form and obtain from him a copy thereof duly verified and shall deliver the same to the officer-in-charge of the check-post or barrier of his entry into the State, within four hours of his exit from the previous barrier or check-post in the State, failing which he shall be liable to pay a penalty to be imposed by the officer-in-charge of the check-post or barrier of his entry, not exceeding two thousand rupees or twenty per centum of the value of the goods, whichever is greater, unless he explains the time taken in excess to the satisfaction of the officer-in-charge of the entry barrier or check-post.

(5) If the officer-in-charge of the check-post or barrier or other officer as mentioned in sub-section (2) has reasons to suspect that the goods under transport are not covered by proper and genuine documents as mentioned in sub-section (2) or sub-section (4), as the case may be or that the person transporting the goods is attempting to evade payment of the tax due under this Act, he may, for reasons to be recorded in writing, and after hearing the said person, order the unloading and detention of the goods and shall allow the same to be transported only on the owner of the goods, or his representative or the driver or other person in charge of the goods carrier on behalf of the owner of the goods, furnishing to his satisfaction a security, in the prescribed form and manner, for an amount not less than ten per centum and not more than twenty-five per centum of the value of the goods:

Provided that such officer may, if he deems fit, having regard to the nature of the carrier or the goods and other relevant matters, allow such goods to be transported, on the owner of the goods or his representative or the driver or other person in charge of the goods carrier, executing, in a prescribed manner, a bond with or without sureties for securing the amount due as security:

Provided further that where any goods are detained, a report shall be made immediately and in any case within twenty-four hours of the detention of the goods by the officer detaining the goods to the officer-in-charge of the district seeking the latter's permission for

the detention of the goods for a period exceeding twenty-four hours as and when so required and if no intimation to the contrary is received from the latter, the former may assume that his proposal has been accepted.

(6) The officer detaining the goods shall record the statement, if any, given by the owner of the goods or his representative or the driver or other person in charge of the goods carrier and shall require him to produce proper and genuine documents as referred to in sub-section (2) or sub-section (4), as the case may be. If, after the enquiry, such officer finds that there has been an attempt to evade the tax due under this Act, he shall, by order, impose on the owner of the goods and in case the owner is not forthcoming or his identity is not disclosed by the person in charge of the goods or the driver or person in charge of the goods carrier, in which goods are being carried, on the person in charge of the goods or the goods carrier or the driver, a penalty of not less than ten per cent and not more than twenty-five per cent of the value of the goods, and in case he finds otherwise, he shall order the release of the goods:

Provided that no penalty shall be imposed unless the owner of the goods or his representative or person in charge of the goods or the goods carrier or the driver has been given a reasonable opportunity of being heard.

(7) If the owner of the goods or his representative or the driver or other person in charge of the goods carrier does not furnish security or execute the bond as required by sub-section (5) within ten days from the date of detaining the goods or goods carrier, the officer referred to in that sub-section may order further detention of the goods, and in the event of the owner of the goods not paying the penalty imposed under sub-section (6) within twenty days from the date of the order imposing the penalty, the goods detained shall be liable to be sold for the realisation of the penalty in the manner provided in sub-section (9).

(8) When any goods are detained under sub-section (7), the officer detaining the goods shall issue to the owner of the goods, if present or, if the owner of the goods is not present, to his representative or the driver or other person in charge of the goods carrier, a receipt specifying the description and quantity of the goods so detained and obtain an acknowledgement from such person or, if such person refuses to give an acknowledgement, record the fact of refusal in the presence of two witnesses.

(9) The goods detained under sub-section (7) shall be sold, by the officer who imposed the penalty, by public auction in the manner prescribed, and the sale proceeds shall be deposited in the Government treasury.

(10) If the goods detained are of a perishable nature, or subject to speedy and natural decay, or when the expenses of keeping them in custody are likely to exceed their value, the officer-in-charge of the check-post or barrier or any other officer empowered under sub-section (2), as the case may be, shall immediately sell such goods or otherwise dispose them of and deposit the sale proceeds of such goods, or the amount obtained by the disposal of such goods otherwise than by way of sale, in the Government treasury.

