
(1990) 03 AP CK 0005

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 14730, 15299, 15307, 15311, 15972, 15973, 15974, 15975, 15976, 15981 and 18364 of 1988

Delux Wines

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 31-03-1990

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 14, 14(1), 14(2), 14(3), 14(4)

Citation : (1990) 77 STC 373

Hon'ble Judges : Y. Bhaskara Rao, J;G. Ramanujulu Naidu, J

Bench : Division Bench

Advocate : S.R. Ashok, for R. Narasimha Reddy and S. Anand Reddy, for the Appellant; M. Ramaiah, Government Pleader for Commercial Taxes, for the Respondent

Judgement

G. Ramanujulu Naidu, J.—As common questions of law are involved in this batch of writ petitions, the same can be disposed of together. The main question that arises for consideration in the batch of writ petitions is - the vires, scope and ambit of section 2(1)(s)(ii) and section 14-B of the Andhra Pradesh General Sales Tax, 1957, hereinafter referred to as "the Act".

2. The petitioners in all the writ petitions are dealers carrying on the business in the products of Indian made foreign liquor. W.P. No. 14730 of 1988 relates to the assessment year 1984-85. W.P. No. 15973 of 1988 relates to the assessment year 1983-84. W.P. No. 15972 of 1988 relates to the assessment years 1983-84 and 1984-85. W.P. No. 15299 of 1988 relates to the assessment year 1985-86. W.P. No. 15307 of 1988 relates to the assessment year 1985-86. W.P. No. 15311 of 1988 relates to the assessment year 1985-86. W.P. No. 15974 of 1988 relates to the assessment years 1984-85 and 1985-86. W.P. No. 15975 of 1988 relates to the the assessment years 1984-85 and 1985-86. W.P. No. 15975 of 1988 relates to the assessment years 1984-85 and 1985-86. W.P. No. 15976 of 1988 relates to the assessment years 1984-85 and 1985-86. W.P. No. 15981 and 1988

relates to the assessment year 1985-86. W.P. No. 18364 of 1988 relates to the assessment year 1985-86.

3. As facts in all the cases are almost identical, we take up for consideration the facts in Writ Petition No. 18364 of 1988.

4. Writ Petition No. 18364 of 1988 is filed by M/s. Vinayaka Wines, Nellore, a firm engaged in the business of distribution of I.M.F.L. (Indian made foreign Liquor) products of McDowell Company Limited at Nellore assailing the show cause notice dated 10th October, 1988, issued u/s 14(4) read with section 14-B of the Act by the Commercial Tax Officer-II, Nellore, proposing to reopen the assessment made for the assessment year 1985-86 and determining the alleged escaped turnover at Rs. 38,77,207. For the said assessment year, the assessee returned a net turnover of Rs. 1,67,14,347 and claimed exemption on a turnover of Rs. 2,85,08,541. Completing the assessment, the Commercial Tax Officer-II, Nellore, by his order dated 12th May, 1987, determined the net turnover at Rs. 1,83,40,949, after due verification of the books of accounts of the assessee maintained in the regular course of business. While so, the impugned notice was issued alleging that the prices charged by the petitioner for his products were low when compared to the prevailing market prices charged by other dealers in the market for similar products and that no dealer would sell fast moving liquor at lesser value when the market value was high. So alleging, the Commercial Tax Officer-II, Nellore, proposed to determine the difference between the sale price charged by the petitioner and the alleged prevailing market price charged by similarly placed dealers as "escaped turnover" and proposed to assess the same to sales tax. The alleged escaped turnover was accordingly determined at Rs. 38,77,207. From the statement enclosed to the show cause notice, it is evident that the Commercial Tax Officer adopted the rates charged by M/s. Deluxe Wines and Sreerama Wine Corporation, two other dealers carrying on the same business at Hyderabad, as the prevailing market prices and determined the difference between the prices charged by the said dealers and the prices charged by the petitioner, as escaped turnover.

5. Indian made foreign liquor is taxable u/s 5(2)(d) read with the Sixth Schedule to the Act, which reads as follows :

"SIXTH SCHEDULE Goods in respect of which tax is livable u/s 5(2)(d) (added by Act No. 11 of 1984, with effect from 8-7-1983).

-----							Sl.	Description
Point	of	levy	Rate	of	tax	No.	of	goods
-----							(1)	(2) (3) (4)
-----							1.	Country

Liquor (a) At every point of 10 paise in the Sale other than at Rupees the point of last sale in the State. (b) At the point of 5 do. last sale in the State. 2. All liquors other (a) At every point 25 do. than country liquor of sale other than at the point of last sale in the State. (b) At the point of last 5 do. sale in the State. Provided that at any point of sale other than the first point of sale and the

last point of sale, the turnover of the goods liable to tax shall be arrived at by deducting the turnover of such goods on which tax has been levied at the immediately preceding point of sale.

Explanation I. - In this Schedule "country liquor" means "liquor manufactured in India, other than liquor manufactured and compounded in India and colored and flavored to resemble gin, brandy, whisky, vodka, wine or rum imported from outside the territory of India".

