THE HON'BLE SRI JUSTICE K.C.BHANU

AND

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

<u>Special Appeal No.4 of 2000</u>

<u>JUDGMENT</u>: ***(Per Hon'ble Sri Justice M.Seetharama Murti)***

This Special Appeal under Section 23(1) of the A.P. General Sales Tax Act, 1957 ('the APGST Act', for brevity) by the appellant-assessee is directed against the order dated 28.10.1999 of the Commissioner of Commercial Taxes, Andhra Pradesh, Hyderabad, passed in CCT's Ref. No.L.III(2)/2305/98.

2. We have heard the submissions of the learned counsel for the appellant-assessee ('the appellant', for brevity) and the learned Special Standing Counsel representing the respondent/Commissioner of Commercial Taxes ('the respondent', for brevity). We have perused the material record.

3. The introductory facts, in brief, are as follows:

The appellant is a manufacturer of bulk drugs. The appellant was granted sales tax holiday under G.O.Ms.No.498, Industries and Commerce Department, dated 16.10.1989. The assessing authority having inspected the business premises of the appellant on 04.11.1995 and having verified the books of accounts and other relevant records had arrived at the conclusion that the appellant had collected sales tax from its customers in contravention of the conditions set out in the final eligibility certificate granted to the appellant. Therefore, the Commercial Tax Officer, Hyderabad ('the CTO', for brevity) had made a final assessment of the appellant-assessee for the year 1994-95 and a provisional assessment for the year 1995-96 under the APGST Act and the Central Sales Tax Act, 1956 (‘the CST Act, for brevity) separately and had passed orders calling upon the appellant to pay the amount of sales tax collected without adjusting the same against the liability for sales tax holiday. In the provisional assessment orders under the CST Act for the subject year 1995-96, the CTO had determined the gross and net turnovers at Rs.1,40,31,510/- and Rs.1,16,14,560/- respectively and had levied a tax of Rs.1,16,115/-. The demand for collection of tax was issued on the ground that the appellant had charged and collected the tax from its customers. The appellant had preferred an appeal before the Appellate Deputy Commissioner (CT). The said authority by common proceedings dated 10.06.1998 had set aside the assessment orders while allowing the appeal of the appellant herein. In the said proceedings, the Appellate Deputy Commissioner had held that the appellant cannot be deemed to have contravened the conditions stipulated in Column 10(i) of the Final eligibility certificate. The respondent herein by his proceedings dated 28.10.1999, which are impugned in this special appeal, had revised the aforementioned appellate order of the Appellate Deputy Commissioner on the ground that the said order is prejudicial to the interests of the revenue of the State as the price charged by the appellant includes sales tax though not separately shown. Aggrieved of the said orders of the respondent, the appellant had preferred the present special appeal.

4. The learned counsel for the appellant would contend as follows:

The appellant had not collected the sales tax. The appellant has not charged and collected the sales tax in commercial invoice issued by it to its dealers/customers. The appellant had computed the element of sales tax and claimed deduction in arriving at the assessable value. In the excise invoice-cum-gate pass, the excise duty on the assessable value of the bulk drugs was separately shown for the purpose of paying basic excise duty and it is only for the purpose of paying excise duty, the element of excise duty as well as sales tax are separately shown though in fact, the appellant had not collected sales tax from the buyers of the bulk drugs. Since the appellant’s unit was producing excisable goods, in the excise invoice-cum-challan, the tax computation is separately shown for the purpose of arriving at the assessable value for paying the central excise duty. It is only for the purpose of arriving at the net assessable value, the appellant had shown the element of tax in the excise invoice. The appellant had issued separate commercial invoices and under the said invoices, the appellant had neither charged nor collected the sales tax separately. The sale invoice is only relevant for sales tax purpose and not the excise invoice-cum-gate pass. There was no segregation and separate posting of sale price and sales tax in the books of accounts. The G.O does not ordain that the appellant's unit availing exemption should not charge sales tax in the invoices.

5. On the other hand, the learned Standing Counsel would contend as follows:

The appellant fairly admits that the sales tax component is separately shown in the excise invoice–cum-gate pass; however, the sales tax need not be separately shown in commercial invoice. The fact remains that the price declared to the excise department includes tax and that the total in the excise invoice corresponds to the price in the sale invoice. In other words, the appellant had issued excise invoice showing the sales tax component separately; whereas, in sale invoice total price was shown and the said total price corresponds to the total given in the excise invoice. The appellant had submitted 'G' Form in support of the claim for concessional rate of tax on the sales made by the appellant. The books of accounts disclose that the appellant collected tax of Rs.1,16,115/- under CST Act from its buyers during the subject year. Small scale industries like the appellant, which are eligible for total exemption from payment of sales tax, cannot collect tax on their sales. In this case, the facts and evidence collected by the Assessing Authority (CTO) established that the appellant collected sales tax from its customers/distributors though it is not entitled to collect the sales tax. Therefore, as there was loss of revenue to the State, the respondent had rightly exercised the power of revision vested in him under Section 20(1) of the APGST Act read with Section 9 of the CST Act and had rightly set aside the orders of the Appellate Deputy Commissioner and had restored the orders of the CTO. Hence, there is no merit in the special appeal and the special appeal is liable to be dismissed.

