
(1977) 09 AP CK 0027
In the Andhra Pradesh High Court
Case No : T.R.C. No. 29 of 1976

Vijaya Wines

APPELLANT

Vs

The State of Andhra Pradesh

RESPONDENT

Date of Decision : 19-09-1977

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 14(1), 2(l)(r)

Citation : (1978) 42 STC 329

Hon'ble Judges : S. Obul Reddi, C.J.; Ramachandra Raju, J

Bench : Division Bench

Advocate : P. Venkatarama Reddy, for the Appellant; Government Pleader for Commercial Taxes, for the Respondent

Judgement

S. Obul Reddi, C.J.—This tax revision case is directed against the order of the Sales Tax Appellate Tribunal, dismissing Tribunal Appeal No. 730 of 1974 preferred by the revision-petitioner. Mr. P. Venkatarama Reddy, the learned counsel appearing for the petitioner, contended that penalty proceedings are quasi-criminal in nature and the Appellate Tribunal has failed to bear in mind the principles laid down by the Supreme Court in Hindustan Steel Ltd. Vs. State of Orissa, in the matter of levying penalty. It is his case that the sales in respect of which addition has been made by the assessing authority are second sales and that there was no enquiry by the assessing authority to ascertain whether the sales are not second sales.

2. The relevant facts necessary for appreciating the points raised in this revision are these: The petitioner is M/s. Vijaya Wines, Kothapet, Tenali. During the assessment year 1972-73, the firm reported a gross turnover of Rs. 1,61,379.65 and claimed exemption on the entire turnover. The business premises of the petitioner was inspected by the officers of the Commercial Tax Department on 22nd August, 1972, which led to the recovery of duplicate set of accounts for the period 27th July, 1972, to 21st August, 1972. They also recovered slips of transactions covering the period 27th July, 1972, to 21st August, 1972. Soon

after the inspection, the petitioner reported closure of its business on 13th September, 1972. The assessing authority checked the accounts for that year and, on the basis of the material gathered by the officers of the department at the inspection, added a turnover of Rs. 71,089.86 as suppression of sales of liquors. On the ground that the petitioner did not prove that it was a second dealer in respect of the liquor transactions, the assessing authority treated the transactions as first sales within the State and subjected the sales to tax at the appropriate rates. The assessment orders were confirmed, on appeal, both by the Assistant Commissioner as well as by the Appellate Tribunal. The assessing authority issued a notice dated 6th December, 1973, to the petitioner to show cause why the turnover disclosed in the second set of account books and slips of papers should not be subjected to tax u/s 14(1) and why, for the reasons stated in the notice, a penalty of Rs. 78,755.25 being five times of the tax due on the estimated suppressed turnover, be not levied. The petitioner filed its objections and, rejecting the objections raised by the petitioner, the assessing authority levied penalty as proposed in the notice. That led the petitioner to prefer an appeal before the Assistant Commissioner, Commercial Taxes and he reduced the penalty equal to the tax assessed by the assessing authority on the ground that it would amply meet the ends of justice. The net result was the penalty of Rs. 78,755.25 was reduced to Rs. 12,658.49. The petitioner then preferred an appeal and that appeal was dismissed by the Appellate Tribunal. Hence this revision.

3. Mr. D. V. Sastry, the learned counsel appearing for the department, contended that penalty is leviable in accordance with the scheme of the Andhra Pradesh General Sales Tax Act and, therefore, the general guidelines laid down by the Supreme Court in *Hindustan Steel Ltd. Vs. State of Orissa*, do not apply, when examined in the light of the scheme of the Act. Therefore, the question that falls for determination is whether penalty proceedings are not in accordance with the requirements of the provisions of the Act and the Rules made thereunder. According to Mr. Sastry, a dealer is bound to disclose in his return the total turnover and then seek exemption, if he is so entitled to under the provisions of the Act and the Rules and as, in this case, there was no disclosure at all in respect of the sale transactions which were discovered by the departmental officials on inspection, it is a case which attracts the penal provision, viz., the levy of penalty.

4. "Total turnover", as defined in Section 2(l)(r), means "the aggregate turnover in all goods of a dealer at all places of business in the State whether or not the whole or any portion of such turnover is liable to tax". Relying upon this definition, Mr. Sastry contends that the question of liability to tax on a turnover should not be the criterion for judging whether a dealer is liable to penalty.