Explanation II. - The point of last sale mentioned in this Schedule shall be the sale by a dealer holding a licence other than a wholesale licence under rule 23 of the Andhra Pradesh (Foreign Liquor and Indian Liquor) Rules, 1970. In the case of a dealer holding a wholesale-cum-retail licence, it shall be his sale to individual consumer as specified in the said rule."

6. Section 2(1)(s) of the Act defines the expression "turnover". The definition was amended by the legislature by the A.P. General Sales Tax (Amendment) Act (18 of 1985) which came into force on 1st July, 1985. The definition of the expression "turnover" as it stood prior to the amendment read thus :

"Section 2(1)(s). - "Turnover" means the total amount set out in the bill of sale (or if there is no bill of sale, the total amount charged) as the consideration for the sale or purchase of goods (whether such consideration be cash, deferred payment or any other thing of value) including any sums charged by the dealer for anything done in respect of goods sold at the time of or before the delivery of the goods and any other sums charged by the dealer, whatever be the description, name or object thereof, of the aggregate of amounts charged u/s 5-C :

Provided that"

7. After amendment, the definition of the expression "turnover" runs thus :

"Section 2(1)(s) :- "Turnover" means,

(i) the total amount set out in the bill of sale;

(ii) the total amount of consideration for the sale or purchase of goods as any be determined by he assessing authority, if the bill of sale does not set out correctly the amount for which the goods are sold; or

....."

8. Further, by the Amendment Act 18 of 1985, brought into force with effect from 1st July, 1985, the legislature incorporated into the statute book, section 14-B of the Act, which reads as follows :

"Section 14-B. - Assessment of the sales shown in accounts at low prices. - (1) If the assessing authority is satisfied that a dealer has, with a view to evade the payment of tax shown in his account sales or purchases of any goods at prices which are abnormally low compared to the prevailing market prices of such

goods, it may, at any time within a period of four years from the date on which any order of assessment was served on the dealer, assess or reassess the dealer to the best of the judgment on the turnover of such sales or purchases after making such enquiry as may be necessary and after giving the dealer a reasonable opportunity to show cause against such assessment.

(2) The provisions of section 14 including penalty shall apply to assessment and reassessment of escaped turnover under this section."

9. In all the notices issued to the petitioners in all the writ petitions, the only allegation levelled is that, the rates charged by the petitioners are abnormally low when compared to the prevailing market prices, that the rates charged by the petitioners as set out in the bills raised cannot be accepted and that the difference between the turnover determined on the basis of the bills and the turnover computed with reference to the prevailing market prices, is liable to be assessed as "escaped turnover" by the respective Commercial Tax Officers in the reassessment proceedings, the assessment years being 1983-84, 1984-85 and 1985-86, as the case may be. While some of the respondent-authorities traced their power to section 14(4) of the Act, some of them specifically invoked section 14-B of the Act.

10. At this stage, we may enumerate the contentions put forward by the learned counsel appearing for the petitioners :

(1) Section 14-B of the Act which enables the assessing authorities to reassess the turnover submitted by a dealer where prices charged by the dealer are found to be abnormally low compared to the prevailing market prices is a substantive provision which affects the vested right of the assesses and is, therefore, prospective in its operation and effective from 1st July, 1985, the date when it was brought into the statute book in the absence of any legislative intent, express or implied, giving it any retrospective effect. The expression "turnover" defined in section 2(1)(s) of the Act as it stood prior to the Amendment Act 18 of 1985, encompasses only the total amount charged as consideration for the sale or purchase of goods. It is only by virtue of the enlarged definition of the expression "turnover" under the Amendment Act 18 of 1985, an enabling provision is made by incorporating another sub-clause to the original definition of the expression "turnover", empowering the assessing authority to determine the total amount of consideration for the sale or purchase of goods, if the bill of sale does not set out correctly the amount for which the goods were sold. Thus, section 2(1)(s)(ii) and section 14-B of the Act as now existing on the statute book and brought into effect from 1st July, 1985, together constitute an integral scheme, and retroactivity cannot, therefore, be given to the said two provisions in the absence of express or implied legislative intent.

(2) In respect of the period prior to 1st July, 1985, sought to be reassessed in the impugned notices, the Government of Andhra Pradesh issued G.O.Ms. No. 938, Revenue (CT-II) Department, dated 18th September, 1989, u/s 42(2) of the

Act, clarifying that the assessments relatable to the period prior to 1st July, 1985, cannot be reopened or revised by the assessing authorities by invoking the provisions of section 14-B of the Act on the ground that the dealers sold their goods at prices which were abnormally lower than the prevailing market prices of such goods and the proposed reassessments for the period prior to 1st July, 1985, cannot in any way stand, and are liable to be quashed.

(3) Section 14-B of the Act is ultra vires for the reason that it vests in the assessing authority an unbridled power to reassess the turnover without prescribing any method or mode of such reassessment, and such unbridled power tends to result in exercise of the power arbitrarily, and is, therefore, liable to be struck down.

(4) Though in some of the impugned notices, the assessing authorities traced the source of power to section 14(4) of the Act, in effect the proposed reassessments are u/s 14-B of the Act only, as is evident from the language employed in the impugned notices, and are, therefore, vitiated.

