

(1987) 04 AP CK 0003

In the Andhra Pradesh High Court

Case No : C.M.P. No's. 688, 1296 and 1880 of 1987 in T.R.C. No's. 233 of 1986 etc.

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APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 13-04-1987

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 14(4)
Civil Procedure Code, 1908 (CPC) — Section 151
Constitution of India, 1950 — Article 226, 227
Income Tax Act, 1922 — Section 66, 66(2)

Citation : (1987) 67 STC 48

Hon'ble Judges : Upendralal Waghray, J; B.P. Jeevan Reddy, J

Bench : Division Bench

Advocate : K. Raji Reddy, for the Appellant; Government Pleader for Commercial Taxes, for the Respondent

Judgement

B.P. Jeevan Reddy, J.—These petitions raise the question of the power of this Court to grant a stay of collection of tax pending a tax revision case preferred u/s 22 of the Andhra Pradesh General Sales Tax Act.

2. Against an order of assessment made by the assessing authority, an appeal is provided by section 19. A further appeal is provided by section 21 to the Sales Tax Appellate Tribunal. Apart from the above, against an order of assessment made, a power of revision is vested in the Joint Commissioner, Deputy Commissioner and the Commercial Tax Officer, by sub-section (2) of section 20. This power is confined to orders made or proceedings recorded by the authorities, officers or persons subordinate to them. Similarly, sub-section (1) of section 20 confers the power of revision upon the Commissioner of Commercial Taxes. These powers are supposed to be exercised in the interest of Revenue. Against an order of the Joint Commissioner, Deputy Commissioner or the Commercial Tax Officer, under sub-section (2) of section 20, an assessee can file an appeal to the Appellate Tribunal u/s 21. Section 22 provides for a revision to

the High Court against the orders of the Tribunal.

3. Sub-section (2-A) of section 19 says that where an appeal is admitted under sub-section (1) of section 19, the appellate authority may, on an application for stay filed by the appellant, order stay of collection, subject to furnishing of such security and on payment of such part of the disputed tax within such time as may be prescribed, pending disposal of the appeal. Against an order passed by the appellate authority under sub-section (2-A), a revision petition is provided to the Joint Commissioner by sub-section (2-B). The Act, however, does not confer any power upon the Appellate Tribunal to stay the collection of disputed tax pending disposal of the appeal. Such a power has been conferred only upon the Joint Commissioner. Sub-section (6) and sub-section (6-A) of section 21 read thus :

"(6) Where a dealer, objecting to an order passed or proceeding recorded by a Deputy Commissioner of Commercial Taxes under sub-section (4-C) of section 14 of suo motu under sub-section (2) of section 20 has preferred an appeal to the Appellate Tribunal, the Joint Commissioner may, on an application filed by the dealer, subject to such terms and conditions, as he may think fit, order stay of collection of the tax under dispute pending disposal of the appeal by the Appellate Tribunal.

(6-A) The payment of tax and penalty, if any, due in accordance with the order of the first appellate authority or of the Deputy Commissioner suo motu under sub-section (4-C) of section 14 or in revision u/s 20, in respect of which an appeal has been preferred under sub-section (1), shall not be stayed pending disposal of the appeal."

4. A reading of the two sub-sections together shows that pending an appeal before the Appellate Tribunal, the collection of disputed tax shall not be stayed except by and under an order of the Joint Commissioner on an application filed by the dealer.

5. Now coming to the power of the High Court, sub-section (6) and sub-section (6-A) of section 22 are relevant. Sub-section (6-A) was introduced by amending Act 18 of 1985, which amendment had also introduced sub-section (6-A) in section 21. Sub-sections (6) and (6-A) of section 22 read as follows :

"(6) Notwithstanding that a petition has been preferred under sub-section (1), tax shall be paid in accordance with the assessment made in the case :

Provided that the High Court may, in its discretion permit the petitioner to pay the tax in such number of instalments, or give such other direction in regard to the payment of tax as it thinks fit :

Provided further that, if, as a result of the petition, any change becomes necessary in such assessment, the High Court may authorise the assessing authority to amend the assessment, and on such amendment being made the excess amount paid by the dealer shall be refunded to him without interest, or

the further amount of tax due from him shall be collected in accordance with the provisions of this Act, as the case may be.

(6-A) The payment of tax and penalty, if any due in accordance with the order of the Appellate Tribunal in respect of which a petition has been preferred under sub-section (1) shall not be stayed pending the disposal of the petition, but if such amount is reduced as a result of such petition, the excess tax paid shall be refunded in accordance with the provisions of section 33-B."