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

(12) Where the detained goods are sold or otherwise disposed of under this section, the owner thereof shall be liable to pay the expenses and other incidental charges incurred in detaining and disposing of the same.

(13) If the sale proceeds of any goods sold or the amount obtained on the disposal of any goods otherwise than by way of sale under the provisions hereinbefore contained exceeds the penalty imposed in respect of such goods, such excess amount after deducting the expenses, and incidental charges referred to in sub-section (12) shall be returned by the officer who conducted the sale or otherwise disposed of the goods, to the owner of the goods.

(14) At every station of transport of goods, bus stand or any other station or place of loading or unloading of goods, other than a post office, when so required by the Commissioner or any other person appointed to assist him under sub-section (1) of section 3, the owner or person in charge of the goods or the driver or other person in charge of the goods carrier shall produce for examination transport receipts and all other documents and account books concerning the goods carried, transported, loaded, unloaded, consigned or received for transport, to be maintained by him in the prescribed manner and the Commissioner or the person so appointed shall have, for the purpose of examining that such transport receipts and other documents and account books are in respect of the goods carried, transported, loaded, unloaded or consigned or received for transport, the power to break open any package or packages of such goods. If the Commissioner or the person so appointed is satisfied that it is necessary for the purposes of investigation or verification, he may seize the transport receipts, documents or account books so produced for examination or found lying at such a station of transport of goods, bus stand or any other station or place of loading or unloading of goods. The Officer seizing the transport receipts, documents or account books shall forthwith grant a receipt for the same and shall return to the person from whose custody these were seized after examination or completion of investigation or verification within a period of sixty days. Where the transport receipts, documents or account books so seized are required to be retained beyond the aforesaid period of sixty days, the authority so retaining them shall record the reasons in writing and shall obtain the approval of the Commissioner for so doing.

(15) Except in accordance with such conditions, as may be prescribed, with a view to ensuring that there is no evasion of tax imposed by or under this Act, -

(a) no driver or person in charge of a goods carrier or any person in charge of a place of loading or unloading of goods, other than a post office, shall accept any consignment of such goods for transport or give delivery of any consignment of such goods, other than personal luggage of goods for personal consumption;

(b) no dealer or any person including a carrier of goods acting on behalf of a dealer, shall take delivery of, or transport from any station of transport of goods, bus stand or any other station or place, of loading or unloading of goods, airport or any other place, whether of similar nature or otherwise other than a post office, any consignment of goods referred to above.

Emphasis added

Following the decision in Sodhi Transport Companys case (supra) this Court in Delite Carriers case held as follows:

We have explained in *Sodhi Transport Co. v. State of U.P.* [1986] 62 STC 381, decided on March 20, 1986, the object of establishing check-posts and introducing provisions in the sales tax law of a State which would facilitate inspection of goods which are carried from one State to another through a third State. In the above-mentioned decision we have upheld the provisions of section 28-B of the U.P. Sales Tax Act, 1948 and the rules made thereunder. For the same reasons we uphold the provisions of section 37 of the Haryana General Sales Tax Act, 1973, rule 45 and form Nos. 38 and 39 of the Haryana General Sales Tax Rules, 1975. These writ petitions are disposed of accordingly. There will be no order as to costs.

From the aforesaid decision in *Delite Carriers case* (supra) it is evident that the Court regarded Section 37 of the Haryana General Sales Tax as being nothing more than a provision which had been enacted in the sales tax law of a State which would facilitate inspection of goods carried from one State to another and would fall within the legislative ambit of Entry 54 of List II. The said Section 37 of the Haryana Act is in pari materia with Section 78 of the Rajasthan Act.

