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**(1995) 11 AP CK 0058**

**In the Andhra Pradesh High Court**

**Case No : Tax Revision Case No's. 341 and 342 of 1990**

Raj Trading Corporation

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

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**Date of Decision : 23-11-1995**

**Acts Referred:**

Andhra Pradesh General Sales Tax Act, 1957 — Section 14(4), 14(8)(1), 7A(2)

**Citation : (1996) 102 STC 601**

**Hon'ble Judges : P. Venkatarama Reddi, J; P. Ramakrishnam Raju, J**

**Bench : Division Bench**

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## **Judgement**

1. The occasion for filing these two tax revision cases by the petitioner-assessee is the order of reassessment dated December 31, 1984, passed by the assessing authority for the year 1980-81 and an order passed on the same day levying penalty u/s 7A(2) of the Andhra Pradesh General Sales Tax Act, 1957 (hereinafter referred to as "the Act"). The appeals against the said orders were rejected by the Appellate Deputy Commissioner, Kakinada and the Sales Tax Appellate Tribunal. Hence, these two tax revision cases, T.R.C. No. 342 of 1990 relates to assessment and T.R.C. No. 341 of 1990 pertains to penalty.

2. The facts giving rise to the reassessment may be briefly stated : The petitioner, which is a firm, is a registered dealer doing business in liquors with its place of business at Visakhapatnam. By an order dated March 22, 1981, the petitioner was subjected to tax on a net turnover of Rs. 20,10,726 after allowing an exemption of Rs. 61,62,838. The exemption represented second sales of liquor and beer. The first sales of beer equivalent to the above net turnover were assessed to tax. It is not in dispute that the petitioner imported during the relevant year beer of different varieties of the value of Rs. 22.47 lakhs from outside the State. In respect of such imported beer sold to local dealers, the petitioner became the first seller and, therefore, was liable to pay tax at 10 per cent under entry 26 of the First Schedule. In addition to the purchases effected from manufacturers/dealers outside the State, the petitioner also claimed to

have purchased beer from its sister concern by name Raj Trading Company, Vijayawada and another concern by name S. S. Wine Palace, Visakhapatnam. It is not in dispute that the sale price at which the beer was alleged to have been purchased from the said two dealers was much less than the cost price of beer. Before making such purchases from the two dealers, the petitioner himself claimed to have sold beer to the two dealers, namely, Raj Trading Company, Vijayawada and S. S. Wine Palace, Visakhapatnam, to the tune of Rs. 8.71 lakhs and Rs. 3.54 lakhs respectively (total Rs. 12.26 lakhs approximately). Here also, the alleged sale price realised by the petitioner was much less than the cost price of beer. The time gap between sale by the petitioner to the aforementioned two dealers and purchases from them by the petitioner was only a day or two. A few transactions of sale and purchase took place on the same day itself. Thus, as far as the first sales effected to the two dealers are concerned, on the admitted case of the petitioner, the sale price was shown at an abnormally low figure. The assessee has no explanation for such unusual sale. No considerations of business expediency or exigencies was pleaded. As far as second sales are concerned, the petitioner had shown the normal market value adding profit to the cost because, in any case, the petitioner will not be liable to pay tax on the second sales. Despite this dubious tax avoidance measures adopted by the petitioner, the original assessing authority accepted the return and allowed exemption on the so-called scrutiny of purchase invoices and the books of account. Three years later, the successor, assessing authority had reopened the assessment on the basis of information gathered as a result of inspection and search of the business premises of the petitioner as well as that of Raj Trading Company, Vijayawada and S. S. Wine Palace, Visakhapatnam. Therefore, a show cause notice was issued on October 15, 1984, proposing to add a turnover of Rs. 6,86,840 towards first sale turnover of beer in addition to the first sales of Rs. 20.11 lakhs recorded in the books of account and subjected to tax already. Apart from the allegation of under-statement of sale price with a mala fide intention, the case of the assessing authority who reopened the assessment was that there was no genuine sale at all in favour of Raj Trading Company, Vijayawada and S. S. Wine Palace, Visakhapatnam. So also, there was no corresponding purchase from the said two dealers. In other words, the alleged sales effected to those two dealers and the alleged purchases made from them were only paper manipulations and the transactions were merely fictitious. This conclusion was reached by the assessing authority on the basis of the way-bills and excise permits found at the premises of Vijayawada dealer and on the very admission of the petitioner-assessee that there was no transport of goods at all from and to Vijayawada. The endorsements made by the excise officials on the transport permits were also doubted by the assessing officer. The assessing authority observed :

