HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

STR No. 1/2024

Dated: 28th of July, 2025.

1. **Commissioner State Taxes,**
   J&K Government,
   Excise & Taxation Complex,
   Solina, Rambagh, Srinagar/
   Rail Head Complex, Jammu.

2. Assessing Authority, Commercial Taxes Check Post,
   Lower Munda, Kashmir
   [Presently State Tax Officer,
   Office of Dy. Commissioner, State Taxes
   (Enforcement) South, Lower Munda, Kashmir].

… Petitioner(s)

Through: -
Mr Mohsin-ul-Showkat Qadri, Sr. AAG with
Ms Maha Majeed, Assisting Counsel.

V/s

M/s Reliance Jio Infocomm Limited,
Drangbal Pampore,
Principal Place 1st Floor K. C. Plaza,
Residecy Road, Jammu.

… Respondent(s)

Through: -
Mr Sachin Sharma, Advocate.

CORAM:

Hon'ble Mr Justice Sanjeev Kumar, Judge.
Hon'ble Mr Justice Sanjay Parihar, Judge.

(JUDGMENT)

Sanjeev Kumar-J:

01. This is a Petition by the Commissioner, State Taxes, J&K Government and Another, filed under Section 12-D of the Jammu & Kashmir General Sales Tax Act, 1962 ["the GST Act" for short] read with Section 6 of the J&K Entry Tax on Goods Act, 2000 ["the Act of 2000"] for

seeking a direction to the J&K Sales Tax (Appellate) Tribunal ["the Tribunal"] to refer the following questions of law:

> "(a) Whether the findings returned by the J&K Sales Tax (Appellate) Tribunal are perverse keeping in view the law laid down by the Apex Court holding/ observing that the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law; and
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> (b) Whether invoking of section 67 (1) (o) of the J&K VAT Act, 2005 by the Assessing Authority instead of invoking section 17 (1) (o) of the J&K GST Act, 1962 renders the order passed by the Assessing Authority as well as proceedings vitiated, more particularly section 17 (1) (o) of the J&K GST Act, 1962 is pari-materia to section 69 (1) (o) of the J&K Vat Act, 2005, in view of the law laid down by the Supreme Court of India in case reported as in Ram Sunder Ram v. Union of India (2007) 13 SCC 255."

02. Before we advert to the questions of law sought to be referred by the Petitioners herein to the High Court, we deem it appropriate to give a brief factual background leading to the filing of this Petition.

03. Vide Order dated 16th of December, 2016 passed by the Assessing Authority, Commercial Taxes Check Post, Lower Munda ["the Assessing Authority"], a penalty to the tune of Rs.1,48,17,658/- was imposed upon the Respondent-Company purportedly under Section 69 (1) (o) of the J&K VAT Act, 2005 ["the Act of 2005"]. The penalty was imposed in reference to an incident which took place on 15th of November, 2016 when a vehicle carrying the goods of the Respondent-Company was intercepted at Lower Munda Check Post and it was found that the goods carried by the vehicle had not been cleared at the Commercial Taxes Check Post, Lakhanpur.

04. On the failure of the driver of the vehicle to produce the documents evidencing the clearance of goods/ vehicle at Lakhanpur Check Post, the goods were detained and proceedings under the Act of 2005 were

initiated. Accordingly, notice under Sections 67 (10) and 69 (1) (o) of the Act of 2005 were issued to the Respondent-Company.

05. The aforesaid notices were contested by the Respondent-Company through their Sales Tax Practitioner and, after considering the matter in the light of submissions made by the Sales Tax Practitioner concerned, the Assessing Authority came to the conclusion that the goods were being transferred by the Respondent-Company for its own use and consumption and not for sale and were, therefore, liable to Entry Tax under Section 4 (2) of the Act of 2000. The proceedings under Section 67 (10) of the Act of 2005 were dropped and order for payment of Entry Tax under Section 4 (2) of the Act of 2000 was issued. The Assessing Authority also invoked the penalty provision, i.e., Section 69 (1) (o) of the Act of 2005 and imposed penalty equal to double the amount of tax payable under the Act of 2000.

06. The said Order of the Assessing Authority was called in question by the Respondent-Company before the Appellate Authority. The Appellate Authority rejected the appeal and upheld the Order passed by the Assessing Authority. This constrained the Respondent-Company to approach the Tribunal by way of a second appeal.

07. The Tribunal, having considered the matter in the light of submissions made on both the sides, came to the conclusion that invocation of jurisdiction by the Assessing Authority under Section 69 (1) (o) of the Act of 2005 was uncalled for and, therefore, the entire proceedings were vitiated. There was further direction from the Tribunal to the Petitioners herein to refund the penalty, if any, deposited by the Respondent-Company.

