
(2000) 08 AP CK 0091
In the Andhra Pradesh High Court
Case No : TRC No. 58 of 1992

A.N. Cigarette Trading Company, Hyd.	APPELLANT
Vs	
State of A.P.	RESPONDENT

Date of Decision : 23-08-2000

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 14(8), 22

Citation : (2000) 5 ALD 726 : (2000) 6 ALT 691

Hon'ble Judges : S.R. Nayak, J;S. Ananda Reddy, J

Bench : Division Bench

Advocate : Mr. A.K. Jaiswal, for the Appellant; Special Government Pleader for Taxes, for the Respondent

Judgement

S. Ananda Reddy, J.—This tax revision case is filed by the assessee-dealer aggrieved by the order of the Sales Tax Appellate Tribunal in TA No.1245 of 1988, dated 15-4-1992 whereunder the penalty of five times the tax was confirmed for the assessment year 1979-80.

2. The petitioner is a dealer in cigarettes and other commodities. Originally, it was assessed for the assessment year 1979-80 on the sales of cigarettes alone. On 24-2-1984, the Commercial Tax Officer, Nampally inspected the business premises of the dealer and noticed huge stocks of matches and some other commodities and he also came across some purchase invoices in the possession of a partner of the petitioner firm and the said invoices were in the name of M/s. A.P. General Stores, Hyderabad, which is a sister concern of the petitioner. The said invoices relates to the purchase of matches, detergent powder and supari etc. The assessment was therefore revised on the information received from the Banks. The Assessing Officer also initiated penalty proceedings u/s 14(8) of the A.P. General Sales Tax Act (hereinafter referred to "the Act") and levied penalty five times the tax due on account of suppressed turnover relating to the matches. Aggrieved by the same, the petitioner-dealer preferred appeal to the Appellate Deputy Commissioner. The Appellate Deputy Commissioner, after

considering the material elaborately, confirmed the assessment as well as the penalty of five times the tax due. Further appeal was preferred to the Sales Tax Appellate Tribunal, which confirmed the order of the first appellate authority. Now the present revision relates only to the confirmation of the penalty at five times the tax by the appellate Tribunal.

3, The learned Counsel for the petitioner contended that the Appellate Tribunal did not consider the issue of levability of penalty as well as the quantum that was contemplated under the provisions of Section 14(8) of the Act. It is contended that the Appellate Tribunal had mechanically and without applying its mind confirmed the order of the first appellate authority. The learned Counsel specifically contended that u/s 14(8) of the Act discretion is conferred on the authorities to levy penalty not exceeding five times the tax due. Therefore, it is contended that the maximum penalty is five times the tax due and it does not mean that in every case the penalty leviable is five times the tax due. The discretion is given to the authorities to consider the facts of the case and deal appropriately depending upon the circumstances and therefore the automatic proposal of the Assessing Officer to levy penalty at five times the tax due in the show-cause notice and the final levy of penalty at five times the tax due by the Assessing Officer, which was confirmed by the first appellate authority as well as the second appellate authority, is only mechanical and none of the authorities have exercised any discretion after considering the facts and circumstances of the present case. Therefore, the levy of penalty at five times the tax due as well as confirmation of the same is illegal and liable to be set aside. The learned Counsel also contended that according to the petitioner the sale of matches is not liable to tax at multi-point and therefore, the petitioner was under a bona fide impression that the sales turnover relating to the matches is not liable to tax and the omission to disclose the sales in respect of the matches' turnover is on account of the bona fide belief that it is not liable to tax and not with the intention to defraud the revenue. The learned Counsel also contended that though the authorities gave a finding that the failure to disclose the turnover relating to the matches was wilful, but such finding was not arrived at after pointing out any specific circumstances. The learned Counsel also contended that in fact, the purchase invoices stand in the name of the sister concern and if there are any omissions in respect of such invoices, the turnover should have been added in the assessment of the sister concern M/s. A.P. General Stores. Hence, it is contended that in any case the levy of penalty is too excessive under the facts of the case.