"From the above, it is clearly established that he has directly sold the goods purchased from outside the State to local dealers and to evade tax on a part of the sale price, he has created fake transactions of sale and purchase with M/s. Raj Trading Company, Vijayawada. So, that part of gross turnover over which he

claimed exemption towards second sales of liquor (being the purchases effected from Raj Trading Company, Vijayawada) has to be subjected to tax."

3. Then, he observed :

"It is undoubtedly established that the assessee has made a wrong claim for exemption by producing before the assessing authority fake sale invoices for transactions which have not been actually effected by them. He has built up all the connected evidence with an ulterior motive to support his bogus claim."

4. The assessing authority, therefore, overruled the objections of the petitioner and withdrew the exemption on a turnover of Rs. 6,86,840 in exercise of his powers u/s 14(4)(cc) of the Act. To the assessment order, two statements showing the details of the alleged sales to and purchases from the Vijayawada dealer and Visakhapatnam dealer were enclosed. Both the appellate authorities, including the Tribunal, agrees with the findings of the assessing officer and upheld the reassessment. The Tribunal was very categorical in its finding that the appellant resorted to falsification of bills and concoction of evidence to put forward a bogus claim for exemption or reduction of tax liability.

5. Two contentions have been urged before us by the learned counsel for the petitioner who did his best to put forward the petitioner's case in a legal perspective. Firstly, it is urged that the endorsement made by the excise officials on the transport permits issued under the Andhra Pradesh Indian Liquor and Foreign Liquor Rules and the receipt of payments by "account payee" bank drafts were ignored by the lower authorities, including the Tribunal. It is submitted that in the face of such convincing evidence, the finding that there was no actual sale is arbitrary and untenable. Secondly, it is contended that the assessing authority committed a jurisdictional error in invoking section 14(4)(cc), which, according to the decided cases of this Court, cannot be invoked for the purpose of making reassessment on a change of opinion and on the basis of very same material which was before the original assessing authority.

6. Adverting to the first contention, we are unable to say that there was no material before the assessing authority to conclude that the alleged first sales to Raj Trading Company, Vijayawada and S. S. Wine Palace, Visakhapatnam, are fictitious. We do not think that the endorsements made on the transport permits issued under the Excise Act rules out the inference as regards the fictitious nature of the transactions. On the other hand, they throw ample light on the manipulative potentialities of the petitioner. Before discussing further, we must say that by highlighting the importance of endorsements made on the excise transport permits, the petitioner has taken a contradictory stand. At the earliest opportunity while giving reply to the show cause notice, the petitioner categorically admitted that there was no transport nor movement of goods from the petitioner's business place at Visakhapatnam to the buyer's business place at Vijayawada. It was the case of the petitioner that only bills were raised and the consideration was received. As there was sale and repurchase from the same

