

AFR

Reserved

Case :- SALES/TRADE TAX REVISION No. - 326 of 2017

Applicant :- M/S Ntl Logistics (India) Pvt. Ltd.

Opposite Party :- Commercial Tax Tribunal & 3 Others

Counsel for Applicant :- Markanday Singh, Abhishek Rai

Counsel for Opposite Party :- C.S.C.

Hon'ble Pankaj Mithal, J.

Hon'ble Manoj Kumar Gupta, J.

Hon'ble Suneet Kumar, J.

(Per Manoj Kumar Gupta, J.)

This reference to Larger Bench is occasioned by order of one of us (Hon. Suneet Kumar, J) noticing divergence of opinion between judgements of two Co-ordinate Benches in **M/s Prakash Transport Corporation Vs. CCT, 2013 UPTC 1456** and **M/s S.B. International Gularbhoj Vs. The Commissioner, Commercial Tax, Lucknow 2013 UPTC 1144**. The questions that have been referred to us are:-

“(i) which of the two cases i.e. M/s Prakash Transport Corporation vs. CCT or M/s S.B. International Gularbhoj vs. The Commissioner, Commercial Tax Lucknow, lays down the correct proposition of law;

(ii) whether the Transit Declaration Form (TDF) is mandatory requirement in view to the circular issued by the Commissioner read with Section 52 of the Act and Rule 58 of the Rules or in the alternative upon non-production of the TDF on interception of the goods whether a presumption that the goods are meant for sale within the State can mandatorily be drawn in view of Section 52 read with Rule 58 and the circular dated 3 September 2013 issued by the Commissioner.”

In **M/s Prakash Transport Corporation**, a vehicle carrying the goods was seized by the mobile squad of the commercial tax department

of the State on 13.9.2013 on account of non-production of transit declaration form (for short 'TDF'). In response to show cause notice, the noticee produced a TDF downloaded from the official website of the department on 18.9.2013. The authorities refused to place reliance upon the same, as according to them, the TDF should have been carried by the driver alongwith him. Since he failed to carry the same, consequently, it was presumed under Section 52 of the U.P. Value Added Tax Act, 2008 (for short 'the Act') read with Rule 58 that the goods were meant for sale within the State. Resultantly, a seizure order exercising power under Section 48/50/51 read with Rule 58 was passed. The learned Single Judge deciding the validity of the seizure order held that the authorities had no power to seize the goods for non-production of TDF, though the same may attract penal consequences.

In **M/s S.B. International** also the driver of the vehicle failed to produce TDF at the time vehicle was intercepted by the authorities. Here also, it was treated to be a violation of the mandatory provisions of Section 52 read with Rule 58. In response to show cause notice, the vehicle owner produced the TDF generated two days after the interception of the vehicle. As in case of **M/s Prakash Transport**, the authorities did not accept the same but treated the non-production of TDF at the time of interception as a violation of the mandatory provisions of Section 52 read with Rule 58 and directed for seizure of the goods. However, in this case, the seizure order was given a seal of approval by this Court.

Before we proceed to deal with the divergent views, it would be advantageous to take note of certain provisions of the Act and the amendments made therein from time to time.

Section 52 of the Act and Rule 58, which were the edifice upon which the seizure orders rested, read thus:-

“52. Provision for goods passing through the State - *When a vehicle coming from any place outside the State and bound for any other place outside the State, and carrying goods referred to in sub-section (1) of Section 50, passes through the State, the driver or other person in charge of such vehicle shall carry such documents as may be prescribed failing which it shall be presumed that the goods carried thereby are meant for sale within the State by the owner or person in charge of the vehicle.”*

“Rule 58. The transit of goods by road through the State-*The driver or person-in-charge of a vehicle carrying goods referred to in sub-section (1) of section 50, coming from a place outside the State and destined for a place outside the State, passes through the State, the driver or person-in-charge of a vehicle shall carry such documents and follow such procedures as may be determined by general or special order issued by the Commissioner from time to time, failing which it shall be presumed that the goods carried thereby are meant for sale within the State by the owner or person in charge of the vehicle.”*

The present Section 52 was substituted by U.P. VAT (Third Amendment) Act No.22 of 2009 w.e.f. 27.8.2009. Prior to its substitution, it read as under:-

“52. Issue of authorisation for transit of goods through the State--*When a vehicle coming from any place outside the State and bound for any other place outside the State, and carrying goods referred to in sub-section (1) of section 50, passes through the State, the driver or other person in-charge of such vehicle shall obtain in the prescribed manner an authorisation for transit of goods from the officer in-charge of the first check-post or barrier after his entry into the State and deliver it to the officer in-charge of the last*

check post or barrier before his exit from the State, failing which it shall be presumed that the goods carried thereby have been sold within the State by the owner or person in-charge of the vehicle :

Provided that the goods carried by such vehicle are, after their entry into the State, transported outside the State by any other vehicle or conveyance, the onus of proving that the goods have actually moved out of the State shall be on the owner or person in-charge of the vehicle.

Explanation--For the purpose of this section, the hirer of the vehicle shall also be deemed to be the owner of the vehicle.”

The prefatory note mentions the objects and reasons for amending the Act as under:-

“With a view to removing inconvenience to persons including traders and entrepreneurs due to check-posts and barriers established under the said Act and for facilitating free trade and commerce, it has been decided to amend the said Act mainly to provide for,-

(d) omitting the provisions for the establishment of check-post and barriers;

(e) allowing the dealer to download the Form of declaration for import, from the official website of the department;

(f) requiring the driver or other person in charge of the vehicle coming from any place outside the State and bound for any other place outside the State and carrying goods mentioned in sub-section (1) of Section 50, to carry such documents as may be prescribed.”

The origin of check-posts and barriers is traceable to the U.P. Sales Tax Act, 1948. The provisions relating to establishment of barriers and check-posts, even under the previous legislation, had to undergo repeated amendments to deal with the problem of evasion arising out of transactions involving movement of goods into the State to any place outside the State. In **Sodi Transport Co. and others Vs. State of U.P.**

and others, 1986 ATJ 289, the validity of Section 28 and 28-B of the U.P. Sales Tax Act, 1948 as substituted by U.P. Act No.1 of 1973, which related to establishment of check-posts and barriers, was subjected to challenge before the Supreme Court on the ground of legislative competence, unreasonableness and a restriction upon free trade and commerce. These provisions were:-

"28. Establishment of check-posts and barriers - The State Government, if it is of opinion that it is necessary so to do with a view to preventing evasion of tax or other dues payable under this Act in respect of the sale of goods within the State after their import into the State, may by notification in the Gazette, direct the establishment of check-posts or barriers at such places within the State as may be specified in the notification.

28-B. Transit of goods by road through the State and issue of transit pass - When a vehicle coming from any place outside the State passes through the State, the driver or other person in charge of such vehicle shall obtain in the prescribed manner a transit pass from the officer in charge of the first check-post or barrier after his entry into the State and deliver it to the officer in charge of the last check-post or barrier before his exit from the State, failing which it shall be presumed that the goods carried thereby have been sold within the State by the owner or person in charge of the vehicle."

Repelling the contention that the provisions impugned were beyond legislative competence of the State Legislature or placed unreasonable restriction, the Supreme Court held :-

"18. The levy of sales tax on goods which are held to have been sold inside the State cannot be considered as contravening Article 301 of the Constitution. The restrictions imposed are not also shown to be unreasonable. They do not unduly hamper trade. On the other hand they are imposed in the public interest. The contentions based on Article 301 and Article 19 (1)(g) of the Constitution are, therefore, without

substance.