4. The learned Special Government Pleader for Taxes, on the other hand, supported the order of the Sales Tax Appellate Tribunal. It is contended that the authorities, after considering the material on record, gave a finding that the omission to disclose the turnover relating to matches was wilful and therefore the said findings, which is a finding of fact, would not be interfered with by this Court while exercising Revisional jurisdiction u/s 22 of the Act. The learned Counsel also contended that but for the inspection by the Commercial Tax Officer, the

turnover relating to the matches would not have come to light and therefore the disclosure of the turnover relating to the matches is only as a result of the inspection by the Commercial Tax Officer and the omission to disclose the turnover relating to the matches is wilful to avoid the liability of tax and the authorities, after considering the material on record, have recorded a finding that the omission was wilful on the part of the dealer and consequently the petitioner-assessee is liable to penalty in terms of Section 14(8) of the Act. The learned Counsel also contended that the petitioner was given a show-cause notice proposing to levy penalty at five times the tax due and after considering the explanation offered by the petitioner the assessing officer levied penalty of five times the tax due, which was confirmed by the first as well as the second appellate authorities and therefore the same does not suffer from any irregularity, which calls for any interference by this Court.

5. From the above rival contentions the issue that falls for consideration is whether the penalty of five times the tax due relating to the suppressed turnover is legal and sustainable.

6. Though the petitioner claimed that it was under a bona fide impression that the turnover relating to matches is not liable to tax, as according to it, it is not a multi point tax item, we need not detail on this aspect as the statutory authorities after considering the factual aspects gave a concurrent finding that the suppression or omission to disclose the turnover relating to the matches was wilful and when such a finding has been arrived at or recorded by the statutory authorities, we do not find that there is any scope for this Court to interfere in the present circumstances, especially when the turnover came to light only after the inspection conducted by the Commercial Tax Officer in respect of the business premises of the petitioner. However, we are left with the consideration regarding the exercise of the powers conferred u/s 14(8) of the Act.

7. For convenience, the relevant provisions as at the relevant time may be extracted hereunder:

""Section 14(8) : The penalty leviable under sub-section (2), sub-section (3) or sub-section (4) shall not exceed-

(a) five times the tax or fee, due in a case where the assessing authority is satisfied that the failure of the dealer to disclose the whole or part of the turnover or any other particulars correctly, or to submit the return before the prescribed date, was wilful; and

(b) one-half of the tax or the fee, due in a case where such failure was not wilful:

Provided that where such failure occurred due to a bona fide mistake on the part of the dealer, no such penalty shall be levied.

Explanation :--The expression "assessing authority" occurring in this section shall, in relation to licence fee or registration fee, be construed as referring to the licensing or registering authority, as the case may be, under this Act.

8. From the above it is quite clear that as per Section 14(8) the penalty leviable under sub-section (2), sub-section (3) or sub-section (4) shall not exceed five times the tax or fee due in case where the assessing authority is satisfied that the failure of the dealer to disclose the whole or part of the turnover or any other particulars correctly or to submit the return before the prescribed date, was wilful and in case where such failure was not wilful one-half of the tax or the fee. Further, as per the proviso when such failure occurred due to a bona fide mistake on the part of the dealer, no such penalty shall be levied. In the present case there is a clear finding that the omission to disclose the turnover relating to matches was wilful, as per the findings of the authorities below. In the light of the said findings the petitioner is liable to tax u/s 14(8) (a) as per which the penalty leviable shall not exceed five times the tax due. The assessing officer was given the discretion to levy penalty and the maximum is five times the tax due and the minimum may be any amount over and above the amount that was stipulated under clause (b) of Section 14(8) of the Act. In the present case, the grievance of the petitioner is that the penalty was levied by the authority without applying its mind with reference to the discretion that was provided u/s 14(8)(a) of the Act. A perusal of the penalty order shows that the assessing officer proposed to levy penalty at five times the tax due in respect of the suppressed turnover. After receiving the explanation the assessing officer did not consider the aspect whether the penalty is to be levied at five times the tax due or lesser, but passed the order in the following words :

"The assessee have agreed that they have committed the mistake on ignorance of law and unawareness of the taxation; hence the penalty levied on suppressed turnovers is as per the provisions of the APGST Act, as such their contentions are rejected and confirmed the (5) five times penalty to the tax due amounting to Rs.2,58,332.85 on the suppressed turnover; as discussed in the penalty notice."

