
(2015) 10 MP CK 0014

In the Madhya Pradesh High Court

Case No : W.P. Nos. 2725 and 2704 of 2014

Sadguru Fabricators and Engineers P. Ltd.

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 06-10-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2015) 4 MPLJ 399

Hon'ble Judges : P.K. Jaiswal and J.K. Jain, JJ.

Bench : Division Bench

Advocate : Umesh Gajankush, for the Appellant; Pushyamitra Bhargava, Deputy Advocate General, for the Respondent

Final Decision : Allowed

Judgement

J.K. Jain, J.—This order shall govern disposal of Writ Petition No. 2725 of 2014 and Writ Petition No. 2704 of 2014. By these writ petitions under Articles 226 and 227 of the Constitution of India, the petitioner is challenging the order dated 13-8-2013 passed by respondent No. 3 in Case No. 30/2013 (State) and Case No. 31/2013 (Entry Tax) and also order dated 30-12-2011 passed by respondent No. 4 in Case No. 45/2010 (State) and Case No. 46/2010 (Entry Tax).

2. Brief facts of these cases are that the petitioner company was carrying its business activity of iron and steel at Indore. On 18-5-2001, an inspection of the premises of business place of the petitioner was carried out by the departmental authorities and some papers were seized from the business place. In these papers, three Bills No. TF/427/2000-01 dated 13-12-2000 amounting to Rs. 9,40,127-76; Bill No. 442 dated 21-12-2000 amounting to Rs. 11,26,659-04; and Bill No. 445 dated 29-12-2000 amounting to Rs. 4,55,558-48 were also found. By these bills, M/s. Nitisha Steel Sales had purchased the iron steel (C.R. Quil) from M/s. Turkiya Feromet Ltd., Bombay. Thereafter scrutiny report was prepared on 19-10-2001. On that basis, the assessment proceedings were initiated against the petitioner, in which original assessment order was passed on

11-2-2004. Thereafter penalty proceedings under section 13 of the Entry Tax read with section 69 of the M.P. Commercial Tax Act, 1994 [for short "the Act of 1994"] was initiated on 24-5-2008 and vide order dated 27-9-2008 under the Act of 1994, penalty of Rs. 4,00,000-00 and under Entry Tax penalty of Rs. 1,25,000-00 was imposed. These orders were challenged by the petitioner by filing Revision No. 12/2009/Indore/Entry Tax and Revision No. 19/2009/Indore/State. The Additional Commissioner, Commercial Tax, Indore (respondent No. 3), vide order dated 23-10-2009 allowed both the revisions and directed that the petitioner be provided an opportunity to cross-examine the witnesses. After the remand, on 30-12-2011 Assistant Commissioner, Commercial Tax, Dhar again passed the order of imposing the penalty of Rs. 4,00,000-00 and Rs. 1,25,000-00 and copy of the order was served upon the petitioner after 11 months of passing of the order. These orders were challenged in Revision No. 30/2013/State and Revision No. 31/2013/Entry Tax before the respondent No. 3, the respondent No. 3 vide order dated 13-8-2013 affirmed the order and dismissed the revisions. Being aggrieved, the petitioner has filed these writ petitions before this Court.

3. The stand of respondents is that the petitioner was given enough opportunity at the time of scrutiny of seized records and burden was on the assessee to prove that transactions were not made on his behalf, therefore, mere was no necessity of cross-examination of witnesses. After remand, fresh notice was issued in the case and fresh penalty proceeding was initiated on 22-4-2010 and penalty order was passed on 30-12-2011 which is in time limit of one calendar year. The department has satisfactorily explained the delay in serving me order on the assessee/petitioner. Thus, there is no ground for presuming that the order passed by Assistant Commissioner, Commercial Tax, Dhar was antedated. Thus, the orders are quite legal, operative and within jurisdiction.