The provisions of Sections 22-A and 22-B of the Rajasthan Sales Tax Act, 1954 were the precursor to the present Section 78 of the 1994 Act. The validity of Section 22-A and other connected provisions were impugned in Writ Petition Nos. 1555-56 of 1983 in *M/s Indian Roadways Corporation and Another vs. State of Rajasthan and Others*. By a short order dated 23rd April, 1986 the validity of these provisions were upheld in the following words:

We have explained in *M/s Sodhi Transport Co. & Anr. vs. State of U.P. & Anr.* decided on March 20, 1986 the object of establishing check posts and introducing provisions in the sales tax law of a State which would facilitate inspection of goods which are carried from one State to another through a third State. In the above-mentioned decision we have upheld the provision of section 28-B of the Uttar Pradesh Sales Tax Act, 1948 and the rules made thereunder. For the same reasons we uphold the provisions of section 22-A and 22B of the Rajasthan Sales Tax Act, 1954 and Rules 61, 62, 62A, 62B and 63 and Forms 18-A and 18B of the Rajasthan Sales Tax Rules, 1955. These writ petitions are disposed of accordingly. There will be no order as to costs.

Yet another challenge to the vires of Sections 22-A and 22-B of the Rajasthan Sales Tax Act was made but was repelled in Civil Appeal No. 152 of 1990 in *Sarna Transport Corporation vs. The State of Rajasthan & Others* by an order dated 23rd July, 1996 which reads as follows:

The Writ Petition that the appellants filed in the Rajasthan High Court sought to challenge the vires of Sections 22-A and 22-B of the Rajasthan Sales Tax Act, 1954. The Writ Petition was rejected.

The challenge to these Sections has been repelled by this Court by its Order dated 23rd April, 1986 in Writ Petition Nos. 1555-56 of 1983 *M/s Indian Roadways Corpn. & Anr. Vs. State of Rajasthan & Ors.*

Mr. Puri, learned counsel for the appellants, submitted that, nonetheless, an order should be made in terms of an interim order made by this Court in some matters. There is no prayer for such relief in the Writ Petition that was filed before the High Court. Secondly, that was an order pending the disposal of the Civil Appeals that were then before this Court. Such an order cannot,

therefore, be passed in this matter.

The appeal is dismissed. No order as to costs.

From the aforesaid decisions, it would be clear that the consistent view of this Court since the case of Sodhi Transport Companys case (supra) has been that provisions similar to Section 78(5) have been held to be within the legislative competence of the State. In fact, validity of Sections 22-A and 22-B of the Rajasthan Sales Tax Act which was specifically challenged in M/s Indian Roadways case (supra) and Sarna Transport case (supra) were upheld by this Court and the said provisions are in pari materia with the new Section 78 of the 1994 Act.

Mr. Singhvi learned counsel for the respondents, however, relied upon a Division Bench decision of this Court in the case of Sant Lals case (supra). It is primarily because of this decision that the High Court in the present case has come to the conclusion that Section 78(5) was ultra vires. In Sant Lals case (supra) the challenge before the High Court, which succeeded, was to the validity of Section 38 of the Haryana General Sales Tax Act, 1973 and Rule 53 of the Haryana General Sales Tax Rules, 1975 framed thereunder. Section 38 required the clearing or forwarding agents etc. to furnish information and to get a license. The same reads as follows:

38. Furnishing of information by clearing and forwarding agents, etc.- (1) Every clearing or forwarding agent, Dalal or any other person transporting goods, within the State, who, during the course of his business, handles documents of title to goods for or on behalf of any dealer, shall furnish to the assessing authority the particulars and information in respect of the transactions of the goods in such form and manner, as may be prescribed.

(2) No clearing or forwarding agent, Dalal or any other person transporting goods within the State shall carry on his business unless he obtains from the assessing authority, on payment of a fee not exceeding fifty rupees, a license in the form and manner and subject to such conditions as may be prescribed.