11. On the other hand, the learned Government Pleader appearing for the State puts forward two contentions. Firstly, it is urged that the writ petitions shall not be entertained as the petitioners have got an alternative remedy. Secondly, it is submitted that the assessing authorities are justified in proposing to reassess the turnover for the period prior to 1st July, 1985, where the sale prices shown by the assesseees were less than the prevailing market prices.

12. Section 14-B of the Act read with section 2(1)(s)(ii) of the Act brought into the statute book with effect from 1st July, 1985, confers power on the assessing authority to assess or reassess to the best of its judgment the turnover of such sales or purchases of goods returned by a dealer where the assessing authority is satisfied that the dealer has shown in his account sales or purchases of the goods at prices which are abnormally low when compared to the prevailing market prices of such goods. The new method of assessment contemplated u/s 14-B read with section 2(1)(s)(ii) of the Act affects the vested rights which accrued to the assesseees in matters of assessment or reassessment. There cannot be two opinions that no retrospectivity can be given to such substantive provisions affecting the vested rights of the assesseees unless the legislature specifically or by necessary implication conferred retrospectivity on such provisions.

13. In *Govind Das and Others Vs. The Income Tax Officer and Another*, , their Lordships of the Supreme Court held :

"Now, it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in volume 36 of the *Laws of England* (third edition) and

reiterated in several decisions of this Court as well as English courts is that "all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective" and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only".

14. The Supreme Court further held that section 171(6) of the Income Tax Act, 1961, would not apply to the recovery process of the tax arrears of Hindi undivided families in respect of the assessments made under the Income Tax Act, 1922, notwithstanding section 297(2)(d) of the Income Tax Act, 1961, which provides that the provisions of the Income Tax Act of 1961, would apply to the assessments pending as on the date of coming into force of the Income Tax Act, 1961. The Supreme Court also categorically held that despite the provisions contained in the Income Tax Act, 1961, the liability of the coparceners to pay the tax for the relevant assessment years, i.e., 1950-51 to 1956-57 was not governed by section 171 (5) and (6) of the Income Tax Act, 1961, but governed by the law as it stood prior to its coming into force. The Supreme Court further held that section 297(2)(d) would only apply to the procedural aspects and would have no effect on the substantive provisions.

15. To the same effect is the decision of a Division Bench of this Court in Udipi Vasanta Vihar v. Deputy Commercial Tax Officer [1969] 23 STC 6, wherein it was held following the decision of the Supreme Court in KANUMARLAPUDI LAKSHMINARYANA CHETTY AND OTHERS Vs. FIRST ADDITIONAL Income Tax OFFICER, NELLORE., that, section 14(4) of the A.P. General Sales Tax Act was no a provision merely affecting procedure, but a provision affecting the substantive right and, therefore, the amended section could not be given retrospective effect so as to affect assessments completed before the amendment.

16. It, therefore, follows that any substantive provision which affects the vested rights that accrued to the assesseees can only be given prospective effect unless the legislature expressly or by implication intended otherwise. There is nothing in the Amendment Act 18 of 1985, indicating retrospectivity to section 2(1)(s)(ii) or section 14-B of the Act. Indisputably the said two provisions are substantive in nature and the same can be involved only in respect of the transactions relatable to the period subsequent to 1st July, 1985 and not for the period anterior thereto.

17. The learned Government Pleader, however, fairly conceded that for the period prior to 1st July 1985, proposed or sought to be reassessed in the impugned notices, the Government of Andhra Pradesh granted relief by issuing G.O.Ms. No. 938, Revenue (CT-II) Department, dated 18th September, 1989 and that the said Government Order is binding upon the assessing authorities.

18. The material portions of the G.O.Ms. No. 938, Revenue (CT-II) Department,

dated 18th September, 1989, may be usefully extracted thus :

"2. The Government have examined the matter in detail. The amended definition of "turnover" in section 2(1)(s)(ii) and section 14-B have been introduced in the Andhra Pradesh General Sales Tax Act, 1957, by the Andhra Pradesh General Sales Tax (Amendment) Act, 1985 (Act 18 of 1985), with effect from 1st July, 1985. Government are advised that since the amendments are not on a true and fair construction thereof, declaratory and clarificatory in character, can only be effected from 1st July, 1985 and cannot be enforced from any date prior thereto. It is also advised that no show cause notice can be issued to reopen assessments completed prior to 1st July, 1985, on the basis that the dealers have sold their goods at rates which are abnormally lower than the prevailing market rates or that the amount stated in the bill of sale is not correct. Such a ground can only be taken on the basis of amended definition of turnover.

3. Under the powers vested under sub-section (2) of section 42 of the Andhra Pradesh General Sales Tax Act, 1957 (Act VI of 1957), the Government hereby clarify that the above amendments can only be effected from 1st July, 1985, and cannot be enforced from any date prior thereto. Hence the above amendments can be enforced for the assessments arising for the transactions after 1st July, 1985. It is also clarified that section 2(1)(s)(ii) and section 14-B of the said Act should be read together and that the assessments completed prior to 1st July, 1985, cannot be reopened on the ground that the dealers have sold their goods at rates which are abnormally lower than the prevailing market rates or the amount stated in the bill of sale is not correct."