6. From a reading of the above sub-sections, it appears that pending a tax revision case, the tax has to be paid in accordance with the assessment made in the case. No stay shall be granted pending disposal of such revision except by the High Court, which "may in its discretion permit the petitioner to pay the tax in such number of instalments or give such other direction in regard to payment of tax as it thinks fit". In the face of express language of the Proviso to sub-section (6), it is idle to contend that even the High Court is deprived of the power to stay the collection of the tax pending the revision. The proviso expressly confers a discretion upon the High Court either to fix the appropriate number of instalments for payment of tax or give such other direction as it thinks regard to the language of the proviso, it cannot be said that the only order that the High Court can make is to fix the instalments, as contended by the learned Government Pleader. That is one type of order that the High Court can make. But it can also make appropriate direction with respect to the payment of tax as it thinks fit. It may mean that it can direct a certain portion of the tax to be paid and stay collection of the balance pending the revision. It is true, the proviso does not contemplate an absolute stay. It contemplates that at least some portion of tax should be paid. At the same time, it would be incorrect to contend that the direction to be made by the High Court should necessarily ensure the payment of the entire disputed tax pending, i.e., before the disposal of the revision. We see no warrant for placing such a limited construction upon the words "give such other direction in regard to payment of tax as it thinks fit", occurring in the proviso.

7. We must make it clear that we are concerned at this stage only with the question of power and not with its exercise. We also take due note of the legislative concern expressed in sub-section (6) and sub-section (6-A) - indeed, of other provisions relating to stay of disputed tax pending appeals, referred to above - that ordinarily the collection of tax should not be stayed pending the revision. It is equally true that by the time matter reaches this Court, more than one Tribunal under the Act has confirmed the exigibility of the tax disputed in the revision. But that is a matter which the High Court shall have to and will - keep in view. It will also have regard to the facts of a case before it. Ordinarily, just because a tax revision case is admitted, an order of stay will not follow automatically. But, if the High Court feels that the facts of a particular case do warrant either the payment of tax in instalments or stay of collection of part of the tax dispute, it may make such an order. The court would not stay the

collection of the entire disputed tax except in very grave cases where it feels that there has been a grave miscarriage of justice.

8. We may now refer to a few decisions cited on this aspect. In *POLSETTI NARAYANA RAO Vs. COMMISSIONER OF Income Tax, HYDERABAD.*, , a Bench of this Court considered the power of this Court to stay the collection of disputed tax pending a reference u/s 66 of the Indian Income Tax Act, 1922. In that case the High Court directed the Appellate Tribunal to state a case for its opinion under sub-section (2) of section 66. The question was whether it has the power to stay the collection of the tax pending the reference. The Bench was of the opinion that the High Court does possess such a power u/s 151 of the CPC as well as article 227 of the Constitution. It was held that sub-section (7) of section 66 did not circumscribe or limit the scope of such power. This decision has been disapproved by the Supreme Court in *Commissioner of Income Tax Vs. Bansi Dhar and Sons*, . The Supreme Court held that the High Court has no such power. The only ground upon which the Supreme Court came to the said conclusion is that while answering a reference u/s 256 of the Income Tax Act, 1961, or section 66 of the Indian Income Tax Act, 1922, this Court exercises only an advisory jurisdiction - a jurisdiction of a special nature. It was pointed out that it was not a jurisdiction conferred either by the CPC or by the Charters or by the special Acts constituting such High Courts and that the object of the reference is limited to obtaining opinion of the High Court on the stated questions of law. It was held that in such a situation the power to stay the recovery of tax pending revision cannot be inferred under the doctrine of incidental or ancillary powers. It was, however, observed that pending disposal of the reference the assessee is entitled to apply to the Appellate Tribunal before whom the appeal must be deemed to be pending, for stay, and if the appellate authority acts without jurisdiction or in excess of its jurisdiction or in case it exercises its jurisdiction improperly, the assessee can always approach the High Court either under article 226 or 227 of the Constitution.

9. It must, however, be mentioned that the above decisions pertain to the power of this Court in exercise of its advisory jurisdiction and therefore, the principle of the said decisions can have no application herein. Here a revision is provided to the High Court by section 22. The proviso to sub-section (6) of section 22 expressly confers upon the High Court the power either to fix instalments for payment of disputed tax or to make such other appropriate order with respect to its payment as it thinks fit.

10. The learned Government Pleader brought to our notice that where a special enactment made the payment of disputed tax a condition precedent for filing the appeal, the courts including the Supreme Court has upheld its validity. It is certainly so. But we are unable to see as to how the said principle has any relevance to the question at issue before us.

11. For the above reasons, we hold that this Court does have the power to direct the payment of disputed tax either in instalments or in such other manner as it

thinks fit in the circumstances of the given case, pending disposal of the tax revision case. The parameters of the said power have been adumbrated by us hereinbefore.

12. Ordered accordingly.