(2009) 05 KAR CK 0014

In the Karnataka High Court

Case No : STRP. No. 14 of 2009 (Tax) and Miscellaneous Civil No. 8136 of 2009 in STRP. No. 14 of 2009 (Tax)

Wipro Limited Infotech Group APPELLANT

Vs

The State of Karnataka RESPONDENT

Date of Decision : 12-05-2009

Acts Referred:
Karnataka Sales Tax Act, 1957 — Section 18, 18 A

Citation : (2009) 25 VST 1

Hon'ble Judges : Ram Mohan Reddy, J;L. Narayana Swamy, J

Bench : Division Bench

Advocate : Vasudev and Company, Sriyuths K.S. Harish, V.S. Arbatti, R. Kiran and S.A. Kalamadi, for the Appellant;

Final Decision : Dismissed

Judgement

Ram Mohan Reddy, J.—The petitioner a public limited company incorporated under the Companies Act, 1956 and a registered dealer since 1981 engaged, inter alia, in the manufacture and marketing of computer hardware and software, received a purchase, order stipulating "all inclusive" price from customers in relation to the products dealt with by it, during the assessment year 2001-02, whence invoices were raised using "Symix Accounting System" developed by Symix India Corporation Limited, though incorporated a particular code to calculate the tax at the applicable rate, after apportioning the basic price nevertheless the rate of tax was calculated at 4% instead of 2%, by mistake, and that in the return for the year 2001-02, Rs. 4,20,77,954 was declared as "CST Collected", are the statement of facts in the petition.

2. The Deputy Commissioner of Commercial Taxes(Transition-I), Mysore, the Assessing Authority issued a penalty notice dated 23.5.2005 pointing out that the petitioner-Assessee company collected Rs. 4,20,77,954 from the customers towards ''CST'' at the rate of 4% as verified from the books of accounts and in respect of which exemption when claimed was allowed, in other words, petitioner

having collected Rs. 97,91,629.00 representing the excess 2% of tax in contravention of Section 18 of the Karnataka Sales Tax Act, 1957 (for short "K.S.T. Act, 1957") was liable for penalty and hence the Assessing Authority invoked Section 9(2) of the Central Sales Tax Act, 1956 (for short "C.S.T. Act, 1956") read with Section 18-A of the K.S.T. Act, 1957 and issued the penalty notice dated 23.5.2005. Thereafter, by an order dated 25.10.2005 Annexure-"A", the Assessing Authority imposed a penalty of Rs. 9,79,163.00 representing 10% of Rs. 97,91,629.00 the excess tax collected. That order when carried in appeal registered as CST/AP. 13/2005-06 before the Joint Commissioner of Commercial Taxes, Mysore Division, Mysore, was dismissed by order dated 28.1.2006 Annexure-"B" Aggrieved by the said order, petitioner preferred STA. No. 260/06 before the Karnataka Appellate Tribunal at Bangalore, which when clubbed with STA. Nos. 259 and 261/06 was dismissed by a common order dated 19.12.2008, impugned herein. Hence, this petition.

3. The petitioner has raised the following substantial question of law:

Whether on the facts and under the circumstances of the case the Karnataka Appellate Tribunal was right in holding that the levy of penalty u/s 9(2) of the CST Act read with Section 18A of the KST Act made by the Assessing Authority and continued by the First Appellate Authority is correct?

4. There is no dispute that Sub-section 2 of Section 9 of the C.S.T. Act, 1956 empowers the authority to impose and collect penalty while Section 18-A of the K.S.T. Act, 1957 provides for penalty for collection in contravention of Section 18, which mandates that a registered dealer shall not collect any amount by way of tax at a rate or rates exceeding the rate or rates at which he is liable to pay tax under the Act. Section 18-A of the K.S.T. Act, 1957 makes it abundantly clear that where any amount is calculated by way of tax or purporting to be by way of tax from any person by any dealer in contravention of Section 18, whether knowingly or not, such dealer shall pay the entire amount so collected, to the assessing authority within twenty days alter the close of the month in which such amount was collected, notwithstanding that the dealer is not liable to pay such amount as tax or that only a part of it is due from him as tax under the Act.

5. In the facts and law noticed supra, the question for consideration is-

Whether the Deputy Commissioner of Commercial Taxes(Transition-I), Mysore was right in imposing penalty on the petitioner for having shown the amount of 4% as Tax in its returns?

6. Undoubtedly, invoking Sub-section (2) of Section 9 of the C.S.T. Act, 1956, the penalty of Rs. 9,79,163.00 represents 10% of Rs. 97,91,629.00, being the excess amount collected as CST at 4% instead of 2% by the petitioner. The petitioner''s case is that the returns filed declaring Rs. 4,20,77,954.00 being 4% CST was a bonafide mistake due to a fault in entering the code in the Symix Accounting System for calculating tax at 4% instead of 2%. That being the contention canvassed by the petitioner before the Assessing Authority and the

Appellate Authorities, it was incumbent on the authorities to consider whether such a plea of filing a return declaring collection of Central Sales Tax at 4% was under a bonafide mistake. In other words, the authorities were required to consider as to whether the plea advanced was frivolous and taken up for the purpose of avoiding forfeiture as a consequence of imposition of penalty. So also it was the duty of the authority to consider as to whether the declaration of 4% tax was made with malafide and unreasonable intentions. It is needless to state that the petitioner having filed the return declaring the amount of CST collected at 4%, the contention advanced that the mistake was on account of an error in feeding the particular code in the accounting system, was an arguable contention requiring serious consideration by the authorities.

7. It is true that imposition of penalty u/s 9(2) of C.S.T. Act, 1956 is penal in character and that unless tiling an inaccurate return is accompanied by a guilty mind, the Section cannot be invoked, as held by the Apex Court in Hindustan Steel Limited v. State of Orissa 1970(25) STC 211 and followed in Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, .

8. Having examined the orders of the Assessing Authority as well as the Appellate Authorities, we are of the considered opinion that there is failure to record a finding as to whether the incorrectness of the return, as claimed by the petitioner was due to want of care on the part of its employee and that there was no reasonable explanation forthcoming from the assessee for such want of care and therefore, it could be inferred that the returns filed is a deliberate false returns. The authorities having failed to apply their mind to the contention, it cannot but be said that the orders of the Assessing Authority Annexure-"A" and the orders impugned of the Appellate Authorities are unsustainable. In the circumstances, the question of law as raised in the petition is answered accordingly.

9. In the result, the petition is allowed. The order dated 25.10.2005 Annexure-''A'' of the Deputy Commissioner of Commercial Taxes(Transition-1), Mysore; the order dated 28.1.2006 Annexure-"B" of the Joint Commissioner of Commercial Taxes, Mysore and the order dated 19.12.2008 of the Karnataka Appellate Tribunal in STA. No. 260/06 are set aside. The proceeding is remitted to the Deputy Commissioner of Commercial Taxes (Transition-I), Mysore, for consideration afresh and to pass orders in the light of the aforesaid observations and the declaration of law by the Apex Court, supra, after extending reasonable opportunity of hearing to the petitioner.

10. The Government Advocate to file memo of appearance within four weeks.

11. Misc. Application for stay is rejected as unnecessary.