08. Feeling dissatisfied with the Judgment dated 17th of March, 2022 passed by the Tribunal, the Petitioners herein moved an application before the Tribunal under Section 12-D of the GST Act seeking reference of questions of law purportedly arising out of the proceedings of appeal

before the Tribunal. Later, during the pendency of the proceedings, on the concession made by the Petitioners herein, the proceedings were treated as proceedings under Section 75 of the Act of 2005.

09. Be that as it may, the matter was considered by the Tribunal at some length and, after hearing both the sides, the Tribunal came to the conclusion that the questions posed by the Petitioners herein for reference were not the questions arising out of the appeal and were, therefore, not referable to the High Court for determination. This is how the instant Petition has been moved by the Petitioners in terms of second proviso to Section 12-D of the GST Act.

10. Having heard learned Counsel for the parties and perused the material on record, we are of the considered opinion that the questions of law framed by the Petitioners herein for making reference to the High Court for determination actually do not arise out of the proceedings. Once it is conceded by the Petitioners that the goods seized by the authorities at Lower Munda Check Post were leviable to Entry tax Under Section 4 of the Act of 2000, no proceedings should have been initiated, either under the GST Act or the Act of 2005. The only provisions under the Act of 2000 pertaining to penalty is sub-section (3) of Section 4 which reads thus:

> "(3) Any person carrying the goods with documents specified in sub-section (1), which are fake or false in respect of any particulars containing therein, shall be liable to penalty, which shall be equal to double the amount of entry tax payable on such goods."

11. From reading of sub-section (3) of Section 4 of the Act of 2000, it clearly transpires that the penalty can be imposed on the person carrying the goods with documents specified in sub-section (1) only on the ground that the documents accompanying the goods are fake or false in respect of any particulars contained therein. This penalty which is leviable under sub-section (3) shall be equal to the double amount of Entry Tax payable on such goods. Indisputably, it is not the case of the Petitioners

herein that the documents accompanying the goods seized at Lower Munda, Check Post were either fake or false.

12. With a view to find out as to whether there is any provision in the Act of 2000 relating to imposition of penalty for bypassing the Commercial Taxes Check Post, we went through the entire Act. We, however, stumbled on Section 6 of the Act of 2000 which, for facility of reference, is reproduced hereinbelow:

> **"6. <u>Application of certain provisions of the Jammu and Kashmir General Sales Tax Act, 1962:</u>** The provisions of the Jammu and Kashmir General Sales Tax Act, 1962 relating to appeal, revisions, appellate tribunal, power to withdraw and transfer cases, recovery of fines, taxes or penalty, powers by authorized person, powers to give instructions and determination of issues, shall, mutatis mutandis, apply to all such proceedings under this Act."

13. From careful reading of Section 6 of the Act of 2000, it is abundantly clear that the provisions of the GST Act or, for that matter, the Act of 2005 do apply to the proceedings under the Act of 2000, but their application is limited to the provisions relating to appeal, revisions, Appellate Tribunal, power to withdraw and transfer cases, recovery of fines, taxes or penalties, etc., etc. The procedural provisions of the GST Act, of which reference is made in Section 6 of the Act of 2000, have been applied to the proceedings under the Act of 2000 *mutatis mutandis* and, therefore, shall be deemed to be part of the Act of 2000 by reference. The provisions of Section 69 (1) (o) of the Act of 2005 and the provisions of Section 17 (1) (o) of the GST Act have, thus, not been made part of the Act of 2000. In short, the only provisions which are adopted *mutatis mutandis* for the proceedings under the Act of 2000, in terms of Section 6 of the Act of 2000, are either those which pertain to the right of appeal and revision and the forums for hearing such appeals and revisions or to the provisions providing for recovery and refund of fines, taxes and penalties imposable under the Act of 2000. Since, no penalty is imposable under the Act of 2000 for

bypassing the Commercial Taxes Check Post simplicitor, as such, Section 6 of the Act of 2000 cannot be interpreted to create a provision of penalty which otherwise does not exist in the Act of 2000.