19. The foregoing discussion disposes of the contentions regarding legislative competence or unreasonable character of the provisions contained in Section 28-B of the Act and rule 87 of the Rules. They are introduced, as stated earlier, to check evasion and to provide a machinery for levying tax from persons who dispose of goods inside the State and avoid tax which they are otherwise liable to pay. The law provides enough protection to them and makes provision to enable them to show that they are in fact not liable to pay any tax. The decision of the High Court upholding the constitutionality of Section 28-B of the Act and rule 87 of the Rules does not call for any interference. We uphold the validity of the said provisions.”

The instant Act is successor of the Sales Tax Act, 1948 (later came to be known as U.P. Trade Tax Act, 1948). Prior to amendment of the instant Act, it contained similar provisions relating to establishment of check-posts and barriers to prevent and detect evasion of taxes in transactions taking place in the name of inter-State trade. Although the validity of similar provisions was upheld by the Supreme Court in **Sodi Transport**, but the State Government was conscious of the fact that it took long time to clear the consignments at the check-posts, resulting in long queues and wastage of time. There was also a persistent demand from the business community to solve the problem. To overcome the malady, the Government decided to abolish check-posts and barriers, but at the same time, it put in place a different mechanism to safeguard the interest of the revenue while taking care of the concerns of the business community. Now, by virtue of the substituted provisions of Section 52 read with Rule 58, driver or person in charge of a vehicle carrying goods

from outside the State, having his destination to some other State, instead of the requirement of obtaining transit pass from the first check-post and then surrendering it at the exist check-post, is under obligation to carry the documents as are specified by general or special order issued by the Commissioner from time to time, failing which, it is presumed that the goods carried thereby are meant for sale within the State.

The Commissioner Commercial Tax Uttar Pradesh in exercise of power under Section 52 read with Rule 58 issued different circulars from time to time, but the common feature of these circulars was the laying down of a mechanism for obtaining duly filled TDF by the concerned person from the official website of the department before the journey commences. One of the disclosures to be made therein was the route that would be followed while taking the goods through the State. The circulars also provided for specified time limit within which the vehicle had to leave the State boundaries. The power of the Commissioner to prescribe a form in this regard was subjected to challenge in **Prakash Parcel Service Limited Vs. State of U.P. and others, 2013 U.P.T.C. 912** and a Division Bench of this Court, while upholding the said power, observed as under:-

“...On invocation of language of the Apex Court, the construction that would best achieve the purpose and object of the Statute should be adopted, we find that the form in dispute is to curb the tax evasion and not more than that. It does not cause any tax burden or financial burden on a dealer. The driver or incharge of the vehicle is required to get the down loaded the document in the shape of the form and after filling up the blanks by supplying requisite information which are with him but spread over, in a consolidated form, shall carry the document. In view of the Sodhi Transport

Company Case (supra), it is crystal clear that the provision relating to necessary documents to be carried by a driver of the vehicle passing through the State of U.P. is a machinery provision. It does not charge on the subject. It is enacted to insure and keep a watch on a person who has brought the goods inside the State and intended to take it outside the State of U.P., enter the State of U.P. actually for taking them out. If he carries such form while passing through the State of U.P., then, there would not be any liability at all. The practical side is that such a person/driver/incharge of the vehicle would also be in a better position to prove that the goods carried by him are not liable to be taxed in the State of U.P.. In that sense, such a provision is beneficial to honest transporters as well as to the department to check tax evasion.”

In one of the later judgments of this Court in **M/s Seema Enterprises, Canal Avenue Vs. The Commissioner, Commercial Tax, U.P., Lucknow, 2013 52 NTN DX 237** the TDF prescribed by the Commissioner by Circular dated 12.12.2012 was found to be lacking in certain material aspects. Consequently, directions were issued by the Court to the Principal Secretary, Financial Institutions to consider making changes in the procedure, as under:-

“Now under Section 52 of the Act read with Rule 48 of the Rules and circular there is a provision for obtaining the Transit Declaration Form by downloading the details of the goods in the departmental website but no mechanism is provides for the surrender of the said transit declaration form. It is very ridiculous. The check posts have been abolished and now the officials sitting in the mobile squad checks the vehicles in route. Everything has been left open on the discretion and the whims of the commercial tax officers of the mobile squad. They have been allowed to act as uncrowned king to operate in any manner in which they may like. It is open to the Mobile Squad to check the vehicle or not and even allow the vehicle to go unnoticed with the unethical understanding and collusion between the transporter/trader and Commercial Tax authorities or for any other reason. There is no mechanism provided under the Act and Rules to verify after the issue of Transit Declaration

Form as to whether the goods had crossed the State or not. In such situation, after the issue of Transit Declaration Form, it would be difficult to raise presumption that the goods have been sold inside the State except in cases where the driver is caught unloading the goods inside the State.

In my opinion, this mechanism has left the scope of large scale tax evasion and the scope of corrupt practices.

In view of the above, I direct the Principal Secretary, Financial Institutions to look into the matter and review the mechanism provided under the Act and take steps to provide such mechanism to check evasion and corrupt practices and may think to revive the earlier provision as was available under the U.P. Trade Tax Act.”

In compliance of the above directions, the Commissioner, Commercial Taxes, Uttar Pradesh issued a Circular dated 3rd September, 2013. The said circular also provided for downloading of a form called TDF-1 from the official website before entry of goods into the State. As in the past, in the said TDF form also the details of the vehicle, the transport company, the weight of the consignments, the route to be taken during movement of goods through the State were required to be disclosed. The TDF-1 would remain valid for four days only from the date of entry of the vehicle, as disclosed in the TDF form. In order to safeguard the interest of the driver and the owner of the vehicle, the number of physical verifications en-route was limited to two. Certain other safeguards were also put in place but at the same time, the circular also stipulated that within 24 hours of movement of vehicle out of the State, the driver/vehicle owner has to upload another form i.e. TDF-2, dully filled, alongwith weighment receipt of the consignment at the time of exit.

In **M/s Prakash Transport**, the Court decided the case in reference

to an identical circular dated 30th July, 2009 issued by the Commissioner, Commercial Tax U.P. and held that there is no provision under the Act which empowers the authorities to seize the goods in default of production of TDF, albeit it could be made a ground for imposing penalty. In taking such a view, the Court also held that in the present era of globalization, checking of vehicles or goods during transport results in hindrance in trade and commerce though it may be necessary to check evasion. The Court also took into consideration the practical aspect that drivers/vehicle owners are mostly illiterate persons and are not amply equipped to download the TDF. The observations made in the judgement are as follows:-

“The Transit Declaration Form as provided by the above circular by the Commissioner has to accompany the goods in transit through the State of U.P. Any deviation or any default in carrying the said Transit Declaration Form would only attract the presumption which has been provided in Section 52 of the VAT Act and Rule 58 of the Rules. The default in carrying the Transit Declaration Form is not a ground specifically provided for the seizure of goods under the VAT Act.

It is not the case of the department that any other document specified under Section 50 of the VAT Act or the Rule 54 of the Rules or as a matter of fact by any other provision of the VAT Act/Rules was not accompanying the goods or was false, incorrect, incomplete or invalid. Therefore, none of the grounds enumerated under the VAT Act actually existed authorising the seizure of the goods.

