IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

FRIDAY, THE 20TH DAY OF DECEMBER 2013/29TH AGRAHAYANA, 1935

WP(C).No. 26735 of 2010 (N)

PETITIONER :

A.JOHN KENNEDY,PROPRIETOR,MEGHA
DISTRIBUTOR, OFFICE AT 15/650, KUNNATHUR MEDU
COIMBATORE MAIN ROAD, PALAKKAD.

BY ADVS.SRI.A.M.SHAFFIQUE (SR.)
SRI.SIJO GEORGE

RESPONDENTS :

1. STATE OF KERALA
REPRESENTED BY ITS SECRETARY, MINISTRY OF FINANCE
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM, .

2. SECRETARY, TAXES DEPARTMENT,
GOVERNMENT OF KERALA, GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM, .

3. COMMISSIONER OF COMMERCIAL TAXES,
COMMERCIAL TAXES DEPARTMENT, GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM

4. THE ASSISTANT COMMISSIONER,
(ASSESSMENT)COMMERCIAL TAXES, SPECIAL CIRCLE
PALAKKAD.

BY GOVERNMENT PLEADER SRI. SUDHEESH KUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 12/9/2013, THE COURT ON 20-12-2013 DELIVERED THE FOLLOWING:

BP

WP(C).No. 26735 of 2010 (N)

APPENDIX

PETITIONER'S EXHIBITS :

P1: EVIDENCES RELATING TO PAYMENT TO TAX WITH INTEREST ON 20/10/2005 AND 1/7/2010.

P2: COPY OF THE JUDGMENT IN WPC 36645/07.

P3: COPY OF THE COMMUNICATION DT 28/6/2010 ISSUED BY THE ROYAL GOVT. BHUTAN TO THE R4.

P4: STATEMENT OF DRAWS FURNISHED ON 3/7/2010.

P5: COPY OF TAX PAID CERTIFICATE FOR THE DRAWS FROM 19/7/2010 TO 31/7/2010 ISSUED BY THE R6.

P6: COPY OF THE NOTICE DT 30/7/2010.

P7: COPY OF THE REPLY DT 6/8/2010 OF THE PETITIONER.

P8: COPY OF THE NEWSPAPER REPORT DT 30/7/2010 IN THE MALAYALA MANORAMA DAILY.

P9: COPY OF THE PENALTY ORDER DT 10/8/2010.

P10: COPY OF THE NOTIFICATION DT 5/4/2010 ISSUED BY THE MINISTRY OF FINANCE, ROYAL GOVERNMENT OF BHUTAN.

P11: COPY OF THE NOTIFICATION DT 20/6/2010 ISSUED BY THE MINISTRY OF FINANCE, ROYAL GOVERNMENT OF BHUTAN.

RESPONDENT'S EXHIBITS : NIL.

//TRUE COPY//

P.A. TO JUDGE

BP

C.K. ABDUL REHIM, J.

W.P.(c) No. 26735 OF 2010-N

DATED THIS THE 20th DAY OF DECEMBER, 2013.

<u>J U D G M E N T</u>

Challenge in this writ petition is against Ext.P9 proceedings issued by the 4th respondent imposing penalty under Section 23 (1) of the Kerala Tax on Paper Lotteries Act, 2005 (the Act for short). Exhibit P6 notice proposing penalty was issued with an allegation that the petitioner had failed to comply with mandate of Section 10 (1) in submitting statement containing particulars of draw of the lotteries for the month of July 2010 and in making payment of tax due thereon, in advance on the 1st day of the preceding month.

2. The petitioner was a registered 'promoter' under the Act, marketing lottery tickets of Royal Government of Bhutan. With respect to marketing of the newly introduced lotteries, “Bhutan Super” and “Bhutan Dear”, for the period from 19-07-2010 to 31-07-2010, the petitioner had submitted the requisite statement and paid tax for 26 daily

draws, amounting to Rs.1.82 Crores along with interest due thereon to the tune of Rs.8,40,000/-, on 01-07-2010. Allegation is that, as per Section 10 (1) the statement should have been submitted along with payment of tax on the 1st day of the preceding month, i.e: on 01-06-2010. In Ext.P6 proposal notice it is mentioned that, from the fact that the petitioner had made voluntary payment of interest it is evident that he was fully aware about launch of the new lotteries with effect from 19-07-2010, even before the due date for filing of statement and for payment of tax. Under Section 23 (1) of the Act a person who fails to furnish statement or return, or fails to pay the tax due under the Act is liable to be imposed with penalty at the rate of Rs.1,000/- for each day of continuing default in addition to penalty of a sum not less than 10% but not exceeding 50% of the amount of the tax due. Alleging that there was wilful suppression on the part of the petitioner, maximum penalty of 50% on the amount of tax due along with penalty @ Rs.1,000/- for 30 days, totaling to Rs.91,30,000/- was proposed.