19. Section 14 of the Act empowers the assessing authority to assess or reassess on the basis of books of accounts or by way of best judgment assessment, as the case may be. While section 14(1) confers power on the assessing authority to make assessment on the basis of books of accounts where such authority is satisfied as to the correctness and the completeness of the return submitted by the assessee, section 14(3)(iii) deals with the powers of the assessing authority to make assessment to the best of its judgment where the dealer fails to submit return before the specified date or produces the accounts, registers and other documents after inspection. Section 14(4) empowers the assessing authority to reopen the assessment and determine the escaped turnover to the best of his judgment where the turnover of a dealer has escaped assessment to tax or has been under-assessed or assessed at a rate lower than the correct rate. Section 14(4-C) of the Act empowers any higher authority, including the Assistant Commissioner, the Deputy Commissioner and the Joint Commissioner to exercise the powers of the assessing authority u/s 14(4) of the Act. Section 14(2) read with section 14(8) of the Act empowers the authority exercising the power under sub-sections (2) and (4) of section 14 to impose penalty which shall not be less than three times but which may extend to five times the tax or the fee in a case where the assessing authority is satisfied that the failure on the part of the dealer to disclose the whole or part of the turnover or any other particulars

correctly was willful. Where such failure was not willful the penalty shall not exceed one-half of the tax due.

20. The scope and ambit of section 14(1), (3) and (4) of the Act has been the subject-matter of various decisions of the High Court. It is settled law now that where turnover of a dealer has escaped assessment to tax, the assessment can be reopened and the escaped turnover can be brought to tax in the reassessment u/s 14(4) of the Act. In State of Andhra Pradesh Vs. Ratna Sree Box Makers, , a Division Bench of this Court consisting of Jeevan Reddy and Neeladri Rao, JJ. reviewed the entire case law. Neeladri Rao, J., observed :

"So, in order to exercise the power u/s 14(4), the concerned authority has to come across material de hors the assessment record. The said material has to show that the whole or any part of the turnover the business of a dealer has escaped assessment to tax or has been under-assessed or assessed at a rate lower than the correct rate or there is escapement of levy in regard to licence fee or registration fee or that it has been levied at rate lower than the correct rate. Then the assessing authority may determine to the best of his judgment the turnover that has escaped assessment and assess the turnover so determined or assess the correct amount of tax leviable on the turnover that has been under-assessed or assess at a correct rate the turnover that has been assessed at a lower rate or assess the correct amount of tax payable in a case where any deduction or exemption has been wrongly allowed."

Jeevan Reddy, J., in a separate but concurring judgment observed :

"There must be a finally to assessment proceedings once concluded, and that assessment should not be reopened lightly, or in a cavalier manner, but for good reasons alone. It is, therefore, necessary to construe the power u/s 14(4) in such a way as to ensure that tax legitimately due to the State is not evaded and, at the same time, the assessee is not put to harassment by repeated reopening of assessments."

Jeevan Reddy, J., also added :

"It is not as if the Act has not provided remedies in such a situation. If an order of assessment is wrong, there is the Deputy Commissioner to correct it under sub-section (2) of section 20. Sub-section (1) of section 20 empowers the Commissioner as well to exercise the similar power. Apart from this, there is another danger inherent in permitting the reopening of the assessment on a mere change of opinion by the assessing authority. There may well be a situation where, on each occasion the same officer, or different officers on different occasions, may hold different views with respect to classification of certain goods. The exercise cannot be an endless one. However, we must qualify this principle by stating that if a decision is rendered either by the Supreme Court or this Court, or by the Sales Tax Appellate Tribunal, or the Commissioner of Commercial Taxes, and if the assessing authority finds that an assessment already made by him ought to be reopened in the light of such decision, it is

always open to him to do so. In such a case, it cannot be said that the assessment is reopened on a mere change of opinion of the assessing authority. This can be equated to a situation where an assessment is reopened on information, and even under the Income Tax Act, it has been held that the decision of the Supreme Court, or the High Court, constitutes information. Similarly, if there is a change in law with retrospective effect, it would be a good ground for reopening the assessment. While it is neither possible nor practicable to exhaustively lay down a situation in which the said power can be exercised, all we need to emphasize is that the assessing authority cannot reopen an assessment on a mere change of opinion on his own part."

Jeevan Reddy, J., also observed :

"When an assessment order is made, it should be presumed that the assessing authority applies his mind to all the relevant facts and makes the assessment keeping in mind the principles of law applicable thereto Subsequently, the same officer, or his successor-in-office may feel differently. But on that ground alone, if he is permitted to reopen, it would seriously interfere with the principle of finality of assessment and may lead to harassment of assesseees."

21. Thus, if there is any information de hors the assessment record coming to the notice of the authority, which reasonably shows that there has been escapement of turnover the assessing authority can reopen the assessment.