In the era of globalization, geographical and trade barriers have become things of the past. It is for this reason that the department itself had abolished the check posts. The checking of vehicles or goods during transportation may be necessary for promoting the interest of the revenue but practical experience is otherwise and it is common knowledge that such exercise causes hindrance not only in trade and commerce and delay in transit of goods but also in

the smooth flow of traffic.

This apart one cannot loose sight of the ground reality that in a country like India where most of the people are not literate, one cannot expect a driver or the cleaner of the vehicle to be competent enough to download a Transit Declaration Form, fill it correctly and produce it before the authority on demand. Generally, the driver or the cleaner of the vehicle are not possessed of internet facility. There is no guarantee that at every place of entry in U.P. from outside there is sufficient provision where a person can go and download the Transit Declaration Form. Even if Cyber Cafe is available one is never sure of its proper functioning enabling downloading of Transit Declaration Form round the clock. In such circumstances, the provision for downloading a Transit Declaration Form and to produce it on demand as stipulated by the circular of the Commissioner dated 30.7.09 and 3.9.13 is totally impractical.

In Prakash Parcel Service Ltd. Vs. State of U.P. & others 2013 U.P.T.C. 912 it has been held that as the goods were moving along with necessary documents and the department has neither raised any question or doubt about the genuineness of the documents which were accompanying the goods at the time of interception, merely for the reason that the goods were not accompanied by Transit Declaration Form which was produced subsequently the seizure of goods becomes bad. Therefore, even if the production of the Transit Declaration Form in response to the show cause notice was an afterthought for which no credit could have been given to it in view of Naresh Kumar Vs. Commissioner, Commercial Tax 2013 U.P.T.C.843 wherein it has been held that Transit Declaration Form produced in response to the show cause notice after downloading it subsequent to detention cannot be recognized as an authentic document, as possession and production of Transit Declaration Form for carrying goods through the State of U.P. is not a ground for seizure, the seizure is without jurisdiction. The absence of Transit Declaration Form only gives rise to a rebuttable presumption and may attract penal consequences but the goods cannot be seized for non-production of it.

The answer to the question, therefore, is that the goods cannot be seized for absence of Transit Declaration Form.”

In **S.B. International**, the Court on the other hand held that there was no dispute that the provisions of the Act requiring TDF to accompany

the driver/vehicle owner is mandatory, consequently, TDF generated two days after the goods were intercepted would be of no consequence and accordingly, the seizure of the goods was held to be valid. The relevant extract from the said judgment is as under:-

“This Court after examining the provisions of the Value Added Tax Act made a pointed query from the learned counsel for the assessee as to whether under the provisions of the Value Added Tax Act it is mandatory that the goods which are brought within the State of Uttar Pradesh for being transported to a place outside the Uttar Pradesh must accompany transit pass at the time they enter into the State of Uttar Pradesh or not. The answer given is in affirmative. Therefore, under the Value Added Tax Act, it is mandatorily required that transit pass must be available with the consignment or must be available for downloading from the official website immediately before the goods actually enter into the State of Uttar Pradesh.

In the facts of the case the interception of the goods had taken place on 20th April, 2013 while the transit form produced had itself been generated only on 22nd April, 2013, which is clearly two days after the entry of the goods in the State of Uttar Pradesh. The generation of such transit pass in the opinion of the Court will not in any way dilute the mandatory requirements of the Value Added Tax Act as already noticed above. Therefore, in the facts of the case, this Court is satisfied that there is no illegality in the orders of seizure of the goods and the demand of security for release of the same.”

The basic issue which falls for consideration is whether in the absence of TDF form being produced by the driver/owner, the authorities are justified in drawing a conclusion that sale had taken place within the State and there was an effort to evade the tax liability inviting seizure and penalty provisions. The above issue assumes importance as the authorities have been interpreting Section 52 and Rule 58 as conferring an

unbridled power to seize goods and impose penalty.

Before we answer these questions, we would like to make a brief reference to certain other provisions of the Act. Section 3 of the Act is the charging provision, which levies tax on every dealer on his taxable turnover of sale or purchase or both, as the case may be, of taxable goods.

The relevant part of Section 3 is extracted below:-

“3. Incidence and levy of tax - (1) Subject to the other provisions contained in this Act, every dealer shall be liable to pay tax under this Act, for each assessment year, on his taxable turnover of sale or purchase or both, as the case may be, of taxable goods, at such rates and at such point of sale or purchase as provided under section 4 or section 5:”

The definition of 'dealer' under Section 2 (h) is an inclusive definition and means any person who carries on in Uttar Pradesh (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods directly or indirectly, for cash or deferred payment or for commission, remuneration or other valuable consideration.

Section 2 (ac) defines 'sale' to mean any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) by one person to another, for cash or for deferred payment or for any other valuable consideration and includes,-

- (i) a transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;*
- (ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;*
- (iii) the delivery of goods on hire purchase or any other system of payment by installments;*
- (iv) a transfer of the right to use any goods for any purpose*

(whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) the supply of goods by an association or body of persons (whether incorporated or not) to a member thereof for cash, deferred payment or other valuable consideration;

(vi) the supply, by way of or as part of any service or in any other manner whatsoever of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration,

and such delivery, transfer or supply of any goods under sub-clause (i) to sub-clause (vi) above shall be deemed to be sale of those goods by the person making the delivery, transfer or supply and a purchase of those goods by the person to whom such delivery, transfer or supply is made.

Section 7 prohibits levy of tax on certain sales or purchases. Clause

(a) of Section 7, which is of relevance, is extracted below:-

7. Tax not to be levied on certain sales and purchases- *No tax under this Act shall be levied and paid on the turnover of,-*

(a) sale or purchase where such sale or purchase takes place-

(i) in the course of inter-State trade or commerce; or

(ii) outside the State; or

(iii) in the course of the export out of or in the course of the import into, the territory of India;”

Thus, under Section 3, the charging provision, the liability to pay tax arises on sale or purchase of taxable goods within the State. Section 7 prohibits levy of tax on sales and purchases made in the course of inter-State trade or commerce or beyond the geographical boundaries of the State. A combined reading of the above provisions would make it amply clear that the liability to pay tax under the Act arises only where sale or purchase of taxable goods is made within the State. Section 52 nor Rule

58 impose any tax on any subject or transaction. These are machinery provisions to prevent evasion of tax under the garb of inter-State trade. These are rules of evidence and gives rise to a presumption that in the absence of a driver carrying documents, as prescribed, it would be presumed that the goods carried are meant for sale within the State. Both Section 52 and Rule 58 gives rise to a presumption in favour of the revenue and against the owner or person in charge of the vehicle. The same is discernable from use of the phrase 'failing which it shall be presumed' employed both in Section 52 and Rule 58.