3. The petitioner filed detailed objections through Ext.P7 contending that, launch of the new lotteries by the Royal Government of Bhutan was announced only on 28-06-2010 and therefore no tax could have been paid prior to that date. It is pointed out that the Royal Government of Bhutan had communicated about their decision to launch the two new lotteries to the 4th respondent, only through Ext.P3 letter dated 28-06-2010. Under such circumstances it was impossible for the petitioner to submit the statement or to make payment of the tax on 01-06-2010. It was further submitted that, the statement was furnished and tax due was paid immediately after obtaining particulars of the draws. There was no failure on the part of the promoter in furnishing the statement or in making payment of the tax due on the lotteries in question. Therefore penalty contemplated under Section 23 (1) is not attracted, is the contention. It is further contended that when the statement was furnished and when advance tax was paid along with interest, there was no failure which attracts imposition of penalty under Section 23 (1).

4. The 4th respondent discarded the objections and confirmed the proposal for imposition of penalty, through the impugned proceedings. Findings in Ext.P9 is that Ext.P3 letter issued by the Royal Government of Bhutan to the 4th respondent contains a reference about the notification issued under Rule 3 (2) and (3) of the Lotteries Regulation Rules, 2010, which is dated 05-04-2010. Therefore it is found that the Royal Government of Bhutan had taken a decision to launch the lotteries in question as early as on 05-04-2010. Hence the promoter cannot plead ignorance about launching of the new lotteries, “Bhutan Super” and “Bhutan Dear”, prior to issuance of Ext.P3 letter. According to the 4th respondent, collection of interest is only compensatory for the delay occurred in payment of the tax amount, but penalty is for deliberate and contumacious omission to make payment as required under law. Since the payment of tax is not made within the time stipulated in the statute, there is wilful failure which attracts penalty. Hence maximum penalty at 50% of the tax amount along with daily penalty of Rs.1,000/- for 30 days was imposed.

5. Contention of the petitioner is mainly on the ground that, the order is totally arbitrary and is vitiated by legal malice and bias. One of the grounds raised is that the impugned order was issued without affording opportunity for personal hearing to the petitioner, despite the mandatory provision requiring such opportunity to be afforded. The proceedings was totally pre-conceived and pre-meditated and there was no independent exercise of statutory power vested on the 4th respondent in a free and fair manner. According to the petitioner, the order was issued only on the directions of respondents 1 to 3 and the 4th respondent was acting only at their mandate and instance. In support of such contention the petitioner had pointed out that there were many instances of belated payment of the advance tax, made along with payment of interest, which were accepted by the 4th respondent. But there was a change in the policy and attitude of the State Government in permitting sale of lotteries belonging to other States and Governments. The authorities were attempting to interfere with sale of lottery tickets of the

Royal Government of Bhutan and the State of Sikkim. The respondents 1 to 3 had instructed the 4th respondent not to receive advance tax from the petitioner. Under such circumstances the petitioner was driven to litigation. This court in Ext.P2 judgment had issued directions for acceptance of advance tax. With respect to payment of advance tax in the present case, the incumbent in the office of the 4th respondent was suspended from service on the allegation that he had failed to impose penalty on the petitioner under Section 23 (1) of the Act. On the next day of issuance of the order of suspension, Ext.P6 notice was issued by another Assistant Commissioner who was given additional charge of the 4th respondent. Hence it is evident that the 4th respondent had not exercised statutory power vested on him independently, but only acted under directions of respondents 1 to 3.

6. Further contention is that there was no ingredients attracting Section 23 (1) for imposition of penalty, because there was no failure to submit statement or to make payment of the advance tax. When the requisite

statement was submitted and tax due was paid, along with interest as prescribed under Section 10 (2), voluntarily by the petitioner, and when such payment was accepted by the 4th respondent, no failure can be attributed. The petitioner could not have complied with the requirements on any earlier date because launch of the new weekly lotteries was communicated only on 28-06-2010.