22. In *Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das*, , the Supreme Court laid down the principles relating to formation of belief by the assessing authority prior to causing of reopening of assessment. The principles governing the relevant provisions of the Income Tax Act equally apply to the proceedings under the A.P. General Sales Tax Act. We may, however, usefully extract the relevant observations of the Supreme Court (at page 448) :

"As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income Tax Officer on the point as to whether action should be initiated for reopening of assessment. At the same time we have to bear in mind that it is not any and every material, howsoever, vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to the escapement of the income of the assessee from assessment. The fact that the words "definite information" which were there in section 34 of the Act of 1922, at one time before its amendment in 1948, are not there in section 147 of the Act of 1961, would not lead to the conclusion that action can now be taken for

reopening assessment even if the information is wholly vague, indefinite, far-fetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretense.

The powers of the Income Tax Officer to reopen assessment, though wide, are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". The reopening of the assessment after the lapse of many years is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exists for believing that income of the assessee has escaped assessment. The underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the Income Tax authorities after the assessment has been completed. The provisions of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and quasi-judicial proceedings."

23. From the aforesaid discussion, it is evident that in order to reopen assessment u/s 14(4) of the Act, there must be some information with the assessing authority, de hors the assessment record, indicating suppression or escapement of turnover to tax and that information or material must sufficiently indicate that there was escarpment of turnover to tax. Any and every material cannot empower the assessing authority to reopen the assessment and the material sought to be relied upon must be certain, definite and proximately connected to the inference proposed to be drawn by the assessing authority that the turnover escaped from assessment. The material must be relatable to the assessee and the assessee cannot be nailed by material or information available on the record of assessment of another assessee. Merely because the assessing authority has reason to suspect that the books of accounts are not maintained correctly, he cannot European the assessment. Further, either in assessment or reassessment proceedings, the burden of establishing that the turnover escaped assessment to tax is on the Revenue, and unless the Revenue establishes the same conclusively, no additional tax can be imposed on the dealer.

24. The next submission put forward on behalf of the petitioner is that though the assessing authority styled the impugned notice as having been issued u/s 14(4) of the Act, in effect, the same were issued u/s 14-B of the Act as is evident from the unmistakable language employed in the notices.

25. It is urged that there is no material for the authorities to show that the goods were actually sold by them at higher rate than what was shown, that the authorities cannot reassess the same merely on the basis that the goods were sold at a lower price and that the impugned notices issued to all the petitioners u/s 14(4) of the Act are liable to be quashed. We are also informed that the Sales Tax Appellate Tribunal also took similar view in *Vinayak Beer v. State of A.P.* 9 APSTJ 45 , wherein the Tribunal held that in the absence of any material to show that beer or liquor was actually sold by the assessee therein at a higher rate than what was shown, the taxing authority cannot revise the assessment merely on

the ground that it was sold at a lower price during the period when section 14-B was not on the statute book.

26. A close scrutiny of the impugned notices shows that there is considerable force in the contention put forward on behalf of the petitioners. The notice issued by the Commercial Tax Officer to M/s. Diplomat Department Wines, Hyderabad, petitioner in Writ Petition No. 15299 of 1988, reads as follows :

"As it is clearly established that the dealer with a view evade the payment of tax, had resorted to under-invoicing of the sale values, which are abnormally lower than compared with the earlier rates charged by similarly placed distributors and also the then prevailing market prices of these McDowell IMFL products, it has become necessary to work out the quantum of under-billing amount with reference to the number of cases under-billed, by a verification of each sale invoice issued by the assessee."

27. It is thus evident that the assessing authority issued the reassessment notices proposing to determine the escaped turnover, by comparing the prices charged by the assessee with the alleged prevailing market price. The reassessment notices though styled as having been issued u/s 14(4) of the Act, has to be treated as one issued only u/s 14-B of the Act having regard to the fact that the reassessment is proposed only on the ground of variation between the prices charged by the assessee and the alleged prevailing market prices. If only the aforesaid material is excluded from consideration, there is no other material mentioned in any show cause notices from which the assessing authority could form the belief that any turnover had escaped assessment to tax under the Act.

28. The last submission put forward on behalf of the petitioners is that section 2(1)(s)(ii) read with section 14-B of the Act confers unbridled and uncanalised power on the assessing authority, there being no guidelines prescribed for exercising the power and that the said power conferred on the assessing authority tends to be exercised in an arbitrary and discriminatory manner and that both the provisions are violative of articles 14, 19(1)(g) and 301 of the Constitution of India.

29. It is contended that section 2(1)(s)(ii) of the Act as incorporated by the Amendment Act 18 of 1985, empowers the assessing authority to determine the turnover nationally at a price higher than the sale price charged by the assessee is less the assessing authority is satisfied that the price charged by the assessee is less than the alleged prevailing market price, that the exercise if indulged in by the assessing authority compels the assessee to sell his goods at higher prices as determined by the assessing authority and that section 2(1)(s)(ii) of the Act in so far as it empowers the assessing authority to determine the turnover at the alleged prevailing market price is violative of articles 14, 19(1)(g) and 301 of the Constitution of India. It is further contended on behalf of the petitioners that section 14-B(1) of the Act is vague, uncertain and capable of being misused or abused in an arbitrary manner and is therefore, violative of article 14 of the

Constitution of India.