Section 28-B of the U.P. Sales Tax Act, which was subject matter of challenge in **Sodi Transport** contained a similar rule of evidence by providing that driver or other person in charge of the vehicle coming from outside the State shall obtain transit pass from the first check-post and surrender the same at the time of exit from the State, 'failing which it shall be presumed' that the goods carried thereby have been sold within the State. Before the Supreme Court, having regard to the said provision, the argument advanced was that thereby, even a transporter, who is not a dealer, had been brought within the ambit of the Act by creating a legal fiction. In other words, the contention was that the impugned provision attaches liability to pay sales tax even where no sale had actually taken place within the State. In the above context, the significance of the phrase 'shall presume' was dealt with in great detail by the Supreme Court and it was held that it only raises a rebuttable presumption. It was held to be a

rule concerning evidence. It only specifies the person on whom the burden of proof lies. It by itself does not impose any charge on the subject. When a party upon whom the burden lies to rebut the presumption, has produced evidence to show that the real fact is not as presumed, the purpose of presumption is over. The evidence will then determine the true nature of facts. It is only where the presumption is not successfully rebutted, the authorities would be justified in relying upon the rule of presumption. The authority before levying the tax has to arrive at a conclusion by a judicial process that the goods have been sold inside the State and in doing so, it may where the presumption contained under the Act and the Rules had not been successfully rebutted, be justified in imposing tax and penalty by treating the sale to have taken place within the State. The law on the subject laid down in the said judgement applies on all fours to the statutory provisions under consideration. It is fruitful to reproduce in detail the entire discussion on the point from the said judgement:-

“10. We shall now deal with the question relating to the presumption contained in section 28-B of the Act. It is seen that if the transit pass is not handed over to the officer in-charge of the check-post or barrier before his exit from the State it shall be presumed that the goods carried thereby have been sold inside the State by the person in charge of the said goods. It is contended that the said rule virtually makes a person who has not actually sold the goods liable to pay sales tax and it is further argued that a transporter being just a transporter cannot be treated as a dealer within the meaning of that expression as it was defined in the Act at the time when section 28-B was introduced into the Act. The appellants contend that the words 'it shall be presumed that the goods carried thereby have been sold within the State' in section 28-B of the Act as meaning that it shall be conclusively held that the goods carried thereby have been sold within the State to buttress their argument that a tax is being levied on a transaction

which is not a sale at all under Entry 54 of List II of the Seventh Schedule by introducing a legal fiction. This argument overlooks the essential difference between the two sets of words set out above. The meaning of these words would become clear if we read the definitions of the words 'may presume', 'shall presume's, and 'conclusive proof' given in section 4 of the Indian Evidence Act, 1872, although the said Act is not directly attracted to this case. These words mean as follows :

4. 'May presume'.-- Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved; or may call for proof of it;

'Shall presume'.-- Whenever it is directed by this Act that Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved:

'Conclusive proof'. When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

11. In the Indian Evidence Act, 1872 there are three cases where conclusive presumption may be drawn. They are sections 41, 112 and section 113. These are cases where law regards any amount of other evidence will not alter the conclusion to be reached when the basic facts are admitted or proved. In Woodroffe & Amir Ali's Law of Evidence (Vol. I), 14th Edition at page 299 it is stated thus :

"Conclusive presumptions of law are :

'rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases in which the long experienced connection, just alluded to has been found so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and therefore, it is that all corroborating evidence is dispensed with, and all opposing evidence is forbidden (Taylor, Ev., s.71 : Best, Ev., p. 317, s.304').

*

*

*

Rebuttable presumptions of law are, as well as the former, the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion or

the effect of the other. The connection, however, in this class is not so intimate or so uniform as to be conclusively presumed to exist in every case; yet, it is so general that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other in the absence of all opposing evidence. In this mode, the law defines the nature and the amount of the evidence which is sufficient to establish a prima facie case, and to throw the burden of proof upon the other party; and if no opposing evidence is offered, the jury are bound to find in favour of the presumption. A contrary verdict might be set aside as being against evidence. The rules in this class of presumptions as in the former, have been adopted by common consent from motives of public policy and for the promotion of the general good; yet not as in the former class forbidding all further evidence, but only dispensing with it till some proof is given on the other side to rebut the presumption raised.

12. *Having regard to the definition of the words 'may presume', it is open to a court where they are used in its discretion either to draw a presumption referred to in a law or may not. The words 'shall presume' require the court to draw a presumption accordingly, unless the fact is disproved. They contain a rule of rebuttable presumption. These words i.e., 'shall presume' are being used in Indian judicial lore for over a century to convey that they lay down a rebuttable presumption in respect of matters with reference to which they are used and we should expect that the U.P. Legislature also has used them in the same sense in which Indian courts have understood them over a long period and not as laying down a rule of conclusive proof. In fact these presumptions are not peculiar to the Indian Evidence Act. They are generally used wherever facts are to be ascertained by a judicial process.*

13. *The history of the rules regarding presumptions is succinctly given in W.S. Holdsworth's 'A History of English Law' (Vol.IX) at page 140 thus :*

"From time to time the ordinary process of reasoning have suggested various inferences, which have been treated by the courts in different ways. Sometimes they are treated as more or less probable inferences of fact; and it is possible, though by no means certain, that in the remote past most presumptions originated as mere presumptions of fact. Just as in the case of judicial notice, the courts, as a matter of common sense, assume the existence of matters of common knowledge without further proof; so they easily drew an obvious inference from facts proved or admitted, and thus created a presumption, as common sense dictated. And just as the truisms which elementary experience teaches came to

be embodied in maxims which illustrate the origins of the doctrine of judicial notice, so other maxims arose which illustrate the origins, in that same elementary experience, of some of the commonest of the presumptions known to the law. But it was inevitable that as the law developed, some of these presumptions should be so frequently drawn that they took upon themselves the character of rules of laws and we shall see that, owing to the exigencies of primitive methods of trial, the Legislature and the courts were active in creating them. Some of them were made or became only prima facie rules - rules, that is, which were rebuttable by further evidence. Others were made or became irrebuttable, and therefore, in effect, rules of law. Others hovered uncertainly on the border line of rebuttable and irrebuttable presumptions.

14. A presumption is not in itself evidence but only makes a prima facie case for party in whose favour it exists. It is a rule concerning evidence. It indicates the person on whom the burden of proof lies. When presumption is conclusive, it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. Then the evidence will determine the true nature of the fact to be established. The rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts, and circumstances.

16. In our opinion a statutory provision which creates a rebuttable presumption as regards the proof of a set of circumstances which would make a transaction liable to tax with the object of preventing evasion of the tax cannot be considered as conferring on the authority concerned the power is to levy a tax which the legislature cannot otherwise levy. A rebuttable presumption which is clearly a rule of evidence has the effect of shifting the burden of proof and it is hard to see how it is unconstitutional when the person concerned has the opportunity to displace the presumption by leading evidence.

17. We are of the view that the words contained in Section 28-B of the Act only require the authorities concerned to raise a rebuttable presumption, that the goods must have been sold in the State if the transit pass is not handed over to the officer at the check-post or the barrier near the place of exit from the State. The transporter concerned is not shut out from showing by producing

reliable evidence that the goods have not been actually sold inside the State. It is still open to him to establish that the goods had been disposed of in a different way. He may establish that the goods have been delivered to some other person under a transaction which is not a sale, they have been consumed inside the State or have been redespached outside the State without effecting a sale within the State etc. It is only where the presumption is not successfully rebutted the authorities concerned are required to rely upon the rule of presumption in Section 28-B of the Act. It is, therefore, not correct to say that a transaction which is proved to be not a sale is being subjected to sales tax. The authority concerned before levying sales tax arrives at the conclusion by a judicial process that the goods have been sold inside the State and in doing so relies upon the statutory rule of presumption contained in Section 28-B of the Act which may be rebutted by the person against whom action is recorded that a person has sold the goods which she had brought inside the State, then he would be a dealer even according to the definition of the word 'dealer' as it stood from the very commencement of the Act subject to the other conditions prescribed in this behalf being fulfilled. A person who sells goods inside the State of Uttar Pradesh and fulfills the other conditions prescribed in that behalf is a dealer even as per amendments made in 1959, 1961, 1964, 1973 and 1978 to the said definition. There is, therefore, no substance in the contention that a transporter was being made liable for the first time after 1979 with retrospective effect to pay sales tax on a transaction which is not a sale. Tax becomes payable by him only after a finding is recorded that he has sold the goods inside the State though with the help of the presumption which is a rebuttable one.”