7. All the contentions of the petitioner was resisted through counter affidavit filed. It is contended that the writ petition itself is not maintainable in view of availability of effective statutory remedy of appeal. It is further contended that the imposition of penalty was for failure to discharge a civil liability which amount to an offence with respect to disregard of statutory provisions. Since the provision is enacted to provide remedy for loss of revenue, penalty under Section 23 (1) is a civil liability. For imposition of such penalty no wilful concealment or mens rea is essential. It is also contended that the failure to submit statement and to make payment of tax within the date stipulated cannot be considered as due to any impossibility, because the

petitioner was well aware about launch of the new lotteries before the due date.

8. Heard; Sri. S. Ganesh, Senior counsel appearing on behalf of the petitioner and Sri. Nidhesh Gupta, Senior counsel appearing on behalf of the respondents.

9. One of the main controversy is regarding maintainability of the writ petition in view of the availability of the statutory remedy. Learned Senior counsel for the petitioner contended that there exists a pure legal question regarding sustainability of penalty under Section 23 (1). Therefore this court is justified in examining validity of the impugned proceedings. Further contention is that the penalty was imposed only on the directions of respondents 1 to 3 and the petitioner cannot expect a fair decision and justifiable interference by the appellate authority, who is subject to administrative and supervisory control of respondents 1 to 3. It is also pointed out that there is a pre-condition for deposit of the entire amount of penalty inorder to entertain the appeal, which makes the appellate remedy onerous. In the particular circumstances of legal malice,

bias and other vitiating factors, the appellate remedy would become an empty formality, is the contention. On behalf of the petitioner reliance is placed on a decision of the Hon'ble Supreme Court in **Siemens Ltd. V. State of Maharastra (2007 (1) KLT 88) (SC).** The apex court observed that, when a notice is issued with pre-meditation, writ petition would be maintainable. In such case, hearing by the statutory authority would not yield any fruitful purpose.

10. In the case at hand, there is evidence to show that there was change in the policy of the Government in not permitting marketing of lottery tickets belonging to the Royal Government of Bhutan and the State of Sikkim, within the territory of the State of Kerala. It is evident from Ext.P2 judgment that there was refusal on the part of the 4th respondent in accepting payment of advance tax. There is also clear evidence that the incumbent in the office of the 4th respondent was suspended on the allegation that he failed to impose penalty on the petitioner under Section 23 (1). It is immediately after the order of suspension that Ext.P6 proposal notice was issued. Hence pre-determination

and pre-meditation in imposing penalty is explicitly clear. Further it is noticed that there is a clear deviation in the allegations raised when comparing contents of the proposal notice and the order imposing penalty. It is also evident that the petitioner was not afforded personal hearing after receipt of Ext.P7 objections. There arise a crucial legal question as to sustainability of penalty under Section 23 (1), based on the contention that there was no 'failure' as contemplated in the said provision. Availability of statutory appellate remedy is not an absolute bar for entertaining a writ petition filed under Article 226, remains the settled legal position. This writ petition was entertained as early as on 20-08-2010 and this court directed the respondents to file detailed affidavit answering each specific contentions. It will be totally unjustifiable to reject the writ petition at this stage on the question of maintainability. Therefore the question of maintainability is found in favour of the petitioner.

11. One of the main question mooted for consideration is regarding sustainability of penalty imposed

under Section 23 (1). A scanning of the relevant provisions will be beneficial. Section 10 deals with payment of tax in advance. Sub section (1) & (2) of Section 10 reads as follows;

> "**10. Payment of tax in advance.-** (1) Subject to such rules as may be prescribed, every promoter shall submit on the 1st day of every month, if the first day being a holiday, on the immediate next working day, to the Assistant Commissioner a statement containing such particulars, as may be prescribed relating to the draws to be conducted during the month commencing from the next succeeding month and shall pay in advance the full amount of tax payable by him under this Act, in respect of the draws shown in the Statement and the amount so payable shall for the purpose of Section 12, be deemed to be an amount due under this Act from such promoter.
>
> (2) If default is committed in the payment of tax for any month, whether a statement as required under Sub section (1) is filed or not, or if the amount of tax paid is less than the amount of tax payable for any month, the promoter defaulting payment of tax or making short payment of tax shall, in addition to the tax, pay interest calculated at the rate of two per cent per month from the date of such default or short payment to the date of payment of such tax."

Section 23 of the Act deals with penalties relating to statement or returns. Sub section (1) of Section 23 reads as follows;

> "**23. Penalties relating to statement or returns**-
> (1) A promoter or other person who fails to furnish a statement or return or who fails to pay the tax due on any statement furnished as required under this Act shall be liable to a penalty of one thousand rupees for each day of default in addition to a further penalty of a sum not less than ten per cent but not exceeding fifty percent of the amount of tax due, together with any tax or interest."