Similarly, the first appellate authority confirmed the penalty levied by the assessing officer, with the following observations :

"Having regard to the suppressions which are proved to be wilful in nature, and the provisions of law in force and the assessing authority imposed penalty at five times the tax due. On the clear admission of the penalty Appellate to pay tax on the alleged suppressed sales, I do not even experience, difficulty in upholding the imposition of penalty by the assessing authority. For the foregoing reasons the penalty orders passed by the assessing authority are upheld and the appeals dismissed."

The second appellate authority considered the claim of the petitioner and passed the following order confirming the penalty:

"It is clear from the facts and circumstances of the case that the Appellant had suppressed huge stocks of purchases of matches, detergents and supari during the various assessment years and such suppression could be noticed only in view of the inspection of the premises made on 24-2-1984 by the CTO, Nampally. As

already stated above, the purchases of such goods were not accounted for by the Appellant in his account books or in the accounts of his sister concern M/s. A.P. General Stores, Nampally, Hyderabad. Under such circumstances, the assessing authority rightly came to the opinion that the suppression of such stocks was wilful in nature and as such the penalty was levied by the assessing authority at five times of the tax levied on the same, Therefore, the levy of penalty at five times of the tax is quite justified and the first appellate authority rightly held that the levy of penalty at five times of the tax cannot be said to be unjust or improper."

9, From the above it is clear that the authorities below did not exercise the discretion that was provided u/s 14(8)(a) of the Act, whether it is a case for the levy of penalty in an amount equal to the tax due as a result of the suppressed turnover or it is a case requiring a penalty to be levied more than the amount of tax due in respect of the suppressed turnover, judiciously.

10. The learned Counsel for the petitioner referred to and relied upon a judgment of this Court in the case of *Vijaya Wines v. State of Andhra Pradesh* (1978) 42 STC 329 where it was held that the fact that the assessee liable to tax or merely because the assessee had not established that the sales made by him were second sales, it did not automatically follow that the assessee was liable to penalty. Although Section 14(2) sanctions imposition of levy of penalty on the turnover that was not disclosed by the dealer, penalty could not be imposed, unless it was found that the assessee either acted deliberately in defiance of law, or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation.

11. The learned Counsel also relied upon the following observations of the Supreme Court in the case of *Hindustan Steel Ltd. Vs. State of Orissa*, :

".....Under the Act penalty may be imposed for failure to register as a dealer.....But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances....."

Further, the Supreme Court in the case of *Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, , expressed its opinion as under :

".....Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act. Reference may be made to

Section 28 of the India Income Tax Act, 1922, where penalty is provided for concealment of income. Penalty is in addition to the amount of income tax. This Court in Jain Bros. and Others Vs. The Union of India (UOI) and Others, said that penalty is not a continuation of assessment proceedings and that penalty partakes of the character of additional tax....."

12. From the above it is clear that merely there was some addition to the total turnover the same does not give rise to cause for levy of penalty. Further, in addition to the cause giving rise to levy penalty, the authorities are given discretion even in a case where there was a failure to disclose the total or part of the turnover, to levy the penalty from an amount equal to the tax due as a result of the suppressed turnover and which may extend to five times. While levying penalty, the discretion conferred on the authorities has to be exercised properly and judiciously in order to determine the quantum of penalty to be levied. A perusal of the orders passed by the statutory authorities does not disclose that any such discretion was duly exercised. No doubt in the present case the petitioner claimed that the omission was a bona fide action on its part which was not accepted by the authorities. But, however, taking the gravity of the omission, the penalty has to be levied. As the authorities below failed to exercise such discretion to levy appropriate penalty, though in the normal course, it may be a matter for remitting back to the authorities below for exercising such discretion, as the matter relates to an assessment year 1979-80, we deem it appropriate to consider the case on merits, instead of remitting the matter to the authorities. Considering the claim of the petitioner that it was under a bona fide impression that the turnover relating to the matches is not liable to tax at multi-point, the levy of maximum penalty at five times the tax due may not be appropriate. Further, taking into account all attendant facts and circumstances of the case we deem it proper and reasonable to reduce the penalty to three times the tax due in the place of five times the tax due that was levied by the assessing officer, which was confirmed by the appellate authorities.

13. Under the above circumstances, the order under revision is accordingly modified, reducing the penalty from five times the tax due to three times the tax due. The revision is accordingly allowed in part. No costs.