The above pronouncement by the Apex Court, in our opinion, clinches the issue and does not leave room for any further discussion. The following conclusions are, therefore, deductible as regards Section 52 and Rule 58:-

- (a) These are machinery provisions and do not *ipso facto* subject any transaction to tax.
- (b) The presumption embodied under the above provisions is a rule of evidence.

(c) The provision permits the authorities to draw a rebuttable presumption against the driver or person in charge of the vehicle that sale had taken place within the State in case he is found not carrying the TDF.

(d) The burden to rebut the presumption is upon the driver or person in charge by leading positive evidence to prove that no sale had in fact taken place within the State and the consignment is meant for transportation outside the State.

(e) Once such evidence is lead, the presumption embodied under the provisions loses its significance and the authorities will have to decide on basis of evidence as to whether sale had taken place within the State or not.

The provisions of the Act contains intrinsic evidence to show that the presumption embodied under Section 52 and Rule 58 is rebuttable and not conclusive. Section 54 of the Act specifies the penalties which could be imposed for various wrongs committed under the Act. Item No.15 of Section 54 stipulates that “Where the driver or person in charge of the vehicle, as the case may be, (i) fails to carry documents referred to in Section 52 and also fails to prove that goods carried in his vehicle are meant for delivery to dealers or person outside the State, he is liable to a penalty specified therein, in addition to the tax, if any, payable by him. The liability to pay penalty arises not merely for failure to carry documents referred to in Section 52 but when the driver or person in

charge of the vehicle also fails to prove that goods carried in his vehicle are meant for delivery to dealers or persons outside the State. It is beyond any pale of doubt that failure to carry documents including TDF ipso facto does not attract penalty but only when the person charged of the wrong doing is unable to lead evidence to rebut the presumption.

The above conclusion also stands re-enforced from Rule 6 (7), which reads thus:-

“(7) In a case in which the driver or person-in charge of a vehicle carrying goods referred to in subsection (1) of section 50, with the documents referred to in Section 52 (Rule 58) to carry such goods out side the State and is found not to carry such goods outside the State, the Commissioner shall nominate the assessing authority for assessment and penal proceedings.”

A plain reading of the above provision would show that driver or person in charge of a vehicle even if carrying documents referred in Section 52 (Rule 58), is found not to carry such goods outside the State, he would be subjected to assessment and penal proceedings. Thus, the material event for imposition of tax or penalty is not failure to carry the documents referred in Section 52 (Rule 58) but failure to prove that goods were meant for delivery to dealer or person outside the State.

There is not much dispute between the parties that the presumption contained under Section 52 and Rule 58 is rebuttable and it is open to the person against whom the rule of presumption is applied to lead evidence and prove that the sale had not taken place nor is intended to take place within the State. The more contentious issue between the parties is

whether the authorities could seize goods for the mere fact that the driver was not carrying TDF during transit of goods through the State. According to Sri B.K. Pandey, learned standing counsel appearing on behalf of the State, as soon as a vehicle is intercepted without the driver carrying the prescribed documents including TDF, a presumption arises that the consignment was meant for sale within the State, and the authorities get invested with the power to seize goods in exercise of power under Section 50 (4) of the Act. In other words, according to him, the statutory presumption embodied in Section 52/Rule 58 is conclusive at the stage of seizure, though rebuttable in penalty proceedings. On the other hand, according to learned counsel for the revisionist, since the presumption is rebuttable, therefore, there is no power of seizure, though it may attract penalty. Alternatively, even if power of seizure would be exercised at the stage of detention of goods during transit, the presumption is rebuttable. If in response to show cause notice issued under Section 50 (4), it is proved by cogent evidence that the sale is not meant to take place within the State, the authorities do not have power to seize the goods.

A brief survey of the relevant provisions would help resolve the issues.

Chapter VII of the Act dealt with check-posts and ancillary provisions. Section 49 of the Act provided for establishment of check-posts to prevent evasion of taxes. The said provision was deleted by U.P.

VAT (Third Amendment) Act, 2009 w.e.f. 27.8.2009. However, the heading of the Chapter was not amended and it continues to remain the same. Section 50 of the Act, also falling under Chapter VII, was drastically amended w.e.f. 27.8.2009 thereby providing that any person importing goods into the State by road could do it after obtaining a declaration in prescribed form. The declaration could be obtained from the assessing authority having jurisdiction over the area, where his principal place of business is situated or, in case there is no such place, where he ordinarily resides. The provision also facilitates, in the alternative, downloading of the declaration form from the official website of the department. Sub-section (3) and (4) of Section 50 which are relevant for our purposes, are extracted below:-

“(3) The driver or other person in-charge of any vehicle carrying any goods referred to in the preceding sub-sections shall stop the vehicle when so required by an officer authorized under sub-section (1) of Section 45 or sub-section (1) of Section 48 and keep it stationary for so long as may be considered necessary by the officer authorised under sub-section (1) of Section 45 or sub-section (1) of Section 48, as the case may be, and allow him to search the vehicle and inspect the goods and all documents referred to in the preceding sub-sections and shall, if so required, give his name and address and the names and addresses of the owner of the vehicle and of the consignor and the consignee of the goods.

(4) Where the officer making the search or inspection under this section finds any person transporting or attempting or abetting to transport any goods to which this section applies without being covered by the proper and genuine documents referred to in the preceding sub-sections and if, for reason to be recorded, he is satisfied after giving such person an opportunity of being heard that such goods were being so transported in an attempt to evade assessment or payment of

tax due or likely to be due under this Act, he may order seizure of such goods.

(5) The provisions of sub-sections (3), (7), (8), (9) and (10) of section 48 shall mutatis mutandis apply to goods detained under sub-section (4), as they apply to goods seized under that section.”

Sub-section (3) of Section 50 invests the authority with the power to stop the vehicle, keep it stationary for so long as may be necessary, search the vehicle and inspect the goods and all documents referred to in the preceding sections and compel the driver or person in charge of the vehicle to give his name and address and the names and addresses of the owners of the vehicles and of the consignor and consignee of the goods. Sub-section (4) confers power upon the officer making the search or inspection to seize the goods after giving him opportunity of hearing if he finds that a person is transporting or attempting to transport any goods to which the section applies without being covered by the proper and genuine documents referred to in the preceding sections. As already noted above, where a vehicle coming from any place outside the State and bound for any other place outside the State is found not to carry the documents prescribed under Section 52 and Rule 58 by the Commissioner it is assumed that the goods carried thereby are meant for sale within the State by the owner or person in charge of the vehicle. This would invest the authorities with the power to invoke Section 50 of the Act, drawing an inference that the goods are meant for sale within the State. The driver or person in charge of the vehicle would naturally not be carrying the form prescribed under Section 50, applicable where the goods imported from

outside are meant for sale within the State. In respect of such a consignment, the provisions of sub-section (4) of Section 50 would then empowers the officer making the search or inspection to seize the goods for not carrying proper and genuine documents.