12. On the factual matrix, allegation in Ext.P6 is that the petitioner was in the knowledge about launching of the two new lotteries with effect from 19-07-2010, even before the due, as is evident from the fact that the petitioner had voluntarily made payment of interest along with the tax. The allegation in Ext.P9 is that, from the reference contained in Ext.P3 it is evident that a notification as contemplated under Rule 3 (2) & (3) of the Lotteries Regulation Rules was issued as early as on 05-04-2010, and therefore it is clear that the Royal Government of Bhutan had taken a decision

with respect to the launch of the new lotteries in May, 2010 itself. Hence it is evident that the promoter was well aware about the launch even before issuance of Ext.P3 letter and even before the due date for payment of tax. It is mentioned in Ext.P9 that, penalty was imposed for deliberate and contumacious omission to make payment as required under law. Since payment of tax is not made as provided under law there is wilful failure, is the allegation.

13. During the course of argument learned Senior counsel for the petitioner contended that, the reference contained in Ext.P3 letter with respect to the notification was only a mistake. The reference number cited was in relation to another notification which is not connected with the new lotteries launched. Copy of the notification dated 05-04-2010 is produced as Ext.P10. It is pointed out that, notification pertaining to the two new lotteries in question was actually issued only on 20-06-2010. Exhibit P11 is the copy of the said notification. On the factual aspects the respondents are not refuting the above position. Therefore it is to be accepted that notification pertaining to launch of

the two new lotteries was issued as per Ext.P11, only on 20-06-2010. Therefore the allegation that the petitioner as promoter was having knowledge about the launch prior to the due date, is seemingly incorrect.

14. Based on the position as enumerated, it is contended that the Royal Government of Bhutan itself had taken a decision to hold draws of the new lotteries with effect from 19-07-2010, only on 20-06-2010. Therefore no return could possibly be submitted on 01-06-2010, without getting complete particulars about the draws. The law does not expect a person to do an impossible task. The legal maxim, 'lex non cogit ad impossiblia' is applicable in the circumstances of the case.

15. But question arises as to whether penalty contemplated under Section 23 (1) will be attracted automatically when there is a failure to submit statement and to pay the tax before the due date. Section 23 (1) casts liability on the promoter who “fails to furnish” a statement or “fails to pay tax due on any statement furnished”, as required under the Act. Learned Senior counsel for the

petitioner contended that on a plain reading of Section 23 (1) it does not provide for imposition of penalty for late a submission of the return. Language of Section 23 (1) is clear and unambiguous that only for non-submission of return and for non-payment of tax, penalty can be imposed. In this regard reliance is placed on decision of the High Court of Calcutta in **Vinar and Co. and another V. Income Tax officer and others (193 ITR (1992) 300)**. Referring to Section 271 (1) (a) of the Income Tax Act, 1961 and Section 20 to 22 of the Companies (Profits) Surtax Act, 1964 it is held that, failure to file a return without reasonable cause alone and not the failure to file return within the time prescribed, is an offence and the Income Tax officer is not entitled to impose penalty on the ground of failure to file return within the time prescribed under the relevant provisions. Finding is that there is no provision in the Income Tax Act imposing criminal liability for delay in deduction or for non-payment in time. Under Section 276-B the delay in payment of income tax is not an offence, is the findings. But it is to be noticed that, in the decided case the question was one pertaining to initiation of criminal prosecution, which may not be made applicable in toto in the case of imposition of penalty, especially when it is contended that the penalty is imposed for a default of the statutory obligation. Question again rings around on the interpretation of Section 23 (1) as to whether it casts a liability on belated submission of return and on belated payment of tax. The wordings, “as required under this Act” contained in Section 23 (1) assumes importance. Whether it can be interpreted that any payment made after the due date stipulated can be construed as a failure of compliance of what is required under the Act. Contention of the petitioner is that delay in submission of the return and in payment of the tax cannot be construed as a failure to comply with Act, when the promoter had voluntarily done it on a subsequent date, along with payment of compensatory interest. Learned counsel contended that when two possible and reasonable constructions of the provision of penalty is possible, construction should always be adopted in favour of the assessee, which saves him from the onerous liability of penalty. In this regard reliance is placed on the decisions in **Tolaram Relumal V. State of Bombay (AIR 1954 SC 496)** & **Commissioner of Income Tax V. Vegetable products Ltd. (88 ITR (1973) 192 (SC)**.