30. Let us therefore, examine the scope and ambit of section 2(1)(s)(ii) and section 14-B(1) of the Act as incorporated by the Amendment Act 18 of 1985. Section 14-B(1) of the Act enacts that it shall be open to the assessing authority to determine the turnover to the best of his judgment if the assessee shows in his account sales or purchases of any goods at prices which are abnormally low when compared to the prevailing market prices of the goods. Sub-section (2) of section 14-B enacts that in relation to such an assessment the provisions relating to imposition of penalty shall also apply. It is not in dispute that the Act does not define as to what is meant by the expression "prevailing market prices." If section 14-B(1) of the Act is sought to be applied to the commodities which are regulated by the statute, no problem arises, but it should be borne in mind that in respect of 99 per cent of the goods taxable under the A.P. General Sales Tax Act, there is no law or regulation prescribing fixed prices and prohibiting sales in excess of the fixed prices. It is therefore, open to the dealers to fix sale price of their goods depending upon various factors such as, purchase price, terms of sale, freight, creditworthiness, solvency of the buyers, their overheads and liquidity and the rapport with buyers. One dealer may make heavy turnover at lesser rate and make more profits with lesser overheads and another dealer may sell at higher rate and make less business with equal or less profit. It is common knowledge that in cases of cash sales, seller gives heavy discount to buyers. The Sales Tax Act cannot compel the sellers to sell their goods at a particular price. But section 2(1)(s)(ii) of the Act enacts that a dealer can be assessed on the turnover determined by the assessing authority where he is satisfied that the price charged by the dealer is low when compared to the prevailing market price thereby compelling the dealer to inevitably sell his products only at the alleged market rates as determined by the assessing authority as otherwise, the dealer would be not only liable to pay sales tax on the difference of turnover from out of his pocket, but also would stand exposed to penalty u/s 14-B(2) of the Act. Is there any legislative sanction for such a course? It should be borne in mind that the Act can only make such incidental or ancillary provisions to effectuate the levy and collection of sales tax. Section 2(1)(s)(ii) of the Act, if construed as enabling the assessing authority to estimate the turnover even in a case where a dealer who collected sale price as mentioned in the bill of sale, would become ultra vires of the legislature. As already stated, the Act does not prescribe any method or manner of determination of "the prevailing market prices". No rules are either framed for the purpose. Section 14-B(1) of the Act as already stated contemplates best judgment assessment and estimate of turnover for levying tax if the assessing authority is satisfied that the prices charged by the dealer are abnormally low when compared to the prevailing market prices. The expression "abnormally low" is also not defined in the Act. Such a vague and uncertain provision is capable of being interpreted by each assessing authority according to their whims and fancies. While a particular authority may hold that variation of prices by 50 per cent as abnormally low, another authority may say even

variation of prices by 10 per cent is abnormally low.

31. In the trade of liquor, goods are handled by five different agencies, viz., manufacturer, distributor, wholesaler, sub-wholesaler and retailer. With the relative advantages they possess, each class of dealers may fix different prices. In a given case the price of a distributor at Anantapur may substantially differ from that of a distributor at Visakhapatnam or Hyderabad having regard to the various factors such as distance, etc. Unless all the factors are found to be common, no price of two dealers will be in a state of comparison as no two dealers are similarly placed. As already stated, there is no machinery contemplated in the Sales Tax Act to determine "the prevailing market prices". In the normal course dealers would arrange their affairs keeping in view the commercial expediency of each of them. In order to highlight this aspect, the petitioners placed before us the rate schedules of various hotels in the city of Hyderabad. A comparable chart has also been prepared in respect of one of the items namely idly, the price of which item varies from Re. 1.60 to Rs. 4. It reads as follows :

Statement showing the selling price of idly in the hotels situated in the twin cities -----

Sl. No.	Name of the place	Status	Price in rupees.
1	Hotel Shanbhag Punjagutta	Air-conditioned	4.00
2	Hotel Minerva Himayatnagar	do.	4.00
3	Hotel Ashoka Lakadikapool	do.	3.50
4	Hotel Sarovar Secretariat Road	do.	3.50
5	Hotel Annapurna Nampally	do.	2.50
6	Hotel Gayatri Himayatnagar	Non-Air-conditioned	3.00
7	Hotel Tajmahal Abids	do.	1.80
8	New Hotel Sudha Chikkadpally	do.	1.75
9	Tajmahal Cafe Narayanguda	do.	1.60

32. Hotels listed at serial Nos. 1 to 5 stand on one footing while hotels listed at serial Nos. 6 to 9 stand on a different footing. Though the hotels listed at serial Nos. 6 to 9 stand on the same footing, the price charged by the hoteliers in respect of the item of idly varies from Rs. 1.60 to Rs. 3. In the case of first group of hotels the price varies from Rs. 2.50 to Rs. 4. Can it be said that the above hoteliers are charging less when compared to the prevailing market prices with a view to evade payment of tax ? First of all, what is the prevailing market price of idly ? Is it Rs. 1.60 charged by Tajmahal Cafe or Rs. 2.50 charged by Annapurna, or Rs. 3 charged by Gayatri Bhavan or Rs. 4 charged by Minerva, or is it the average of all the prices ?