Rule 55 also relates to inspection of goods in transit and provides as under:-

“Rule 55. Inspection of goods in transit.- (1) *At any place inside the State when so required by an officer empowered under rule 5 to exercise powers under section 45 or section 48, the owner, driver or any other person-in-charge of the vehicle or vessel, as the case may be, shall stop the vehicle or vessel and keep it stationary as long as may be required by such officer. He shall also allow such officer to examine the contents of the vehicle or vessel and to inspect all documents and records relating to the goods carried, which may be in his possession or in the possession of any other person in the vehicle or vessel.*

(2) *If on such examination, the officer finds or has reason to believe that –*

(a) *any one or more consignments are not covered by one or more of the documents referred to in sub-rule (1) of rule 54; or*

(b) *any such documents in respect of any consignment is false, bogus, incorrect, incomplete or invalid, the officer shall issue a notice to the driver or person-in-charge of the vehicle or vessel why the goods should not be seized.*

(3) *The officer, if he is satisfied as to the reason or reasons for the omission or defect, as the case may be, may vacate the notice after recording his finding therefor.*

(4) *If the officer is not satisfied with the explanation furnished by the owner, driver or the person-in-charge of the vehicle, he shall order the seizure of the goods and furnish a receipt to the person aforesaid in respect of the goods seized.*

(5) *The commissioner may from time to time issue instructions with regard to the procedure to be followed*

regarding search and seizure of goods imported into the State from out of State.”

Once again, the officer inspecting the goods in transit is invested with the power to seize goods, if he finds that the documents in respect of the consignment is false, bogus, incorrect, incomplete or invalid. These powers are wide enough to empower the officer making search of goods in transit to seize the goods where TDF is not being carried by the driver or the owner of the vehicle. It would be a case where incomplete or invalid documents are carried during transit.

Section 48 deals with power of an authorised officer to seize goods found in a dealer's place of business, vehicle, vessel or any other building or place or in other contingencies stipulated thereunder. Sub-section (5) of Section 50 makes applicable *mutatis mutandis* the provisions of sub-sections 3, 7, 8, 9 and 10 of Section 48 to goods seized under Section 50. Section 48 reads thus:-

“48. Power to seize goods. (1) *An officer authorised under sub-section (1) of section 45 shall have the powers to seize any goods -*

(i) which are found in a dealer's place of business, vehicle, vessel or any other building or place; or

(ii) which, such officer has reason to believe to belong to the dealer and which are found in any place of business, vehicle, vessel or any other building or place, but are not accounted for by the dealer in his accounts, registers or other documents maintained in the ordinary course of his business;

(iii) which are found in any place of business, vehicle, vessel or any other building or place, and such goods are accompanied by any tax invoice or sale invoice or any other

document pertaining to value of goods, as the case may be, containing value of goods under valued to the extent more than fifty percent of the value of goods prevalent at the relevant time in local market area where the said transaction had taken place, with intention to evade payment of tax.

Provided that a list of all the goods seized under this sub-section shall be prepared by such officer and be signed by the officer and not less than two witnesses.

(2) Where any officer referred to in sub-section (1) has reason to believe that the goods found in any vehicle, vessel, building or place are not traced to any bonafide dealer or the documents issued by a bonafide dealer with respect to the accompanying goods contains wrong particulars or that it is doubtful if such goods are properly accounted for by any dealer in his accounts, registers or other documents, maintained in the ordinary course of his business, he shall have power to seize such goods and the remaining provisions of this section shall mutatis mutandis apply in relation to such seizure.

(3) An officer seizing the goods under sub-section (1) shall take all the measures necessary for their safe custody and forward the list, referred to in the proviso to sub-section (1), along with other documents relating to the seizure to the assessing authority concerned.

(4) The said assessing authority shall serve on the dealer or, as the case may be, the person in-charge of the goods at the time of seizure (hereinafter in this section referred to as the person in-charge) a notice in writing requiring him to show cause, why a penalty should not be imposed.

(5) If such authority, after taking into consideration the explanation, if any, of the dealer or, as the case may be, the person in charge and after giving him an opportunity of being heard, is satisfied that the said goods were omitted from being shown in the accounts, registers and other documents referred to in sub-section (1) or not traced to any bonafide dealer or not properly accounted for by any dealer or the documents issued by a bonafide dealer with respect to the accompanying goods contained wrong particulars or the goods are undervalued to the extent of more than fifty percent of the value of goods prevalent at the relevant time in the local market area where the said transaction had taken place, with intention to evade payment of tax, it shall pass an order imposing a penalty not exceeding forty per cent of the

value of such goods, as he deems fit.

(6) A copy of the order imposing penalty under sub-section (5) shall be served on the dealer or, as the case may be, the person in-charge.

(7) The officer seizing the goods shall serve on the dealer or, as the case may be, the person in-charge an order in writing mentioning the fact of such seizure and indicating the amount, not exceeding such amount as would be sufficient to cover the penalty likely to be imposed, on deposit whereof in cash, the goods so seized may be released in favour of the dealer or, as the case may be, the person in-charge:

Provided that the Commissioner or such other officer, not below the rank of a Deputy Commissioner, as may be authorised in this behalf by the Commissioner, may, for sufficient reasons to be recorded in writing, direct that the goods be released without any deposit or on depositing such lesser amount, or furnishing security in such form other than cash or indemnity bond, as he may deem fit:

Provided further that in case of a person, who is not a registered dealer and against whom penalty order referred to in sub-section (7) has been passed, filing of return by such person and assessment of tax on him may not be necessary.

(8) The penalty or such part thereof as remains after adjustment of any amount deposited under sub-section (7) shall be deposited in the prescribed manner within thirty days of the date of service of the copy of the order imposing the penalty. In default, the assessing authority shall cause the goods to be sold in such manner as may be prescribed and apply the sale proceeds thereof towards the penalty imposed, and subject to the provisions of section 40, refund the balance, if any, to the dealer or, as the case may be, to the person in-charge.

(9) Where the officer seizing the goods, before forwarding the list and other documents referred to in sub-section (3), or the assessing authority at any time thereafter, is of the opinion that the goods are subject to speedy and natural decay or where the tax assessed or penalty imposed, as the case may be, is not deposited in accordance with the provisions of this Act, the officer seizing the goods or the assessing authority, as the case may be, may, without prejudice to any other action that may be taken in accordance with other provisions of this Act, cause the goods to be sold by public auction in the prescribed manner. The sale proceeds of such goods shall

be adjusted towards the expenses of tax assessed or penalty imposed. The balance, if any, shall be refunded to the dealer or, as the case may be, the person in-charge in accordance with the provisions of sub-section (8).

(10) If the amount deposited under sub-section (7) is more than the amount of penalty imposed under sub-section (5), the excess amount so deposited shall be refunded to the dealer or, as the case may be, the person in-charge by the authority with whom it was so deposited, in accordance with the provisions of section 40.”

Section 45 is the power to order production of accounts, documents and power of entry, inspection, search and seizure conferred upon the officer empowered by the State Government in this behalf. Such an officer is invested with the power to require any dealer to produce before him any book, document or account relating to his business and may inspect, examine and copy the same and make such enquiries from the dealer as may be necessary.

Section 46 which is of significance deals with power of search, inspection and seizure in case of a person other than a dealer. It empowers the officer authorised under sub-section (1) of Section 45 to exercise the above powers in respect of a person carrying on an activity ancillary or incidental or in connection with business of a dealer and it includes transporter or any other carrier or forwarding agent of goods or a person who holds in custody any goods belonging to a dealer. These provisions are wide enough to empower the authorised officer under Section 45 to search and seize the goods being carried by a transporter for the purpose of investigating into tax liability.

