(2012) 10 AP CK 0024

In the Andhra Pradesh High Court

Case No : Writ Petition No''s. 7174, 7212 and 7213 of 2010

Eagle Distilleries APPELLANT

Vs

Assistant Commissioner (CT) LTU and Others RESPONDENT

Date of Decision : 10-10-2012

Acts Referred:
Andhra Pradesh Value Added Tax Act, 2005 — Section 22(2), 31, 33, 4(4), 53(3)

Citation : (2012) 56 VST 147

Hon'ble Judges : Goda Raghuram, J;B.N. Rao Nalla, J

Bench : Division Bench

Advocate : Bhaskar Reddy Vemireddy, for the Appellant; B. Venkatadri, Special Standing Counsel for Commercial Tax, for the Respondent

Final Decision : Allowed

Judgement

Goda Raghuram, J.—Heard Sri Bhaskar Reddy Vemireddy, the learned counsel for the petitioner and the learned Special Government Pleader for Commercial Taxes for the respondents-Revenue. All the writ petitions are by the same petitioner-M/s. Eagle Distilleries. The challenge in the writ petitions is to a notice dated December 28, 2009 issued by the first respondent calling upon the petitioner to pay Rs. 12,10,443 within the stipulated time towards balance penalty and interest liable in respect of the assessment years 2005-06, 2006-07 and 2007-08. This notice was issued by the first respondent in response to the letter of the petitioner dated December 11, 2009 seeking refund of the disputed tax, deposited while preferring appeals to the Appellate Deputy Commissioner and thereafter to the Sales Tax Appellate Tribunal. Having regard to the fundamental error in the impugned notice dated December 28, 2009 issued by the first respondent, we consider it appropriate to set out the relevant chronology of events, common in all the writ petitions. We record the facts in W.P. No. 7174 of 2010 as illustrative of the matrix of the facts involved in the other writ petitions as well.

2. W.P. No. 7174 of 2010:

? The petitioner is a proprietary concern in the business of manufacture and sale of Indian Made Foreign Liquor (IMFL). It is a registered dealer under provisions of the Andhra Pradesh Value Added Tax Act, 2005 (for short, ''The 2005 Act") and is registered on the rolls of the first respondent as such. As a part of its business, the petitioner purchases acid, soda, empty bottles and labels from non-VAT dealers and unregistered dealers for employment in its business.

? In respect of the assessment year 2005-06, i.e., April 1, 2005 to May 31, 2006, the first respondent issued a notice dated December 12, 2007 proposing to levy tax u/s 4(4) of the 2005 Act on the basis of a Ruling by the Authority for Clarification and Advance Ruling issued in favour of another distillery, on the ground that the turnover relating to acid, soda, empty bottles and labels, purchased from non-VAT/TOT dealers, who were not liable to pay tax on these commodities and which were used in the manufacture of IMFL, is liable to levy of purchase tax in the hands of the petitioner.

? The first respondent also issued a notice dated December 12, 2007 proposing to levy penalty u/s 53(3) and interest u/s 22(2) of the 2005 Act. The petitioner submitted its objections to the levy of tax, penalty and interest.

? The first respondent passed order of assessment dated March 1, 2008 confirming the levy of tax as proposed in the show-cause notice and also passed an order dated March 25, 2008, confirming the penalty.

? Challenging the assessment order dated March 1, 2008, the petitioner filed a writ petition. This was allowed by this court by order dated July 3, 2008 (a common order in respect of three writ petitions challenging the orders of assessment in respect of the assessment years 2006-07 and 2007-08 as well). The writ petition was allowed on the ground that no opportunity of personal hearing was provided to the assessee. The order of the assessment was quashed and the matter remitted to the first respondent for passing a de novo order of assessment, in accordance with law.

? In view of the annulment by this court of the order of assessment dated March 1, 2008, the first respondent could not have and did not advisedly proceed to recover the penalty determined by the proceedings dated March 25, 2008. No proceedings for recovery of interest were also initiated.

? The first respondent revisited the assessment and by a subsequent order dated August 30, 2008 again levied tax. Against the fresh order of assessment dated August 30, 2008, the petitioner preferred an appeal to the Appellate Deputy Commissioner concerned after depositing 12.5 percent of the disputed tax as a condition precedent for preferring the appeal, as mandated by the provisions of the 2005 Act.

? Pending determination of the appeal, the petitioner obtained a conditional stay from depositing the assessed tax liability, subject to payment of 50 percent of the disputed tax. That the 50 percent amount of the stipulated tax was paid by the petitioner is not in dispute.

? On February 4, 2009, the petitioner''s appeal was dismissed; and the petitioner preferred a further appeal to the STAT, Hyderabad in T.A. No. 143/09 (along with two other appeals in respect of the other assessment years).

? By a common order dated October 9, 2009, the three appeals preferred by the petitioner were allowed by the STAT, which nullified the orders of assessment as confirmed by the appellate orders.

? After the fresh order of assessment dated August 30, 2008 (passed by the first respondent after remand consequent on the order of this court dated July 3, 2008), the first respondent issued a fresh penalty notice u/s 53(3) of the 2005 Act, consequent on this order of assessment dated August 30, 2008. This penalty notice refers to the earlier penalty proceedings dated March 25, 2008 (issued in consequence of the initial and since invalidated order of assessment dated March 1, 2008).

? Consequent to the orders of the Tribunal dated October 9, 2009 nullifying the orders of assessment as confirmed in appeal and thus the liability of the petitioner to tax, the petitioner submitted a representation dated December 11, 2009 to the first respondent for refund of the tax deposited while preferring appeals before the Appellate Deputy Commissioner and the STAT and in terms of the conditional order passed by the Additional Commissioner.