33. When 90 per cent of the dealers charge a particular rate and 10 per cent of the dealers having regard to their commercial expediency charge a higher rate, what is the prevailing market price ? Should the assessing authority take the highest price charged by a dealer at a particular place to the average of the sale prices charged by all the dealers of that particular place or the average of the sale prices charged by all the dealers within the State ? Nothing is indicated in the legislative scheme, and the two expressions "prevailing market prices" and

"abnormally low" employed in section 14-B(1) of the Act are so vague and uncertain that there is abundant scope for abuse of the power conferred thereunder by the assessing authority. It is also relevant to point out here that the discretionary power conferred u/s 14-B(1) of the Act is not reserved for any higher functionary under the Act. The assessing authority as envisaged u/s 14-B(1) of the Act includes Commercial Tax Officer, Deputy Commercial Tax Officer and Assistant Commercial Tax Officer, u/s 2 of the Act. The Assistant Commercial Tax Officer is only a non-gazetted officer while the Deputy Commercial Tax Officer is the lowest gazetted officer. It is true that the assessment made by any one of them is subject to appeal to the Appellate Deputy Commissioner and a second appeal to the Sales Tax Appellate Tribunal. But that is hardly a real safeguard. If the reassessment is made at astronomical figures and huge demands are raised compelling the dealers to pay huge amounts by way of tax, they stand exposed to serious prejudice and hardship and more often than not, they may be eliminated even from the trade, if redressal is delayed.

34. There is also every scope for enforcing section 14-B(1) of the Act in an arbitrary manner, as is evident from the very case of the petitioner in Writ Petition No. 18364 of 1988. It is submitted before us that the petitioner returned gross profit at 12 per cent for the assessment year 1985-86. According to the proposed notice of reassessment issued to the petitioner the turnover which escaped assessment by reason of sale of his goods at alleged lower prices is proposed to be determined at Rs. 38,77,207 which approximately works out to 9.43 per cent of his turnover. If variation between the prices charged by the petitioner as disclosed in his accounts and the alleged prevailing market prices is about 9.43 per cent, can it be said that the prices charged by the petitioner are abnormally low ? It is common knowledge that khadi products are sold at a discount of 20 per cent throughout the year and during festival seasons the discount is increased even up to 40 per cent. Some of the dealers also resort to "reduction sales" and announce discount of 30 per cent to 40 per cent as part of the sales promotion schemes. By no standard, variation of about 10 per cent in sale price by a dealer can be said to be abnormally low.

35. Yet another interesting feature noticed in the context of the petitioner in Writ Petition No. 18364 of 1988 is that the Commercial Tax Officer quoted the prices charged by Deluxe Wines, Hyderabad and Srirama Wines Corporation, Hyderabad, as the prevailing market prices and applied the said rates for computing the petitioner's turnover. But the record discloses that the Commercial Tax Officers dealing with the reassessments of Deluxe Wines and Srirama Wines Corporation also issued notices to those assessee's alleging that the prices charged by them were abnormally low, compared to the prices charged by certain other dealers and proposed to reassess their turnovers on estimate basis and they filed Writ Petition Nos. 15311 and 15307 of 1988 in the above batch.

36. As already stated while enacting section 14-B of the Act, the legislature has

not only empowered the assessing authority to determine the difference between sale prices and the alleged prevailing market prices as escaped turnover but also empowered the assessing authority to impose penalty u/s 14(2) of the Act in relation to such escaped turnover. When the provision entails such serious consequences of not only levy of sales tax but also penalty at minimum of three times of such tax, the provision must be clear, categorical and certain and at any rate free from ambiguity or vagueness. If the mode of determining the prevailing market prices is indicated in the statute, the dealers would arrange their affairs and sell their goods at such rates as may be prescribed by the legislature or any authority that may be empowered in that behalf and ward off penal consequences contemplated u/s 14-B(2) of the Act. The scheme of assessment contemplated u/s 14-B(1) of the Act is so vague and uncertain that there is abundant scope and vulnerability for each assessing authority to take a different view and adopt a different yardstick for different assessees with different consequences, resulting in drawing invidious discrimination between similarly placed dealers. There is, therefore, considerable force in the submission made on behalf of the petitioners that sections 2(1)(s)(ii) and 14-B(1) of the Act, if literally construed, tend to be violative of articles 14, 19(1)(g) and 301 of the Constitution of India and the two provisions are therefore liable to be struck down. It is, however, settled law now that a provision in any enactment can be read down in order to avoid rendering the statutory provision, avoid and inoperative by striking it down and every effort should be made by the court to interpret the provisions in a harmonious way without striking it down as unconstitutional. We, therefore, hold that sections 2(1)(s)(ii) and 14-B(1) of the Act must be read down so that the said provisions would come into force as and when guidelines are prescribed by the legislature for determination of the two expressions, "prevailing market prices" and "abnormally low".