It is noteworthy that the provisions of seizure of goods both in respect of a dealer as well as a driver or a person in charge of a vehicle (other than a dealer) are not in themselves penal or confiscatory in nature but to secure the interest of the revenue in case ultimately penalty is levied on such person. The same is clear from sub-section (7) of Section 48 which restricts the power of the officer seizing the goods to demand an amount not exceeding such amount as would be sufficient to cover the penalty likely to be imposed and on deposit whereof in cash, the goods so seized are to be released in favour of the person concerned. The aforesaid conclusion is fortified by the proviso to sub-section (7) of Section 48 which empowers the Commissioner to release goods without insisting for any deposit for sufficient reasons to be recorded in writing or to demand such lesser amount or other security other than cash or indemnity bond as he may deem fit. Once again, sub-section (8), though it permits goods to be sold in default to deposit the security demanded as a result of seizure of goods, the excess amount from the sale proceeds after deducting the penalty amount which is ultimately imposed, has to be refunded to the dealer or person in charge. Likewise, where the seized goods are subject to natural and speedy decay, the authorities while being invested with the power to auction the goods, are required to return excess amount of sale proceeds after deducting penalty which is ultimately imposed in accordance with sub-section (8). Again sub-section (10) which requires excess amount, after deducting penalty to be refunded to the dealer or person in charge, evinces a clear intention that the seizure of goods is an

interim measure to secure the interest of the revenue in case ultimately penalty is imposed.

Before the goods are seized, as provided under sub-section (4) of Section 50, the person concerned has to be given an opportunity of hearing. A similar hearing is also stipulated under Rule 55 (2) (b). The order of seizure could only be passed if the concerned officer is satisfied after giving opportunity of hearing that goods were being so transported in an attempt to evade assessment or payment of tax due or likely to be due under the Act. Likewise, under Rule 55 (2) the officer concerned is empowered to inspect the documents and records relating to goods carried and if on such examination, the officer finds or has reason to believe that any such documents in respect of any consignment is false, bogus, incorrect, incomplete or invalid, the officer shall issue notice to the driver or person in charge of vehicle or vessel why the goods should not be seized. Sub-section (3) specifically provides that if the officer is satisfied as to the reason or reasons for omission or defect, as the case may be, he may discharge the notice after recording his findings therefor. Only if the officer is not satisfied with the explanation furnished by the driver or person in charge of the vehicle, by virtue of sub-rule (4) of Rule 55, he can direct seizure of goods.

At this stage, it is apposite to note the penalty provision, i.e. Section 54, which again embodies the principles of natural justice by conferring right in favour of the person concerned to a reasonable opportunity of

hearing before penalty is imposed in addition to tax, if any. The penalty could only be imposed if the driver or person in charge of the vehicle, though found not carrying the documents referred in Section 52, fails to prove that the goods carried in his vehicle are meant for delivery to dealers or persons outside the State. The relevant part of Section 54 reads thus:-

“54. Penalties in certain cases. (1) *The assessing authority, if he is satisfied that any dealer or other person, as the case may be, has committed the wrong described in column (2) of the table below, it may, after such inquiry, if any, as it may deem necessary and after giving dealer or person reasonable opportunity of being heard, direct that such dealer or person shall, in addition to the tax, if any, payable by him, pay by way of penalty, a sum as provided in column (3) against the same serial no. of the said table:*

15.	<p><i>Where the driver or person in charge of the vehicle, as the case may be,-</i></p> <p><i>(i) fails to carry documents referred to in Section 52 and also fails to prove that the goods carried in his vehicle are meant for delivery to dealers or persons outside the State; or</i></p> <p><i>(ii)</i></p> <p><i>(iii)</i></p> <p><i>(iv)</i></p>	<p><i>Tax payable on the value of goods or 40% of the value of goods which ever is higher</i></p>
-----	---	---

Once the scheme of the Act reveals that the seizure is not automatic but a result of quasi judicial process where decision is taken consistent with the principles of natural justice after recording satisfaction regarding

infraction of the provisions of the Act or an attempt to evade payment of tax, it follows as a necessary corollary that the presumption contained under Section 52 and Rule 58 would also be rebuttable at such stage, otherwise providing hearing would be an empty formality and eyewash.

This leads to another question as regards the scope of enquiry which has to be made at the stage of issuance of show cause notice before seizure is directed. As noted above, the seizure of goods is not confiscatory in nature. The title in the goods seized did not vest in the State Government. The object, as stated above, is to secure the interest of the revenue so that if ultimately penalty is imposed, the amount could be set off against the security amount which the person concerned may furnish for getting the seized goods released in his favour. The Commissioner is invested with the power to release the goods even without any deposit or on deposit of such lesser amount or furnishing security in such form other than cash or indemnity bond, as he may deem fit. The above provisions unequivocally evinces the legislative intent that as far as possible the seized goods should be returned to the driver or person in charge as soon as the amount is deposited or the security is furnished. The seized goods should not be kept for a long period as it may not only be prejudicial to the interest of the person concerned but would also pose problem for the revenue to secure the seized goods. Therefore, it is implicit that at the stage of consideration of the explanation before passing order of seizure, a prima facie enquiry as regards ultimate success

of the penalty proceedings has to be undertaken.

Although no time is prescribed under the Act or the Rules as regards the time frame within which explanation is to be furnished and final order has to be passed dropping the proceedings or seizing the goods, but in view of the very object of the provision and the scheme of the Act, the time for replying to show cause notice should be a short period, say 48 hours to a week. If the noticee during this period produces cogent, reliable and unimpeachable evidence to prove that there was no attempt to evade assessment or payment of tax due or offers satisfactory reasons for omission or defect to carry the documents prescribed, the seizing authority if satisfied with the explanation may discharge the notice. The noticee at this stage cannot insist for being provided with opportunity to lead oral evidence or place reliance on documents, the authenticity whereof has to be established by leading further evidence or by lengthy process of reasoning. This would be possible only at the stage of enquiry in pursuance to show cause notice issued during penalty proceedings.

Thus, by way of illustration, there could be a case where driver or person in charge of the vehicle despite having downloaded TDF from the official website before entering the State may, for valid reason or omission, not have carried the same alongwith him but produces the same forthwith in response to show cause notice during seizure proceedings alongwith other supporting documents to prove that consignment is meant

for transportation to a place outside the State. In such a case, the seizing authority if satisfied, will have no other option but to discharge the notice. On the other hand, if the noticee produces evidences which could not be accepted on its face value or seeks time to produce oral evidence of the consignor and the consignee or other witnesses to prove that the consignment was meant for sale outside the State, the appropriate stage for leading such evidence would be during course of penalty proceedings. The authority in such a case, placing reliance upon the presumption embodied under Section 52/Rule 58 would be justified in directing seizure of goods.

In **Naresh Kumar Vs. Commissioner, Commercial Tax, 2013 UPTC 843**, one of us (Hon. Pankaj Mithal, J.) held that documents prepared or manufactured after receipt of notice of seizure would not be taken into consideration. It has been held that:-

“The mandate to consider the documents produced in response to the show cause notice is only with regard to existing genuine and bona fide documents which for one reason or the other could not be produced when the goods were detained but this mandate would not apply to documents which were not in existence at the relevant time and were procured or manufactured subsequently.”