4. Learned counsel for the petitioner submits that the respondent No. 3 has committed an error of law in holding that as per section 14 of the Act of 1994 the burden lies on the assessee to prove that he is not liable to tax. In the present set of facts, section 14 of the Act of 1994 is not applicable. Respondent No. 3 by the impugned orders erroneously held that there was no necessity of cross-examination of third party witnesses as the burden lay on the assessee to prove that he was not liable to tax. There was a specific direction in earlier revisional order for affording a reasonable opportunity for cross-examination of witnesses, but the reasonable opportunity has not been granted to the petitioner. The burden of proving the essential ingredients for imposition of the penalty is not on the assessee but on the department as held by this Court in the case of S.R. Kalani and Co. vs. C.L. Sharma and another, (2004) 3 STJ 282 (M.P.).

5. Learned counsel for the petitioner submits that as per the provisions of section 69(2) of the Act of 1994, the penalty proceedings are required to be completed within one calendar year from the date of initiation; whereas in the present case the penalty proceedings were initiated on 24-5-2008 and the order of imposing

penalty was concluded on 30-12-2011 clearly beyond the prescribed period. Thus, the order is illegal and inoperative.

6. Learned counsel for the petitioner further submits that the order was purported to be passed on 30-12-2011; whereas the copy of the order was served upon the petitioner on 3-12-2012 i.e. after 11 months of passing of the order. It shows that the order was ante-dated and no explanation has been offered by the respondent No. 4 as to why the order was served so late. In such circumstances it must be presumed that the order was not passed on the date it purports to have been passed and it might have been passed after the expiry of the prescribed period. For this purpose, he placed reliance on the judgment of Apex Court in the case of *State of A.P. vs. M. Ramakishnaiah and Co.*, (2005) 5 STJ 820 (SC).

7. Learned counsel for the petitioner submits that the findings reached in the assessment order cannot conclude the matter and cannot operate as *res judicata* in penalty proceedings as held by this Court in the case of *S.R. Kalani and Co.* (*supra*).

8. On the other hand, learned Deputy Advocate General for the respondents/ State supports the impugned orders and submits that the respondents have considered all these objections and after elaborate discussions dismissed the revisions. The interference by this Court in exercising the powers under Articles 226 and 227 of the Constitution of India are limited and in the present facts no interference is called for.

9. After hearing learned counsel for the parties, perused the record.

10. Before advertizing in the issue, we would like to examine the provisions of the Act which are applicable in the present case. The following two questions are crop up before this Court--

(i) Whether as per the provisions of section 14 of the Act in penalty proceedings, the burden of proving the essential ingredients lay on the assessee or on the department?

(ii) When in the penalty proceedings the revisional authority remanded the matter, then the limitation for concluding the proceedings will be one calendar year as per section 69(2) of the Act, or two calendar years as per section 27(8) of the Act?

11. Section 14 of the Act of 1994 reads as under:--

"14. Burden of Proof.--The burden of proving that any sale or purchase effected by a dealer is not liable to tax under section 9 or section 9-A or section 10 or section 21 as the case may be, shall be on the dealer."

12. As evident from the provisions of section 14 of the Act of 1994, the burden of proving that any sale or purchase effected by a dealer is not liable to tax under section 9 or section 9-A or section 10 or section 21 shall be on the dealer. The

provisions of section 9 or section 9-A or section 10 or section 21 of the Act are not in regard to penalty proceedings. As per section 14 of the Act of 1994 to prove the claim for exemption lay on the dealer. Thus, the provisions of section 14 of the Act of 1994 come into play at the time of assessment proceedings and not for the penalty proceedings.

13. Section 69(1) of the Act of 1994 provides the provision of imposition of penalty. The provisions of section 69(1) of the Act of 1994 are as under:--

"69. Power of Commissioner or appellate or revisional authority to impose penalty in certain circumstances.--(1) If the Commissioner or the appellate or revisional authority, in the course of any proceedings under this Act is satisfied that a dealer has concealed his turnover or the aggregate amount of purchase prices in respect of any goods or has furnished false particulars of his sales or purchases, as the case may be, in his return or returns for any year or part thereof or has furnished a false return or returns for such period, the Commissioner or the appellate or the revisional authority as the case may be, may initiate proceedings separately for imposition of penalty under this section.