5. Section 14 is the relevant section which deals with assessment of tax, as also penalty. Section 14(1) says "if the assessing authority is satisfied that any return submitted u/s 13 is correct and complete, he shall assess the amount of tax

payable by the dealer on the basis thereof...." It further says "if the return appears to him to be incorrect or incomplete he shall, after giving the dealer a reasonable opportunity of proving the correctness and completeness of the return submitted by him and making such inquiry as he deems necessary, assess to the best of his judgment, the amount of tax due from the dealer...." In this case, the assessing authority did not accept the return submitted by the dealer and as the inspection revealed concealment of transactions, a best judgment assessment was made on an estimated turnover. Sub-section (2) of Section 14, which is relevant for the purpose of discussion, reads :

(2) When making an assessment to the best of judgment under Sub-section (1), the assessing authority may also direct the dealer to pay in addition to the tax assessed, a penalty as specified in Sub-section (8) on the turnover that was not disclosed by the dealer in his return.

6. Mr. Venkatarama Reddy, appearing for the petitioner, seeks to construe the words "on the turnover that was not disclosed" as "on the turnover liable to tax". According to him, Sub-section (2) of Section 14 is attracted only where taxable turnover is not disclosed by the dealer and not otherwise. According to Mr. Sastry, to construe the words "on the turnover" as meaning "on the turnover taxable" would be introducing the word "taxable" which the legislature has not chosen to insert after the word "turnover".

7. Whether penalty is leviable in a particular case or not depends not merely on non-disclosure of turnover but also on the conduct of the dealer. It is true that the word "taxable" cannot be inserted by the court, when the legislature has chosen not to, but this Sub-section has to be read in the light and in the context of Sub-Section (8) of the same section and Section 13. Section 13 deals with submission of return of turnover by the dealers. This section casts a duty on the dealer, who is liable to tax under the Act, to submit such return or returns relating to his turnover, in such manner, within such periods and to such authority as may be prescribed. Section 13 speaks of disclosure of every transaction.. In so submitting the return, the total turnover has to be shown by the dealer. Rule 6 provides for the tax being levied on the net turnover of a dealer and in determining the net turnover deductions shall be made from the total turnover of the dealer. Monthly returns have to be filed in form A-2 and appendix II provides for a statement being furnished showing the turnover of business in Schedule I goods. It has to be shown under different heads, viz., (i) rate of tax, (ii) nature of goods, (iii) total turnover, (iv) exemption claimed, (v) net turnover and (vi) tax due on the net turnover. Relying upon this rule and appendix II, Mr. Sastry contends that the expression "on the turnover that was not disclosed", occurring in Sub-section (2) of Section 14, takes in turnover whether taxable or otherwise and the words cannot be construed to mean only taxable turnover. We are inclined to agree with Mr. Sastry in so far as the interpretation of the words "on the turnover that was not disclosed" is concerned, viz., those words not being attributable to "taxable" turnover that was not

disclosed : but, Sub-section (2) of Section 14, as has been adverted to by us earlier, has to be examined in the context and in the light of Sub-section (8) of the same section, which provides for varying rates of penalty leviable under Sub-section (2), Sub-section (3), or Sub-section (4) of Section 14. The proviso has an important bearing on the question of levying penalty under Sub-section (2), or Sub-section (3), or Sub-section (4) of Section 14. This proviso lays down :

Provided that where such failure occurred due to a bona fide mistake on the part of the dealer, no such penalty shall be levied.

8. According to Mr. Sastry, the failure to disclose the turnover which the assessing authority added, should be due to a bona fide mistake on the part of the dealer and if the dealer is not able to satisfy the assessing authority, or the other forums provided under the Act, that it was due to bona fide mistake that the failure to disclose the turnover had occurred, the penal provision, i. e., Sub-section (2), is automatically attracted and penalty would be leviable at the rates provided in clauses (a) and (b) of Sub-section (8). Notwithstanding such provisions of the Andhra Pradesh General Sales Tax Act, this Court and the Supreme Court have been consistently laying down certain guidelines in the matter of levy of penalty. The Supreme Court in *Hindustan Steel Ltd. Vs. State of Orissa*, had occasion to construe Section 9(1) and Section 25(I)(e) of the Orissa Sales Tax Act, which provided for imposition of penalty for failure to register as a dealer. That was a case where the Hindustan Steel Ltd. defaulted in registering as a dealer and submitting its returns. The Sales Tax Officer directed the company to pay tax and penalty in addition, for failure to register itself as a dealer. There is no doubt that there was non-compliance with the requirements of Section 9(1) and Section 25(I)(e) of the Orissa Sales Tax Act, but non-compliance by itself was not held to be sufficient by the Supreme Court to attract the penal provision, which provided for imposition of penalty. Shah, J., speaking for the court, observed that :

...Under the Act penalty may be imposed for failure to register as a dealer... But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances....