? In response to the representation dated December 11, 2009, the first respondent issued the impugned notice dated December 28, 2009 which reads:

M/s. Eagle Distilleries, Kadapa, is hereby informed that you have preferred an appeal before the Sales Tax Appellate Tribunal against the orders of the Appellate Deputy Commissioner (CT), Kurnool on the dispute of payment of tax against the assessment order passed by the Assistant Commissioner (CT), LTU on March 1, 2008 for the years 2005-06, 2006-07 and 2007-08.

The honourable STAT, Hyderabad, issued orders vide TA Nos. 143/9, 144/9 and 145/9 dated October 9, 2009 and allowed the appeal in favour of the appellants. During the course of appeal, the dealers have paid 50 percent of the disputed tax as per the orders of the Additional Commissioner (CT), Legal vide CCT''s Ref. No. LIII(3)/130/2009 dated April 17, 2009. Accordingly adjusted the tax already paid against penalty.

3. Section 33 of the 2005 Act sets out provisions relating to appeals to the Tribunal. The first proviso to section 33 of the 2005 Act enjoins that no appeal shall be admitted unless it is accompanied by satisfactory proof of payment of fifty percent of the tax, penalty, interest or any other amount as ordered by the appellate authority. The fourth proviso to section 33 of the 2005 Act enjoins that the authority prescribed shall refund the amount of twelve and half percent or twenty five percent or fifty percent (as the case may be) of the difference of the tax, penalty, interest or any other amount as assessed by the authority

prescribed or revisional authority as the case may be and the tax, penalty, interest or any other amount admitted and paid by the appellant, with interest calculated at the rate of 12 percent per annum if refund is not made within 90 days from the date of receipt of the order passed u/s 31 or section 33 of the 2005 Act.

4. We are concerned with the liability to refund by the respondents of the amounts of pre-deposit of 50 percent of the disputed tax, deposited by the petitioner while preferring appeals before the Appellate Deputy Commissioner and the Tribunal, arising consequent on the order of the Tribunal dated October 9, 2009 allowing the appeal preferred by the petitioner u/s 33 of the 2005 Act.

5. On a true and fair construction of the fourth proviso to section 33 of the 2005 Act, the conclusion is compelling that the prescribed authority is required to sui generis and without need for an application in that behalf, refund 50 percent of the disputed tax which the petitioner/appellant had deposited during the course of appeals to the Appellate Deputy Commissioner and the Tribunal, consequent on the order dated October 9, 2009 by the STAT in T.A. Nos. 143, 144 and 145 of 2009.

6. Not only has the first respondent (the prescribed authority) failed to gracefully and as statutorily enjoined, refund the amounts deposited by the petitioner but has, despite the representation of the petitioner, issued the impugned notice demanding penalty and interest of Rs. 12,10,443 (graciously giving credit to the petitioner of Rs. 10,13,721 deposited while preferring the appeals and further appeal to the STAT).

7. It also requires to be noticed that after issuing the penalty notice dated October 3, 2008 (consequent on the fresh order of assessment dated August 30, 2008 passed by the first respondent, after the initial order of assessment dated March 1, 2008 was invalidated by this court by the judgment dated July 3, 2008 (Eagle Distilleries v. Assistant Commissioner (CT) LTU, Kadapa) in W.P. No. 7176 of 2008 and batch), the first respondent did not pursue the penalty proceedings to culmination and did not pass final orders imposing penalty, pursuant to the penalty notice dated October 3, 2008. There was thus an unfertilized penalty proceedings, which did not culminate in an order of penalty. Insofar as the interest on tax liability is concerned, also mentioned in the impugned notice dated December 28, 2009, such interest liability suffered a plenary eclipse consequent on the order of assessment having been nullified by the order of the Tribunal dated October 9, 2009 in T.A. No. 143 of 2009.

8. In the light of the facts and circumstances and chronology of events adverted to hereinbefore, the conclusion is irresistible that there was a systematic failure on the part of the respondents, in particular, the first respondent, in failing to execute the statutory obligation under the fourth proviso to section 33 of the 2005 Act, in refunding the amount of tax deposited by the petitioner along with the applicable interest.

9. This failure is compounded by the impugned notice dated December 28, 2009 which discloses the total and fundamental non-application of mind either to the material on record or to the logical and inevitable legal consequence of the order of the Tribunal dated October 9, 2009 in T.A. Nos. 143, 144 and 145 of 2009.

10. On the analysis above, while quashing the notice dated December 28, 2009.s issued by the first respondent, we direct the first respondent to forthwith and in any event within a period of 10 days from the date of receipt of a copy of this order compute and issue orders of refund of the tax paid/deposited by the petitioner for the assessment years 2005-06, 2006-07 and 2007-08 along with interest as mandated by the provisions of section 33 of the 2005 Act. As the petitioner has been constrained to seek judicial remedy on account of the failure of the respondents to comply with the statutory mandate of the provisions of the 2005 Act and due to the irrational and misconceived notice dated December 28, 2009 issued by the first respondent, leading this court to consider this grievance which was an avoidable litigative exercise, we are inclined to impose costs of Rs. 10,000, which shall be paid by the respondents, Rs. 5,000 to the petitioner and Rs. 5,000 to the Andhra Pradesh State Legal Services Authority, within a period of 30 days from the date of receipt of a copy of this order. A copy of this order shall also be marked to the Secretary, A.P. State Legal Services Authority for information. The writ petitions are allowed as above with costs.