dealer, there was no need for movement of goods. In other words, according to the contention of the petitioner, the delivery of goods was only symbolic and the transactions of sale and purchase as between the petitioner and the Vijayawada dealer were brought about by mere exchange of sale bills and passing of sale consideration. But there is an inherent fallacy and improbability in such explanation of the petitioner. No business expediency or exigency or any plausible reason was shown for restoring to this *modus operandi*. What was the reason for selling the goods at a far less price (i.e. 15 to 50 per cent less) than the cost price of the goods to another dealer ? What was the reason for the repurchase of the goods from the same dealer within the next few days at an equally low price ? Where was the need for the petitioner to purchase the beer from outside the State at a much higher price when he was in a position to purchase the same at a far lesser price from the two dealers ? We could find no convincing answer to any of these questions either from the explanation submitted by the petitioner or from the contentions urged before us or the appellate authorities. The inevitable inference is that the *modus operandi* adopted by the petitioner should, in the circumstances, be treated as a colourable device wholly and solely meant to evade the tax. Such devices which are not merely bona fide tax planning measures fall within the mischief of the proposition laid down in *McDowell and Co. Ltd. Vs. Commercial Tax Officer*, . Faced with the difficulty of imparting a reasonable or at least plausible basis for the pattern of business conducted by the petitioner, the learned counsel for the petitioner has concentrated on the argument that the movement of the goods did take place as evidenced by the excise permits. It is contended that the endorsement made by the officials of the Excise Department amply prove that the consignments did, in fact, reach Vijayawada and taken to the stock account of the purchasing dealer. According to the learned counsel for the petitioner, these endorsements have to be taken to be true in the absence of examination of the makers of the endorsements, and they prevail over any explanation given by the petitioner to the contra. It is difficult to agree with this contention. To say that the version of the petitioner as given out in his reply to the show-cause notice must be ignored in the light of the endorsements on the excise permits, is only an argument in despair. The authenticity and genuineness of the endorsements made on the excise permits ought to be judged from the perspective of explanation given by the petitioner as to how the transactions took place. There is nothing wrong in the assessing authority coming to the conclusion that the endorsements on the excise permits being inconsistent with the version given by the petitioner himself cannot be given any weight and they must be presumed to have been created to serve as evidence to establish movement of goods. When the assessee realised that there were several factors such as non-availability of entries in the books of account regarding freight charges and defective way-bills without lorry numbers which stood against him, he came forward with the explanation that factually, there was no transportation of goods from Visakhapatnam to Vijayawada and vice versa but only the bills were exchanged. The petitioner cannot be permitted to blow hot and cold. In any

case, when there is evidence for and against the movement of goods, it is for the assessing and appellate authorities to appreciate that evidence and come to a conclusion as to which of the factors are entitled to greater weight. In this revision petition, we cannot reappraise the evidence and substitute a different opinion as it is only on a question of law that revision lies. Assuming that the sale consideration was received by means of "account payee" drafts (for which there is no evidence on record), that cannot be regarded as a clinching factor as it is not difficult to create such evidence in perpetuation of the design to evade tax. We, therefore, reject the first contention of the learned counsel.

7. The next contention raised is one with regard to the jurisdiction of the assessing officer to reopen the assessment u/s 14(4)(cc) of the Act. Clause (cc) was added to sub-section (4) of section 14 in the year 1978. Broadly speaking, sub-section (4) deals with what is known as "escaped turnover" or under-assessment of turnover. In so far as it is relevant, sub-section (4) reads as follows :

"(4) In any of the following events, namely, where the whole or any part of the turnover of a 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 where the licence fee or registration fee has escaped levy or has been levied at a rate lower than the correct rate, the assessing authority may, after issuing a notice to the dealer, and after making such enquiry as he may consider necessary, by order, setting out the grounds therefore -

(a) determining to the best of his judgment the turnover that has escaped assessment and assess the turnover so determined;

(b) assess the correct amount of tax payable on the turnover that has been under-assessed;

(c) assess at the correct rate the turnover that has been assessed at a lower rate;

(c) assess the correct amount of tax payable, in a case where any deduction or exemption has been wrongly allowed;

(d).....

(e).....

(f)....."

Notwithstanding the wide phraseology of clause (cc), implied limitations, have been placed by this Court while interpreting the said clause based on certain observations of the Supreme Court. Those observations were made in the context of analogous provisions in the Madras and Kerala Sales Tax Acts dealing with escaped turnover but those provisions did not contain a clause similar to clause (cc) of the A.P. General Sales Tax Act.