9. In other words, the view of the Supreme Court is that the mere fact that there is liability to pay sales tax does not by itself give rise to imposition of penalty because of the default committed by a dealer in not furnishing correct and complete return of his total turnover. The Supreme Court again, in *Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, considered the question as to

when penalty can be imposed. The opinion expressed by the Supreme Court in *Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, is :

...Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment.. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act. Reference may be made to Section 28 of the Indian Income Tax Act, 1922, where penalty is provided for concealment of income. Penalty is in addition to the amount of Income Tax. This court in *Jain Brothers v. Union of India* 1970 77 ITR 107 (S.C.) said that penalty is not a continuation of assessment proceedings and that penalty partakes of the character of additional tax....

10. The facts of that case are of course different. That was a case where the assessee under the Central Sales Tax Act were sought to be made liable for penalty under the provisions of the State Sales Tax Act. But the principle stated by the learned Judges there, viz., that penalty is not merely adjunct to assessment, or consequential to assessment and not merely sanction, applies to all penalty proceedings. Whether there has been a bona fide failure to make a complete disclosure of the turnover, or whether the assessee deliberately or wilfully committed the default, depends upon the facts of each case. The case of the petitioner throughout has been that the accounts which were seized, related to second sales in the State and as such those transactions were not exigible to sales tax. It is true that this plea was rejected by the assessing authority ; but, if the Assistant Commissioner, who heard the appeal, had confirmed the finding recorded by the assessing authority, there would not have been any difficulty in rejecting the contention of the petitioner before us. The relevant portion of the order of the Assistant Commissioner reads:

...It is no doubt true that the department has not made any consequential enquiries to prove that the appellants smuggled goods and suppressed the purchases and sales. The purchase bills recovered by the department are only local purchases and the sales are not exigible to tax. In Appeal No. 389/73-74, I have confirmed the assessment on the suppressed turnover with modification relating to rates of tax among other reasons that the alleged sales are not supported by purchase vouchers. The department has not proved the guilt of the appellants to warrant levy of maximum penalty. The appellants have admittedly stopped their business from 1st October, 1972. I consider that the levy of penalty equal to the tax confirmed by me would amply meet the ends of justice. I therefore reduce the penalty from Rs. 78,755.25 to Rs. 12,658.49. The appeal is accordingly disposed of....

11. It would look as though he made a compromise order between the department and the assessee. If really he was convinced that the purchase bills recovered by the department were only local purchases and the sales were not exigible to tax, we are unable to understand how he could have either confirmed the assessment in the assessment appeal or could sustain the penalty by reducing it from Rs. 78,755.25 to Rs. 12,658.49. The Tribunal has not recorded

any finding disagreeing with the view expressed by the Assistant Commissioner, though it had given its own reasons. The Tribunal, dealing with the documents recovered at the time of inspection and the contention of the petitioner that it was a second dealer in liquors and as such exempt from tax and, consequently, no penalty could be levied, observed:

...The fact that the transport expenses noted in the secret book were small do not establish that the liquors were purchased from dealers within the State. They have not established that they were second dealers in liquors as they failed to disclose the names of the persons from whom they purchased these liquors either in the secret books or before the assessing authority, or before us. In view of these circumstances, it cannot be said that the appellants are second dealers in respect of the suppressed transactions and, therefore, not liable to tax and, consequently, not liable to imposition of penalty....

12. Merely because the petitioner had not established that those were second sales, it does not automatically follow that it is liable to pay penalty. The fact that the petitioner was liable to tax does not automatically attract the liability to penalty. The guidelines stated by the Supreme Court in *Hindustan Steel Ltd. Vs. State of Orissa*, or what was observed in *Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, have not been borne in mind by the Tribunal. Merely because Sub-section (2) of Section 14 sanctions levy of penalty on the turnover that was not disclosed by the dealer, penalty cannot be imposed, unless it is found that the petitioner either acted deliberately in defiance of law, or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. The finding of the Assistant Commissioner that the department had not made any consequential enquiry to prove that the petitioner had smuggled goods or that the purchases were not local purchases, has not been set aside by the Appellate Tribunal. Therefore, having regard to the facts and the circumstances of this particular case, we are inclined to hold that the levy of penalty as confirmed by the Sales Tax Appellate Tribunal, is not justified. It is, accordingly, set aside. No costs. Advocate's fee Rs. 200.