In **Prakash Transport Corporation (supra)**, the Court while deciding the validity of the seizure order noted that the seizure order itself records that except for the fact that TDF form was not produced when the vehicle was intercepted, no other discrepancy was found in the other documents accompanying the goods. The consignor and consignee were

found to be genuine dealers. There was no unloading of goods within the State of U.P. The driver of the vehicle in response to show cause notice also produced a TDF downloaded from the official website, though five days after the vehicle was detained. In the aforesaid background facts, the learned Single Judge held that the seizure was bad. While so holding, the Court also observed that non-production of transit declaration form is not a ground for seizure though it may attract penal consequences. A close reading of the above judgment reveals that the observation that non-production of TDF is not a ground for seizure, was made in the fact situation obtaining in that case. The Court was convinced that the presumption stood adequately rebutted as the authenticity of other documents were not in doubt. In this regard, it also placed reliance on the Division Bench judgement in **Prakash Parcel Services Ltd. (supra)** where the Division Bench after upholding the provision relating to prescription of TDF form by the circular of the Commissioner dated 30.7.2009, held in the facts of that case, that the presumption of sale stood rebutted as the goods were booked from Vallabhgarh Faridabad, Haryana to BHEL, Haridwar, State of Uttranchal, a Government of India Enterprise. The goods were found to be of a nature as were not meant for consumption, use or sale by the public at large. The Court held that the seizure of the goods would, therefore, be unsustainable. The relevant extract from the above judgement is as follows:-

“13. On the merits of the case, the learned counsel for the petitioner submitted that except the down loaded form

prescribed by the Commissioner the goods were moving along with all necessary documents. The department has neither raised nor doubted the genuineness of other documents which were being carried by the driver of the vehicle at the time of interception of the goods. The goods were booked at Ballabhgarh, Faridabad (State of Haryana) to BHEL, a Government of India Enterprises. The details of the consignor and consignee were not found to be incorrect. The goods were not meant for consumption, use or sale by the public at large. The submission is that there was no intention to evade the payment of tax in the State of U.P.. A perusal of the impugned order would show that the goods were intercepted and security for their release was demanded only on the ground that it did not accompany with the downloaded transit pass. Except the above default everything was found in order. Reliance has been placed on certain decisions namely *M/s. Crystal India Limited Vs. Commissioner of Commercial Tax 2012 Tax Law Diary-130*, *M/s. Balaji Timbers and Paints Vs. Commissioner of Commercial Tax, 2010 NTN (43) 521*, and certain other unreported judgments to show that presumption of sale stands rebutted. The learned standing counsel, on the other hand, could not point out anything to the contrary. Even in the case of *Sodhi Transport (supra)* as also in the circular issued by the Commissioner it has been laid down that a rebuttable presumption in absence of necessary documents to be drawn against a person. The Apex Court in the case of *Sodhi Transport (supra)* has examined this issue in depth and laid down that the presumption is rebuttable presumption. This Court in the case of the above relied upon decisions has gone to the extent that if the transit form is furnished subsequently, after the interception of the vehicle, the seizure order becomes bad. The Appellate Authority fixed 15 per cent cash security and bank guarantee to be given for 25 per cent of the value of the goods as a condition for releasing the goods. This order was modified by this Court while passing an interim order by providing that if the petitioner gives the bank guarantee for remaining 15 per cent of the amount also, the goods shall be released in its favour. In absence of any finding by any of the authorities below, that there was an intention to evade the payment of tax, the irresistible conclusion is that the seizure order is bad. On merits, we are in agreement with the submission of the learned counsel for the petitioner, therefore, the seizure order cannot be allowed to stand and is hereby set aside. Resultantly, the bank guarantee furnished by the petitioner, if any, stands discharged and the cash amount, if any, deposited by the petitioner as security is

liable to be refunded forthwith preferably within a period of one month. The point is decided accordingly.”

If we confine the observations made in the judgement in **Prakash Transport Corporation** that the seizure cannot be made for absence of TDF, to the facts of that case, we find nothing wrong in that. At the same time, the said observation cannot be accepted as a general proposition of law, in view of what has been held above.

In so far as the judgement of this Court in case of **S.B. International (supra)** is concerned, it was based more on concession of the parties that carrying of TDF is mandatory without examining the legal provisions and thus, does not appear to lay down any law of general application.

Having regard to the above discussion, the irresistible conclusion is that under the scheme of the Act, the carrying of TDF is both for the benefit of the driver or person in charge of the vehicle as well as revenue as it prima facie establishes that the consignment is meant for transportation outside the State. It is mandatory in the sense that once it is duly carried during transit, the authorities would then not be in a position to draw presumption under Section 52/Rule 58. But, even if such case, it is not conclusive evidence of the fact that such goods are meant for transportation outside the State. If it is found as a matter of fact that the goods had not been so carried out of the State, the authorities would still have power to levy tax and impose penalty [Rule 6 (7)]. On the other

hand, if the driver or the person in charge of the vehicle is intercepted without carrying TDF, a presumption would be raised that the goods carried thereby are meant for sale within the State inviting seizure and penalty. Such a person in response to show cause notice issued to him in course of seizure proceedings, can rebut the presumption contained under Section 52 and Rule 58 by leading cogent and reliable evidence of unimpeachable character to prove that the consignment was not being transported in an attempt to evade assessment or payment of tax due or likely to be due but is destined for sale outside the State. In case he leads evidence to the said effect, the purpose of presumption is over and the authority has to take an informed decision based on judicial process and can direct seizure of such goods only if it satisfied that the goods were being transported in an attempt to evade assessment or payment of tax due or likely to be under the Act or that the reason for omission or defect to carry the required documents was not satisfactory. In such cases, the authority is invested with the power to direct seizure of goods requiring the person concerned to deposit an amount not exceeding such amount as would be sufficient to cover the penalty likely to be imposed and upon deposit whereof in cash, the seized goods would be released in his favour. The Commissioner is authorised to waive the requirement of making deposit or direct deposit of such lesser amount or may require furnishing security in such form other than cash or indemnity bond, as he may deem fit. The driver or person in charge of such a vehicle would get another opportunity to rebut the presumption contained under Section 52 and Rule

58 during course of penalty proceedings. Here he would get a more elaborate hearing and opportunity to lead evidence followed by final order imposing penalty or dropping the proceedings. Based on ultimate outcome of the penalty proceedings, amount, if any, deposited as per provisions of sub-section (7) or sale proceeds under sub-section (9) would be adjusted and the excess amount refunded to him.

We accordingly answer question no. (i) by holding that the observations made in **M/s Prakash Transport Corporation** that good cannot be seized for non-production of TDF was confined to the facts of that case, but cannot be approved as laying down any general principle of law. Again, the observations made in **M/s S.B. International** were based more on concession of the parties than laying down any law of general application. Thus, none of the above judgments lay down any general proposition of law to be treated as a precedent and therefore, no question of conflict arises between the two judgments.

We answer question no. (ii) by holding that the provision relating to carrying of TDF is a machinery provision. The production of TDF during transit is mandatory in the sense that it thereby denudes the authorities of their power to draw presumption under Section 52/Rule 58. Absence of the same does not mandatorily lead to the conclusion that goods are meant for sale within the State. It only gives rise to a rebuttable presumption. The presumption is rebuttable subject to limitations discussed above during course of seizure proceedings and without any limitation

whatsoever at the stage of penalty proceedings.

The reference is answered accordingly.

The papers may now be placed before the regular Bench for deciding the case in accordance with the answer given above.

(Suneet Kumar,J.)

(Manoj Kumar Gupta,J.)

(Pankaj Mithal, J.)

Order Date : 25.01.2019

SL