16. Further it is contended that the interpretation of Section 23 (1) by the authorities, only as one attracting penalty on failure to submit return or to make payment of tax was on the basis of a consistent and contemporaneous understanding, during the previous period. Petitioner points out instances of acceptance of belated payments along with interest, without imposition of penalty. Further it is pointed out that, submission of statement and payment of tax along with interest made on 01-07-2010 was accepted without any hesitation or protest, which will indicate about the consistent and contemporaneous understanding that penalty is not leviable under such circumstances. It is only on the basis of extraneous reasons that steps for imposition of penalty was initiated after a period of one month, on 30-07-2006, through Ext.P6. The contemporaneous understanding by the authority is of crucial importance in

construing provisions of a penal Section, is the contention. In support of the dictum the petitioner relies on the decisions in **Desh Bandhu Gupta & Co. and others V. Delhi Stock Exchange Association Ltd. (AIR 1979 SC 1049), State of Karnataka and others V. Balaji Computers and others (2007) 2 SCC 743** and **R & B Falcon (A) PTY Ltd. V. Commissioner of Income Tax (2008) 12 SCC 466**.

17. In construing whether delay in payment within the date as required under the Act will amount to 'failure' attracting penalty, it is to be analysed as to whether it requires any wilful omission, contumacious act or suppression. Learned Senior counsel for the petitioner contended that an order imposing penalty for failure to carry out a statutory obligation is in the nature of a quasi-criminal proceedings, and penalty will ordinarily be attracted only if the person has either acted deliberately in defiance of law or was guilty of conduct which is contumacious or dishonest or acted in conscious disregard of his obligations. It is a matter of discretion of the authority

to be exercised judicially on consideration of all the relevant circumstances, and penalty cannot be imposed summarily because it is lawful to do so. The petitioner relied on one of the oldest decisions of the apex court in this regard, **Hindustan Steel Ltd. V State of Orissa (XXV 1970 STC 211)**. Reliance was also placed on the decision of the Hon'ble Supreme Court in **Union of India V. Rajasthan Spinning and Weaving Mills (2009) 13 SCC 448**.

18. Contradicting the above contentions, Senior counsel appearing for the respondents argued that the provisions in Section 23 (1) indicates that the Section has been enacted only to provide a remedy for loss of revenue and the penalty contemplated is a civil liability. Wilful concealment, deliberate omission or contumacious act is not an essential ingredient for attracting the civil liability. Penalty is imposed is for avoidance of civil liability not amounting to an offence, which flows from the disregard to the statutory provisions. As distinguished from a penalty for an offence imposed when there is an element of mens rea, the penalty in this case is compensatory in nature. He had

placed reliance on the decision of the Hon'ble apex court in **State of U.P. and others V. Sukhpal Singh Bal (2005) 7 SCC 615**. The Court observed, "penalty" is a slippery word and it has to be understood in the context when it is used in a given statute. The penalty may be subject matter of breach of statutory duty. It may be subject matter of a complaint in ordinary parlance. The proceedings may cover penalty for avoidance of civil liabilities which do not constitute offence against the State. This distinction is responsible for any enactment indicated to protect public revenue. It is held that Section 10 (3) of the U.P. Motor Vehicle Taxation Act is compensatory and penalty is levied for failure of a statutory duty for non-payment of tax under the Act, which is intended to protect public revenue, and it is enacted as a deterrent for tax evasion.

19. Learned Senior counsel had further relied on a more recent decision of the Hon'ble Supreme Court in **Union of India and others V. Dharamendra Textile Processors and others (2008) 18 VST 180 (SC)**. Referring to Section 271 (1) & (c) of the Income Tax Act,

1961 it is held that the provision is enacted to provide remedy for loss of revenue and the penalty under that Section is a civil liability for which wilful concealment is not an essential ingredient. In yet another decision of the Supreme Court in **Assistant Commercial Tax officer V. Bajaj Electricals Ltd. (2008) 18 VST 436 (SC)** it is held that penalty leviable under the provisions of the Rajastan Sales Tax Act, 1994 for failure to comply with the statutory provisions, is not criminal or quasi-criminal in nature. The penalty is only for a statutory offence. There is no question of proving any intention or mens rea, as the same is excluded from the category of essential element for imposing penalty. The penalty is attracted as soon as there is contravention of the statutory obligation. Intention of parties committing such violation is wholly irrelevant, is the finding.