14. When a Statute levies tax, interest or penalty, it does so by inserting a charging Section by which a liability is created or fixed and then proceeds to provide machinery to enforce the liability. The Section in the Statute that creates or fixes liability, whether it is tax, interest or penalty, is known as 'Charging Section' and the Section that provides mode for recovery and collections of tax, interest or penalty is known as 'Machinery Provision'. The penalty is a statutory liability and is in addition to tax and, therefore, can only be created by a 'Charging Section'. This view we have taken is fortified by a Judgment of the Hon'ble Supreme Court rendered in case titled **'M/s Khemka and Co. (Agencies) Pvt. Ltd. v. State of Maharashtra'**, reported as **(1975) 2 SCC 22**. Paragraph Nos. 25 to 28 are relevant and reproduced hereunder:

> "25. Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act. Reference may be made to section 28 of the Indian Income-tax Act, 1922 where penalty is provided for concealment of income. Penalty is in addition to the amount of income-tax. This Court in Jain Brothers & Ors. v. Union of India said that penalty is not a continuation of assessment proceedings and that penalty partakes of the character of additional tax.
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> 26. The Federal Court in Chatturam & Ors. v. Commissioner of Income-tax, Bihar said that liability does not depend on assessment. There must be a charging section to create liability. There must be, first a liability created by the Act. Second, the Act must provide for assessment. Third, the Act must provide for enforcement of the taxing provisions. The mere fact that there is machinery for assessment, collection and enforcement of tax and penalty in the State Act does not mean that the provision for penalty in the State Act is treated as penalty under- the Central Act. The meaning of penalty under the Central Act cannot be enlarged by the provisions of machinery of the State Act incorporated for working out the Central Act.

> 27. This Court in State of Tamil Nadu v. K. A. Ramudu Chettiar & Co. said that the power to enhance assessment which was contained in the Madras Act of 1959 though such power was not available under the 1939 Act would be available in respect of assessment under the Central Act. Enhancement it of assessment is in the process of assessment. It is a procedural power. The liability to tax is created by the statute. Therefore, when the power to assess is attracted a fortiori enhancement is within the power.
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> 28. For the foregoing reasons we are of opinion that the provision in the state Act imposing penalty for non-payment of income-tax within the prescribed time is not attracted to impose penalty on dealers under the Central Act in respect of tax and penalty payable under the Central Act. There is no lack of sanction for payment of tax. Any dealer who would not comply with the provisions for payment of tax, would be subjected to recovery proceedings under the public Demands Recovery Act. A penalty is a statutory liability. The Central Act contains specific provisions for penalty. Those are the only provisions for penalty available against the dealers under the Central Act. Each State Sales Tax Act contains provisions for penalties. These provisions in some cases are also for failure to submit return or failure to register. It is rightly said that those provisions cannot apply to dealers under the Central Act because the Central Act makes similar provisions. The Central Act is a self-contained code which by charging section creates liability for tax and which by other sections creates a liability for penalty and impose penalty. Section 9(2) of the Central Act creates the State authorities as agencies to carry out the assessment, reassessment, collection and enforcement of tax and penalty by a dealer under the Act."

15. It is, thus, trite that penalty, being a liability and a sort of additional tax, requires constitutional mandate for its imposition. Article 265 of the Constitution of India provides that no tax shall be levied or collected, except by authority of law. It is, thus, well settled that the penalty is like addition tax and can only be charged or levied by a substantive 'Charging Section'. In the instant case, Section 4 of the Act of 2000 is a standalone 'Charging Section' dealing with imposition of penalty and provides for its imposition only if the documents accompanying the taxable goods are found false and forged with regard to particulars containing therein. Section 6 of the Act of 2000 is merely a 'Machinery Provision' that is by reference to GST Act/ Act of 2005.

16. There may be lacuna in the Act of 2000, but the Court has to interpret and apply the provisions of the Statute as they stand. We also find it little anomalous that a person, who violates law and does not report the concerned Check Post for verification of the documents and the goods, is not held liable for any penalty and would be let off only by payment of the Entry Tax leviable under the Act of 2000. This was something for the Petitioners herein to ponder over and take remedial measures, if they so deemed it fit. This lacuna was required to be taken care of at the appropriate stage but the legislation has now been repealed, therefore, nothing more is required to be said on the issue. However, in the instant case, the debate on the various provisions of the GST Act and the Act of 2005 was totally uncalled for and the forums below were unnecessarily kept engaged on the issues that never arose for determination in the proceedings. It is, thus, high time that we put quietus on the issue.

17. For all the aforesaid reasons, we find no merit in this Petition and the same is, accordingly, **dismissed**. Interim direction(s), if any subsisting as on date, shall stand vacated.

(Sanjay Parihar)
Judge

(Sanjeev Kumar)
Judge

SRINAGAR
July 28th, 2025
"TAHIR"

i. Whether the Judgment is approved for reporting? **Yes**.