8. The limitations propounded are that (1) there must be material de hors the

assessment record and to justify the exercise of power u/s 14(4); (2) by a mere change of opinion, the power of reassessment cannot be resorted to. Suffice it to refer to the Division Bench decision of this Court in State of Andhra Pradesh Vs. Ratna Sree Box Makers, .

9. After referring to the decisions of the Supreme Court in Deputy Commissioner of Agricultural Income Tax and Sales Tax, Quilon Vs. Dhanalakshmi Vilas Cashew Co., , etc., Neeladri Rao, J., observed in State of Andhra Pradesh Vs. Ratna Sree Box Makers, that "wider meaning has to be given to the words "escaped turnover", if the revisional authority is also vested with the power to reopen in regard to escaped turnover, while restricted meaning has to be given to the same if the revisional authority is not conferred with the power to reopen with regard to escaped turnover". As the revisional authority is also vested with the power to reopen assessment under the Andhra Pradesh General Sales Tax Act, restricted meaning has to be given to the words "escaped turnover". Referring to the decision in Andhra Steel Corporation Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam, , the learned Judge observed thus :

"..... the said decision does not support the contention for the department that even in a case where turnover was exempted after deliberation, the assessing authority by mere change of opinion can reopen u/s 14(4) of the Act."

10. It was further held :

"Thus it can be seen that mere fact of wrong allowance of deduction or exemption does not give power to reopen the assessment. Only when material de hors the assessment record is available disclosing escaped turnover referred to in section 14(4), the power of reopening can be exercised u/s 14(4) of the Act."

11. The learned Judge agreed with the view expressed by the Division Bench of this Court of Fatechand and Sons v. Commercial Tax Officer [1983] 54 STC 166 that mere change of opinion cannot be a basis for reopening u/s 14(4) of the Act.

12. Jeevan Reddy, J., in his separate but concurring judgment, after highlighting the fact that the language of section 14(4) of the Andhra Pradesh General Sales Tax Act is wider than section 147 of the Income Tax Act and, therefore, the decisions rendered u/s 147 cannot be applied to a case arising u/s 14(4) of the Andhra Pradesh General Sales Tax Act, nevertheless reiterated the principle that reassessment u/s 14(4) cannot be resorted to on a mere change of opinion. The learned Judge observed :

"..... 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 emphasise is that the assessing authority cannot reopen an assessment on a mere change of opinion on his own part. But, if there is a change in law as elucidated hereinabove, it shall always be open to him to reopen the assessment."

13. The necessity to restrict the scope of sub-section (4) of section 14 was felt

by Jeevan Reddy, J., having regard to the need to impart finality to assessment coupled with the existence of a remedy u/s 20 to the department to set aside an illegal or improper order operating to the detriment of Revenue. The dicta laid down in *Fatechand and Sons Vs. The Commercial Tax Officer, V Circle, Hyderabad*, and in *Menta Narasimhaswamy and Company Vs. The State of Andhra Pradesh*, was cited with approval by the learned Judge. In the latter case, it was held that the power u/s 14(4) cannot be exercised for reviewing an order on the same material.

14. In conclusion, it was held that when once exemption was granted taking a particular view regarding classification of goods, clause (cc) cannot be invoked to withdraw that exemption on a change of opinion by the assessing authority himself.