37. Yet another contention put forward on behalf of the petitioners in support of their last submission is that even for invoking section 14-B(1) of the Act it is not sufficient for the department to allege that the prices charged by the assessee are abnormally low when compared to the prevailing market prices, and that for the purpose of assumption of jurisdiction u/s 14-B(1) of the Act, the department must show that the assessee collected more than the ostensible sale consideration charged in the bill, with a view to evade payment of sales tax. The words "shown in his account sales or purchases of any goods at prices which are abnormally low" employed in section 14-B(1) of the Act, it is contended, are sufficiently indicative of the legal requirement that the prices shown in the accounts of the assessee must be different from what the assessee had collected and that such showing must be with a view to evade payment of tax. In other words, unless there is positive material indicting the factum of collection of more than ostensible sale consideration, section 14-B(1) of the Act cannot be pressed into service. Reliance is placed on the decision of the Supreme Court in *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, wherein their Lordships of the Supreme Court interpreting section 52(1) and (2) of the Income

Tax Act, 1961, held :

"If the first condition is satisfied, the Revenue cannot ask the court to presume that the second condition too is fulfilled, because even in a case where the first condition of 15 per cent difference is satisfied, the transaction may be perfectly honest and bona fide transaction and there may be no understatement of the consideration. The fulfillment of the second condition has, therefore, to be established independently of the first condition and merely because the first condition is satisfied, no inference can necessarily follow that the second condition is also fulfilled."

38. The above principle laid down by the Supreme Court equally governs section 14-B(1) of the Act. It therefore follows that the authorities cannot in any event invoke section 14-B(1) of the Act unless they had material to show that the assessee collected more price than what was shown in their accounts. It is admitted in all the impugned notices that the authorities could not collect any evidence or material of any secret payments to the assessee. The impugned notices of reassessment cannot therefore be sustained having regard to the ratio of the decision of the Supreme Court in the aforesaid case. On this ground also the impugned show cause notices are liable to be quashed.

39. The decision of the Kerala High Court in *T.A.C.A. Association v. State of Kerala* [1988] 71 STC 332, relied upon by the authorities does not deal with any issues urged before us. On a perusal of the judgment rendered by the Kerala High Court none of the aspects raised before us was either put forward or decided.

40. The contention put forward by the learned Government Pleader that the writ petitions cannot be entertained as there is an alternative remedy is absolutely without substance. It is settled law now that the writ petitions cannot be rejected on the ground of availability of alternative remedy when the writ petitions had already been admitted, and rule nisi was issued and the writ petitions have been pending for quite some time in the High Court. Apart from this the question of vires of a provision cannot be raised before the statutory authorities like the assessing authority and the appellate authority because they are creatures under the Act.

41. The other submission made by the learned government Pleader that the prices charged by the same dealer were varying on the same date and therefore resort to section 14-B(1) by the assessing authority was proper, cannot also be countenanced. In the first instance, the statement at page 17 of the counter-affidavit that "a dealer in liquor had shown two different prices on the same day" is too vague and uncertain. It is also submitted on behalf of the petitioners that different prices came to be charged because some of the stocks sold are traceable to the old stocks when the purchase price was low. Even otherwise, as long as dealers make sufficient gross profit in the aggregate it does not matter even if they sell some of their goods at lower price. It is common knowledge that

having regard to commercial expediency the dealers do extend the benefit of concessional rates to some categories of buyers. There may be cases where some of the dealers are compelled to sell at a loss in order to sustain themselves in the market, or to avoid further losses. Merely because on the same day a dealer has sold goods at different prices, that by itself cannot lead to the inference that the dealer has sold the goods at lesser prices with a view to evade the tax. What is more, this aspect was within the knowledge of the assessing authority even at the time when the original assessment was made as, admittedly, the assessing authority verified the books of accounts of the petitioners before completion of the original assessment. The assessing authority having made the assessment cannot on mere change of opinion reopen the assessment as held by the Division Bench of this Court in *State of Andhra Pradesh Vs. Ratna Sree Box Makers*, .

42. In the result, we hold that section 2(1)(s)(ii) and section 14-B of the Andhra Pradesh General Sales Tax Act, 1957, as incorporated by the Amendment Act 18 of 1985, are only prospective and the transactions relatable to the period prior to 1st July, 1985, cannot be assessed or reassessed or revised by the Commercial Tax authorities by invoking section 14-B of the Act on the ground that prices charged by the assesseees were less than the prevailing market prices of the goods charged by the other dealers. We also declare that section 2(1)(s)(ii) and section 14-B of the Andhra Pradesh General Sales Tax Act, 1957, as incorporated by the Amendment Act 18 of 1985, must be read down by not giving effect to the said provisions until and unless the legislature prescribes guidelines for exercising the power conferred thereunder and defines the expressions "prevailing market prices" and "abnormally low" occurring in section 14-B of the Act. We, however, make it clear that as and when the legislature chooses to define the said two expressions and indicate the method and manner of determination of turnover with reference to the prevailing market prices, section 14-B of the Act can be enforced from such date.

43. In the result, the impugned notices issued by the respondent-authorities in all the writ petitions are quashed and the respondent-authorities are restrained from reopening the the assessments on the ground of variation between the prices charged by the assesseees and the alleged prevailing market prices. The writ petitions are accordingly allowed. We, however, make no order as to cost. Advocate's fee Rs. 250 in each of the writ petitions.

44. Writ petitions accordingly allowed.