(3) If any clearing or forwarding agent or Dalal or person transporting goods within the State contravenes the provisions of sub-section (1) or sub-section (2), the Commissioner or any person appointed to assist him under sub-section (1) of Section 3 may, after giving the person concerned a reasonable opportunity of being heard, direct him to pay by way of penalty, an amount equivalent to twenty per centum of the value of goods in respect of which no particulars and information has been furnished under sub-section (1).

Explanation.- For the purpose of this section-

(i) Dalal shall include a person who renders his services for booking of, or taking delivery of, consignments of goods at a Railway Station, booking agency, goods transport company office, or any place of loading or unloading of goods or contrives, makes and concludes bargains and contracts for or on behalf of any dealer for a fee, reward, commission, remuneration or other valuable consideration or otherwise;

(ii) person transporting goods shall, besides the owner, include the manager, agent, driver, employee of the owner or person incharge of a place of loading or unloading of goods or of a Railway out-agency, city booking office or city booking agency, when run by a private person under a contract with the Railways but excluding a rail head or a post office, or of a goods carrier carrying such goods, or a person who accepts consignments of such

goods for despatch to other places or gives delivery of any consignment of such goods to the consignee.

After referring to the definition of dealer in Section 2(c) and taking note of the fact that Section 37 provided for the establishment of check-post or barrier and the inspection of the goods in transit, this Court analysed Section 38(1) and observed as follows:

14. As is clear from a reading of sub-section (1) of the said Section 38, it is not every clearing or forwarding agent or dalal or person transporting goods who comes into possession of the particulars and information required to be furnished under the said Act and Rules for the sub-section itself casts that obligation only upon such clearing or forwarding agents, dalals or persons transporting goods who during the course of their business handle documents of title to goods for or on behalf of any dealer'. It is, therefore, at best, only such clearing or forwarding agents or dalals or other persons transporting goods who handle documents of title to goods for or on behalf of dealers who can be said to have a connection with the transaction of sale thereof. It is only such clearing or forwarding agents, dalals or other persons transporting goods who can be required to obtain from the assessing authority under the said Act a licence for carrying on their business and be made liable to cancellation of such licence and penalty for breach of their obligations under the said Act. However, inasmuch as the said Act does not define what precisely it means by the expression documents of title to goods, it is unclear which class of forwarding or clearing agents or dalals or persons transporting goods it intends to bring within the ambit thereof. To clearing and forwarding agents, dalals and other persons transporting goods who do not handle documents of title to goods for or on behalf of any dealer, the provisions of the said Act can have no application at all. In respect of such persons the State Legislature has no power of legislation under the legislative entry concerned. Qua them the legislation is not in respect of any matter ancillary or subsidiary to the legislative entry which entitles the State Legislature to impose a tax on the sale of goods.

15. The same point can be stated differently. A clearing or forwarding agent or dalal or person transporting goods does not necessarily handle the booking or receipt of goods which have been sold; they could very well be handling goods which a consignor may consign to himself from one town or village to another in the State. The said Act does not take account of this and requires all forwarding and clearing agents, dalals and persons transporting goods to be licenced under the said Act. To this extent the said Section 38 goes beyond the ancillary and subsidiary powers of the State Legislature in enacting a law imposing sales tax.

This Court then concluded as follows:

19. There can be no doubt that the State Legislature would be entitled to impose sales tax upon a person who carries on the business of selling goods and who has in the customary course of business authority to sell goods belonging to the principal. A clearing or forwarding agent, dalal or person transporting goods does not carry on the business of selling goods and does not have, in the customary course of his business, authority to sell goods belonging to the dealer whose goods he books or receives. As we have already stated, there has to be a reasonable and proximate connection between the transaction of sale and the clearing or forwarding agent, dalal or person transporting goods before the State Legislature can, in exercise of the power to levy sales tax, enact legislation concerning him. We are not satisfied that there is such close and direct connection between the transaction of sale of

goods by a dealer and the clearing or forwarding agent or dalal who books or receives such goods or a person who transports such goods within the meaning of the said Section 38.