20. Per contra, it is contended on behalf of the petitioner that, the question as to whether penalty contemplated under Section 23 (1) requires mens rea or whether it is merely a civil liability which is intended to

compensate for loss caused to the State by breach committed, is a matter which depends on interpretation of the whole scheme of the statute. When Section 10 (2) of the Act provides for filing of late return on payment of tax along with interest at 2% per month, which will fully compensate the revenue from any loss, the provision can only read and understood as on which is made not to compensate the State, but to punish the assessee for his wilful default or of contumacious conduct. Therefore the judgments relied on by the revenue is clearly distinguishable and have no application in the present case, is the contention. The impugned order was issued on the footing that imposition of penalty requires deliberate, contumacious or wilful act on the part of the petitioner in committing the breach. In the judgments relied on by the revenue the scheme of the statutes does not provide for compensating loss caused on account of default of the assessee. But in the case at hand Section 10 (2) is clear and specific on the aspect of compensating loss. Further the contemporaneous understanding of the authorities was that, for imposition of penalty under Section 23 (1) element of mens rea is essential. Therefore the authorities cannot content that imposition of penalty under Section 23 (1) is merely a civil liability which does not require any element of mens rea, is the contention on behalf of the petitioner.

21. On an evaluation of the rival contentions, this court is of the considered opinion that penalty contemplated under Section 23 (1) is not in the nature of criminal or quasi-criminal proceedings. But the penalty is included only for statutory violations. The element of mens rea need not be proved there is no necessity for attributing deliberate, contumacious or wilful act on the part of the defaulter. The penalty is in the nature of civil liability to be imposed on contravention of the statutory obligations. But what exactly is the statutory obligation under Section 10 (1) & (2) is the crucial question. As observed above Section 10 (2) permits belated filing of statement and belated payment of tax along with payment of interest. In other words, the provision under Section 10 (2) facilitate the revenue to compensate loss due to belated payment if any, by way of collecting

interest. In a case where the promoter voluntarily submitted statement and paid tax along with interest due under Section 10 (2), it cannot be held that there was failure to submit statements or to make payment of advance tax. The authority cannot impose penalty in such case, after accepting the belated payments, alleging that there was failure to furnish statement or to pay tax due within the date required under the Act. When the statute enables for payment of tax along with interest on any date after the due date stipulated, it cannot be construed that there occurred a failure to furnish statement and to pay tax as required under the Act. In the case at hand it is evident from Ext.P9 that penalty was imposed on the specific allegation that the penalty is intended for deliberate and contumacious omission to make payment of tax as required under law. On the facts of the case it is proved that the petitioner was not in position to comply with the requirements within the due dates stipulated. Hence they cannot be attributed any deliberate, contumacious or wilful omission. As observed above, the provision is construed as one to compensate loss sustained to the revenue. But as long as Section 10 (2) provides for collection of interest on belated payment it cannot be accepted that Section 23 (1) is intended to compensate loss on the basis of the belated payment. Therefore it is to be declared Section 23 (1) will not be attracted in the circumstances when the promoter made voluntary payment of tax along with interest and when the authority had accepted such payment on date subsequent to the due date of payment stipulated. In arriving at such a conclusion the theory of beneficial interpretation in favour of the assessee as well as the theory of consistent and contemporaneous understanding is also was taken note of. More over no penalty can be sustained alleging failure of an impossible act.

22. Apart from the above aspects, the petitioner is successful in establishing that there was no independent exercise of power vested on the 4th respondent. Evidently the penalty proceedings was initiated after about one month from the date of acceptance of the tax, on the basis of specific instructions from respondents 1 to 3. The attempts

from the part of respondents to refrain from accepting advance tax from the petitioner with respect to lotteries of the Royal Government of Bhutan and the State of Sikkim, is clearly illustrated. Coupled with that the order of suspension issued against the 4th respondent on the specific allegation of non-imposition of penalty against the petitioner, will clearly indicate that the 4th respondent was acting on the mandate of his higher-ups. Further it is also evident that there was failure to afford opportunity of personal hearing to the petitioner after receipt of objections to the proposal notice. For the cumulative reasons as mentioned above this court has no hesitation to hold that penalty imposed under Section 23 (1) of the Act by virtue of the impugned order cannot be sustained in the eye of law.

In the result the writ petition is allowed. Exhibit P9 order imposing penalty is hereby quashed.

Sd/-
C.K. ABDUL REHIM,
JUDGE.

AMG

True copy

P.A to Judge