14. The provisions of section 43(1) of the M.P. General Sales Tax Act, 1958 (for short "the Act of 1958") are as under:--

"43. Power of Commissioner or appellate authority to impose penalty.--(1) If the Commissioner or the appellate authority in the course of any proceeding under this Act, is satisfied that a dealer has deliberately concealed his turnover in respect of any goods or furnished a false return, the Commissioner or the appellate authority, as the case may be, may after giving the dealer a reasonable opportunity of being heard, direct that the dealer shall, in addition to the tax payable by him, pay by way of penalty a sum not exceeding the amount of the tax which would have been avoided if the return furnished by the dealer had been accepted as correct."

15. From bare reading, it reveals that the provisions of section 43(1) of the Act of 1958 and the provisions of section 69(1) of the Act of 1994 are in substance the same.

16. This Court while interpreting section 43(1) of the Act of 1958 in the case of S.R. Kalani and Co. (supra) held as under:--

"The proceedings under section 43(1) being in their very nature penal proceedings, the burden of proving the essential ingredients for imposition of the penalty is not on the assessee but on the department. The assessment proceedings and penalty proceedings are different in their nature."

17. In the case of S.R. Kalani and Co. (supra), this Court has also held that:--

"The findings given in assessment proceedings are no doubt relevant and admissible in penalty proceedings; but they do not operate as res judicata for the reason that the considerations that arise in penalty proceedings are entirely

different from those in assessment proceedings. Under section 43(1) a penalty can be imposed only if there is deliberate concealment of turnover or if the dealer has furnished a false return. The conclusion, therefore, of the assessing authority in assessment proceedings that the return filed by the assessee is false or that he has concealed his turnover cannot be made the sole basis of an order of penalty. In rebuttal of the evidence led by the department the assessee is entitled to adduce evidence to show that no penalty ought to be imposed on him."

18. With the aforesaid, it is clear that for penalty proceedings the provisions of section 14 of the Act of 1994 are not applicable. These provisions are come into play only at the time of assessment proceedings.

19. Now we have to consider what is the period of limitation for imposing the penalty after remanding the proceedings? Section 69(2) of the Act of 1994 provides the period of imposing penalty which is as under:--

"(2) The proceeding under sub-section (1) shall be initiated by the Commissioner or the appellate or revisional authority as the case may be, by issue of a notice in the prescribed form for giving the dealer an opportunity of being heard. On hearing the dealer, the Commissioner or the appellate or the revisional authority as the case may be, shall pass an order not later than one calendar year from the date of initiation of such proceeding or within such further time as allowed by the State Government, directing the dealer that he shall in addition to the tax payable by him, pay by way of penalty a sum which shall not be less than three times but shall not exceed 3.5 times of the tax evaded."

20. Section 27(8) of the Act is also provides the limitation which is as under:--

"(8) The assessment shall be made under this section--

(i) in respect of a registered dealer and a dealer referred to in clause (b) of sub-section (6) within a period of two calendar years from the end of the period for which assessment is to be made; and

(ii) in respect of a dealer who has failed to apply for registration, within a period of two calendar years from the commencement of proceedings under sub-section (6):

Provided that --

(a) Where a fresh assessment has to be made to give effect to any finding or direction contained in any order under sections 61, 62 or 70 or to any order of the Civil Court, High Court or Supreme Court, such assessment shall be made within a period of two calendar years from the date of the order containing such finding or direction or the order of the Civil Court, High Court or Supreme Court, as the case may be. If for any reason such fresh assessment is not made within the specified period, the Commissioner shall take steps to ensure that assessment is made as expeditiously as possible;

(b) Where an order of ex parte assessment is set aside and case re-opened

under section 72 for making a fresh assessment, such fresh assessment shall be made within a period of six calendar months from the date of setting aside the ex parte order of assessment or within the period laid down in clause (i) whichever is later; and

(c) Nothing contained in this sub-section shall apply to proceedings initiated under section 28 or section 29 or any proceeding other than assessment of tax that may be instituted under any other provisions of this Act."