It is for the aforesaid reasons that Section 38 was held to be beyond the purview of the State Legislature and was struck down. It will be seen that while the validity of Section 37 of the Haryana Sales Tax Act was upheld by this Court in *Delite Carriers* (supra), it is Section 38, dealing with dalal or clearing or forwarding agents being required to take out a licence, that the court held the section to be ultra vires primarily for the reason that the forwarding or clearing agent or dalal does not carry on the business of selling goods and does not have in the customary course of a business authority to sell goods belonging to the dealer whose goods he books or receives. Section 37 (upheld in *Delite Carriers* case which is similar to 78 here) and Section 38 of the Haryana Act operate differently. The two provisions are not identical and it is presumably for this reason that there is no reference to *Delite Carriers* cases decision in *Sant Lals* case.

The applicability of the decision of *Sant Lals* case (supra) came up for consideration in *Tripura Goods Transport Association and Another vs. Commissioner of Taxes and Others*. The appellants therein were an association which was doing the business of transporting goods within and outside the State of Tripura. On the ground that they were transporters and not dealers within the meaning of the Act, the appellants therein had challenged different provisions of the Tripura Sales Tax Act and the Rules framed thereunder which had required them to obtain a Certificate of Registration and to comply with other formalities prescribed under the Act and Rules. Rules were framed under the Act which were also impugned. Rule 46-A, inter alia, required the transporter to give a complete and correct account of the goods carried by him in a prescribed form which could be inspected by the officer in charge of the check-post or the barrier about the correctness of the statements made therein. Rule 63-A gave the power of search at any place to an officer in charge of the check-post, Superintendent of Taxes or any officer specially empowered by the Commissioner. In furtherance of this power, the driver or any other person in charge of the goods vehicle could be stopped and the vehicle examined and the records inspected. If it was found that the goods are being carried in contravention of the provisions of the Act or the Rules, the officer conducting the search could seize the goods found in the vehicle along with any container or materials used for packing. Rule 64-A lay down the procedure for the registration of transporter etc. For the non-compliance of the provisions of the Act and the Rules, punishments were provided. On behalf of the appellants it was contended that they were mainly transporters, carrying goods of the consignor to the consignee, and they were neither a dealer nor were they doing any business of sale or purchase of any goods and hence the obligations cast on them including punishment for the offences was beyond the legislative competence of the State Legislature under Entry 54 of List II of the Second Schedule. While upholding the validity of the aforesaid provisions, this Court observed as follows:

Every taxing statute has charging sections. It lays down the procedure to assess tax and penalties etc. It also provides provisions to cover pilferage of such revenue by providing such mechanism as it deems fit, in other words, to check evasion of tax and in doing so, if any obligation is cast on any person having connections with the consignor or consignee in relation to such goods, maybe other than a dealer, to perform such obligation in aid, to check evasion and in case he is made liable for any offence, for his dereliction of duty or deliberate false act contrary to what he is obligated to do. In our opinion it cannot be construed to be beyond the competence of the State Legislature. The impugned

provisions are not charging sections, no tax liability is placed on the transporters. We find neither Sections 29, 30, 32 and 36-A nor Rules 46-A, 63-A and 64-A lack any legislative competence. They are within the legislative competence of the State and would fall under List II of Entry 54 of the Seventh Schedule of the Constitution of India.

It also noticed the decisions of this Court in Sodhi Transport Companys case (supra). After referring to Sant Lals case (supra) it was held that the same was clearly distinguishable inasmuch as the provisions of the Haryana General Sales Tax Act were not similar to those which were impugned in the Tripura Associations case (supra). It appears to us that the scheme and the provisions under the Tripura Sales Tax Act and the Rules are similar to that contained in Section 37 of the Haryana Sales Tax Act as well as to Section 22-A of the Rajasthan Sales Tax Act, 1954 and Section 78 of the Rajasthan Sales Tax Act, 1994.