15. We have our own reservations in accepting the principle too broadly stated by Neeladri Rao, J., in *Ratna Sree Box Makers'* case [1980] 75 STC 82 (AP) that for exercising the power u/s 14(4)(cc), some material outside the assessment record must form the basis. However, without disputing the principles laid down in the above case, we find no difficulty in coming to the conclusion that both the conditions for the exercise of power as laid down in the decided cases are satisfied here. In the present case, the reopening was occasioned by the inspection of business premises of the alleged purchasing dealer at Vijayawada and Visakhapatnam. Some of the way-bill copies pertaining to the disputed transaction were found with the purchasing dealer at Vijayawada. From those way-bills, it can be deduced that there was no real movement of goods. At the same time, the excise transport permits showed that the goods were received and taken to stock by the Vijayawada dealer. This naturally evoked reasonable doubt in the mind of the assessing authority and made him to probe further into the matter. It was as a result of such probe it was found that the alleged first sales made by the petitioner were fictitious and the alleged purchases from M/s. Raj Trading Company, Vijayawada and S. S. Wine Palace, Visakhapatnam were also fictitious. This is how the proceedings for reopening the assessment were initiated. It is obvious that the material de hors the assessment record was taken into account for the purpose of initiating the reassessment as well as for the purpose of recording the conclusion that the petitioner failed to disclose the correct turnover. It is not a case of reassessment made on change of opinion at all. The assessment order does not show that the assessing authority had in mind the grossly low sale price realised by the petitioner from the alleged first sales and the repurchase of the same stocks from the buyers at a slightly higher price. As observed in *Andhra Steel Corporation Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam*, , the grant of exemption as a result of failure to apply the mind by the assessing authority is one of the legitimate grounds for making reassessment u/s 14(4)(cc). The Division Bench relied upon the observations of the Full Bench of the Madras High Court in *State of Madras v. Louis Dreyfus and Company Ltd.* [1955] 6 STC 318 wherein it was said that the turnover can be said to have escaped assessment even by lack of care on the

part of the officer or by reason of his inadvertence. P. A. Choudary, J., speaking for the Division Bench observed :

"This is not a case where there was any change of opinion by the assessing authority. The notice has been issued in this case, because the assessing authority had thought that exemption had been wrongly granted to the assessee without calling upon him to furnish necessary proof of the facts."

16. The unusual features of the transactions depicted by the petitioner and the incongruities inherent in the claim of the petitioner should have been duly taken note of by the original assessing authority instead of readily granting the exemption on the basis of "purchase invoices, etc." There was no discussion at all on the question whether the transactions as disclosed by the petitioner inspired credibility and beyond reproach. In such a situation, the reassessment cannot be invalidated applying the change of opinion test.

17. Thus, both the contentions of the petitioner fail and we see no infirmity in the order of the Tribunal upholding the reassessment u/s 14(4).

18. Next, we come to the levy of penalty u/s 7A(2) which is the subject-matter of T.R.C. No. 341 of 1990. The Tribunal while giving a finding that it is a fit case to levy penalty, however reduced the penalty at two times the tax leviable, though the section provides for the levy of penalty at three times. To that extent, the relief was allowed by the Tribunal.

19. It is contended by the learned counsel for the petitioner that section 7A(2) is not attracted to the facts of the instant case and if at all, the penalty should have been levied u/s 14(8)(1). It is contended, inter alia, that the bills produced by the petitioner cannot be said to be false bills.

20. Section 7-A(2) reads as follows :

"Where a dealer issues or produces a false bill, voucher, declaration, certificate or other document with a view to support or make any claim that a transaction of sale or purchase effected by him or any other dealer, is not liable to be taxed or is liable to be taxed at a reduced rate, the assessing authority shall on detecting such issue or production, direct the dealer issuing or producing such document to pay as penalty;

(i) in the case of first such detection, three times the tax due in respect of such transaction; and

(ii) in the case of a second or subsequent detection, five times the tax due in respect of such transaction :

Provided that before issuing any direction for the payment of the penalty under this section, the assessing authority shall give to the dealer an opportunity of making representation against the levy of such penalty."