21. From bare reading of these sections, it is clear that section 27(8) of the Act of 1994 is applicable for assessment proceedings and not for penalty proceedings. For penalty proceedings section 69(2) of the Act of 1994 is applicable and this section provides that for initiation of penalty proceedings, the Commissioner or the appellate or the revisional authority as the case may be, shall pass an order not later than one calendar year from the date of initiation of such proceeding or within such further time as allowed by the State Government. Thus, as per the provisions one calendar year is provided for concluding the proceedings. Now the question arises that when revisional authority remitted back the matter for re-consideration of imposition of penalty what is the period of limitation? There is no specific provision in the Act. Therefore, we are of the opinion that when the matter is remitted back to Assessment Officer and Assessment Officer started re-hearing the matter, from that date he has to conclude the penalty proceedings within one calendar year.

22. Now we have examined the facts of the present case. In the impugned order Additional Commissioner, Commercial Tax held that as per the provisions of section 14 of the Act of 1994, the burden is on the petitioner to prove that he has not purchased any iron steel (C.R. Quil) from M/s. Turkiya Feromet Ltd., Bombay and he is not liable for penalty. We are unable to be convinced with this finding as we have already held that section 14 of the Act of 1994 shall not come into play in the penalty proceedings and in the penalty proceedings the burden is on the department and only on the basis of revised assessment, the penalty cannot be imposed.

23. Now we have to consider the arguments in regard to period of limitation. The penalty proceedings under section 69(2) of the Act of 1994 were initiated on 24-5-2008 and on 27-9-2008 penalty of Rs. 4,00,000-00 and Rs. 1,25,000-00 was imposed. Thus, the order was passed within one calendar year. Against that order revision has been filed. The revisional authority vide order dated 23-10-2009 remanded the matter for re-hearing. Then the Assistant Commissioner started re-hearing on 22-4-2010 and the hearing was closed on 30-12-2011 and thereafter the order was passed on same day i.e. 30-12-2011 and the copy of order was served upon the petitioner on 3-12-2012 i.e. after 11 months of passing of the order.

24. Hon'ble Apex Court in the case of M. Ramakishtaiah and Co. (supra) held that when the order was served on the assessee by unusual delay then the

department has to give a proper explanation and in absence of any explanation, it is presumed that the order was not made on the date it purports to have been made and it could have been made after the expiry of the prescribed period.

25. In the present case, there is a delay of 11 months and for this delay Additional Commissioner in the order has mentioned that the file of penalty proceedings was transferred from Indore Division to Assistant Commissioner, Commercial Tax, Dhar and there was shortage of Process Servers, therefore, the order could not be served on the petitioner in time. But for such explanation, no evidence has been produced by the department. Thus, it is presumed that the Assistant Commissioner has not passed the order on the date it purports to have been made.

26. In such circumstances, we are of the view that the department has failed to explain the inordinate delay of 11 months. Therefore, it is presumed that the order of penalty was passed ante-dated. Assistant Commissioner started rehearing on 22-4-2010, therefore, it was obligatory on his part to conclude the proceedings of imposition of penalty within one calendar year i.e. up to 21-4-2011; whereas the Assistant Commissioner failed to conclude the penalty proceedings within prescribed period of one calendar year.

27. With the aforesaid discussions, we are of the view that the Additional Commissioner, Commercial Tax has erroneously held that for penalty proceedings provisions of sections 14 and 27(8) of the Act of 1994 shall be applicable and the finding that the department has explained the delay of 11 months in serving the order of penalty upon the petitioner is not sustainable in law. With the aforesaid, the petitions are allowed and the penalty imposed by the department is set-aside.

Let a copy of this order be kept in the record of connected matter.