It is thus settled law that provisions to check evasion of tax are within the legislative competence of the States under Entry 54 of List II. This being so, the provisions to make the imposition of tax efficacious or to prevent evasion of tax are within the legislative competence. Unlike the dalals and forwarding agents, as in Sant Lals case, the persons referred to in Section 78(2) are persons concerned with the movement of goods which are sold or likely to be sold. With there being no valid challenge to Section 78(2) a provision contained in sub-section (5) of Section 78 which provides for levy of penalty in case of non-compliance of Section 78(2) can only be regarded as consequential and valid. If there was legislative competence to enact Section 78(2) then the same power contained in Entry 54 of List II could enable the State Legislature to provide for consequence of non-compliance by incorporating sub-section (5) therein. Section 78(5) and Section 78(8) are part of an integral scheme and deal with two separate classes of people referred to in Section 78(2).

Unlike Sant Lals case, here under Section 78(5) levy of penalty is only on the person in charge of the goods. It is he who should have all the requisite documents relating to the title or sale of the goods which are being transported. Penalty under Section 78(5) is leviable under two circumstances. Firstly if there is non-compliance with Section 78(2)(a) i.e. not carrying the documents mentioned in that sub-clause or, secondly if false or forged documents or declaration is submitted. This sub-section cannot relate to personal belongings which are not meant for sale but would relate to those types of goods in respect of which documents referred to in Section 78(2)(a) exist or can exist.

Such submission of false or forged documents or declaration at the check-post or even thereafter can safely be presumed to have been motivated by desire to mislead the authorities. Hiding the truth and tendering falsehood would per se show existence of mens rea, even if required. Similarly where, despite opportunity having been granted under Section 78(5) if the requisite documents referred to in sub-clause 2(a) are not produced, even though the same should exist, would clearly prove the guilty intent. It is not possible to agree with the counsel for the respondents that breach referred to in Section 78(5) can be regarded as technical or venial. Once the ingredients of Section 78(5) are established, after giving a hearing and complying with the principles of natural justice, there is no discretion not to levy or levy lesser amount of penalty. If by mistake some of the documents are not readily available at the time of checking, principles of natural justice may require some opportunity being given to produce the same. This provision cannot be read as to imply that the penalty of 30% is the maximum and lesser penalty can be levied. The legislature thought it fit to specify a fixed rate of penalty and not

give any discretion in lowering the rate of penalty. The penalty so fixed is meant to be a deterrent and we do not see anything wrong in this. The quantum of penalty under the circumstances enumerated in Section 78(5) cannot, in our opinion, be regarded as illegal. The legislature in its wisdom has thought it appropriate to fix it at 30% of the value of goods and it had the competence to so fix. As held by this Court in *Rai Ramakrishna & Others vs. The State of Bihar* at 910; The objects to be taxed so long as they happen to be within the legislative competence of the legislature can be taxed by the legislature according to the exigencies of its needs, because there can be no doubt that the State is entitled to raise revenue by taxation. The quantum of tax levied by the taxing statute, the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the legislature, and in dealing with the contention raised by a citizen that the taxing statute contravenes Art. 19, courts would naturally be circumspect and cautious as such there cannot, in the present case, be any valid challenge to the rate of penalty provided for in Section 78(5) of the Act.

Following the decisions of this Court in cases of *Sodhi Transport Co. and others* (supra), *Delite Carriers* (supra), *Indian Roadways Corporation* (supra) *Sarna Transport Corporation* (supra) and *Tripura Goods Transport Association* (supra) we hold that the provisions of Section 78(5) of the *Rajasthan Sales Tax Act, 1994* are valid and the impugned decision of the High Court in this regard is not correct. These appeals, except Civil Appeal No. 1321 of 2001, are accordingly allowed. Civil Appeal No. 1321 of 2001 is dismissed. Parties to bear their own costs.

.....J.
[B.N. Kirpal]

...J.
[N. Santosh Hegde]

.J.
[B.N. Agrawal]

October 4, 2001.