21. The ground on which the penalty was levied under the aforementioned

provision is that the petitioner knowingly produced false purchase bills obtained from its own sister concern M/s. Raj Trading Company, Vijayawada and another firm by name M/s. S. S. Wine Palace, Visakhapatnam, to support the claim for exemption on the turnover on which reassessment was made u/s 14(4). The assessing authority found that the same stock which was alleged to have been sold by the petitioner to the said two dealers was shown to have been repurchased on the same day or the next day. The co-relation statement of sales and purchases is furnished in the annexures I and II to the assessment order. The sale value as well as the purchase value is very much less than the cost price and the price at which the beer was sold to other local dealers. As already stated, the petitioner admitted in his explanation that no movement of goods took place and the sales and purchase were effected only by book entries. There was no actual movement of goods either from the petitioner's place of business or from the place of business of the two dealers from whom the petitioner was supposed to have repurchased. We have already commented that the petitioner failed to give even a plausible reason for such abnormal business transactions. By showing the price of the first sale of beer at a grossly low price the petitioner suppressed the taxable turnover of the first sales and offered a lesser turnover for assessment. The stock said to have been sold to the two dealers was, in fact, not sold to the two dealers at Vijayawada and Visakhapatnam. But the stock remained with the petitioner and the reasonable inference that could be drawn and has been drawn by the assessing authority was that the said stock was sold to other local dealers at the normal market price. Similarly by showing repurchase from the same dealers and accounting them as second sales, the petitioner was able to camouflage the first sales as second sales. The fictitious sale in favour of the two dealers and the fictitious purchases of the same stock from those dealers are integral part of the design to depict the first sales as second sales so as to avoid tax on the taxable sales. But for the purchase bills obtained from the said two dealers, it would not have been possible for the petitioner to build up the stocks on record which could form the subject-matter of the second sales. That is how the disputed purchase bills were pressed into service by the petitioner to base his claim for exemption on the alleged second sales now subjected to tax. For the purpose of section 7A(2), it is not necessary that the bill or the other document produced by the assessee should be a forged or fabricated bill. It is enough if the contents thereof are false. It may be, as contended by the learned counsel for the petitioner, that the department's case is not that the two dealers of Vijayawada and Visakhapatnam did not issue the bills at all but if the bills did not reflect the true state of affairs but were meant to be sham documents showing fictitious sales, that is enough, in our view, to attract section 7A(2) of the Act.

22. The learned counsel for the petitioner has strenuously contended that in the case of the assessment of Raj Trading Company, Vijayawada, the Sales Tax Department accepted the bills partially in the sense that without rejecting the bills treating them as relatable to non-existent sales, subjected the said dealer to

tax on a higher turnover. That means, the very transactions of sales to the petitioner by Raj Trading Company, Vijayawada, were considered to be first sales by that dealer, accepting his claim in that behalf but certain turnover was added on the ground that there was understatement of turnover. It is, therefore, contended that the department cannot take a different stand in the instant case. It is also contended that no enquiries were made with the Vijayawada dealer and his records were not checked by the assessing authority before coming to the conclusion that the sales effected by that dealer were fictitious in nature. It is difficult to agree with this contention. The details of assessment made against Raj Trading Company, Vijayawada, are not available on record. Even otherwise, the findings on the basis of assessment made on the said dealer in a different assessment proceeding need not be mechanically followed by the assessing authority in the instant case. It cannot be said that the findings in the assessment order pertaining to the selling dealer arrived at by a different assessing authority should legally bind the assessing authority who has reopened the assessment in the present case. One mistake need not lead to the other. Moreover, when once the sale by the petitioner in favour of its sister concern Raj Trading Company, Vijayawada is disbelieved, it logically follows that the sale by that dealer in favour of the petitioner should also be disbelieved because the petitioner himself admitted in his explanation dated July 3, 1985 that Raj Trading Company, Vijayawada and S. S. Wines Palace, Visakhapatnam, sold to the petitioner the very stock which they purchased from the petitioner. We have already upheld the view of the assessing and appellate authorities that the alleged sales to the said two dealers did not take place at all. Hence, the irresistible inference is that the repurchases from those two dealers have also been manipulated to suit the petitioner's claim for exemption. We, therefore, see no ground to interfere with the order levying penalty as confirmed by the Tribunal. Incidentally, we may mention that it has been brought to our notice that this Court dismissed the tax revision cases filed by Raj Trading Company, Vijayawada, against the orders of assessment and penalty.

23. In the light of the foregoing discussion, we see no grounds to interfere with the orders of the Tribunal confirming the orders of the sale tax authorities. The T.R.Cs. are accordingly dismissed without costs.

24. Petitions dismissed.