6. In the above stated factual matrix and the contentions of both the sides, the only questions that arise for consideration are -- 'whether the appellant had collected sales tax during the period of tax holiday? And, if so, the same is collected in violation of the terms of the final eligibility certificate granted to it? And if so, whether the order impugned is sustainable under facts and in law?'

7. <u>POINTS</u>:

The appellant is a manufacturer and seller of bulk drugs, which are basic drugs. As per the provisi0nal assessment, during the year 1996, appellant's gross and net turnovers are Rs.1,40,31,510/- and Rs.1,16,14,560/- respectively. The appellant is enjoying tax holiday for an amount of Rs.35,00,000/-, which was granted to it for a period of five years from 16.08.1991 to 15.08.1996. As per the terms of G.O.Ms.No.498 dated 16.10.1989, if the appellant collects tax from the buyers on the sales, the appellant is liable to pay the same amount of tax to the Government. In the final eligibility certificate, where under Rs.35 lakhs was fixed as the sales tax exemption for the above period, one of the basic conditions is that the appellant is not entitled to collect sales tax from the consumers and that in case, the appellant collects the sales tax during the availment period of sales tax exemption, the appellant would be liable to remit the sales tax collected to the Government. The contention on behalf of the respondent is that the appellant had collected sales tax from its buyers on the first sales of basic drugs and had charged sales tax and the said fact is evident from the invoices-cum-excise gate passes. The further case of the respondent is that having noticed the said fact, the CTO had issued a show cause notice inviting written objections, if any, from the appellant and that the CTO had further given an opportunity of hearing to the appellant and that after verification of the facts, the CTO had passed orders on merits confirming the proposal to levy and collect tax on the turnover shown in the show cause notice. As already noted, the Appellate Deputy Commissioner had allowed the appeal of the appellant. As per the terms of the GO and eligibility certificate, indisputably, the appellant is not entitled to collect sales tax from the consumers during the availment period of sales tax exemption. In case, the appellant collects such tax, the appellant is liable to pay the same amount of tax to the Government not only as per the terms of the final eligibility certificate but, also as per the terms of G.O.Ms.No.498 dated 16.10.1989 is not in dispute. The genuineness of the excise invoice-cum-gate pass which was considered by the CTO is not in dispute. One of the invoices, i.e., excise invoice No.53 dated 30.06.1996 raised by the appellant on M/s.Anmol Drugs and Pharmaceuticals Limited, Kiriti Nagar Industrial Area, New Delhi, on a perusal laid bare that the total assessable value is Rs.2,21,420/- and that the central excise duty and sales tax collection are Rs.22,142/- and Rs.2,436/- respectively. Therefore, the total value for which the invoice was raised is Rs.2,45,998/-. The sale price is also Rs.2,45,998/, which included excise duty as well as sales tax. Had the appellant not collected sales tax, the sale price would have been mentioned as Rs.2,43,562/- after excluding Rs.2,436/- viz., the sales tax collection. It is not in dispute that the corresponding commercial invoice also disclosed the same sale price of Rs.2,45,998/- which is equivalent to the value in the aforementioned excise invoice. Therefore, the contention that the excise invoice–cum-gate pass was raised only for the purpose of paying basic excise duty at the rate of 10% on the assessable value of the bulk drugs and that the central sales tax component and sales tax component are separately shown for the purpose of paying the excise duty and that the appellants have not collected sales tax from the buyers of bulk drugs cannot be countenanced. It is an admitted fact that the appellant in its books of account had not segregated and had not separately posted the sales price and the sales tax. Whether the sales tax is separately shown either in the commercial invoice or books of account is immaterial and what is relevant is the fact that the sales tax was collected from the customers of the appellant. The fact that remains is that the sale price shown in the commercial invoice is inclusive of sales tax. Admittedly, the sales are made by the appellant to the distributors who are its consumers. The appellant, being a small scale industry, which is availing incentive in terms of the G.O.Ms.No.498, is not entitled to collect the sales tax. Section 30B of the APGST Act, which deals with prohibition against collection of tax in certain cases, clearly mandates that no dealer shall collect any sum by way of tax, in respect of sale or purchase of any goods, which are not liable to tax under this Act. Further, Section 30C which deals with imposition of penalty for contravening certain provisions ordains that if any person collects tax in contravention of the provisions of Section 30B, any sum so collected shall be forfeited either wholly or partly to the State Government and in addition he shall be liable to pay a penalty of an amount not exceeding two thousand and five hundred rupees. In the well-considered view of this Court, the observations in the order of the Appellate Deputy Commissioner contrary to the facts born out by the two corresponding invoices and the further observation that the distributors or wholesalers to whom the appellant sold the goods are not consumers are not acceptable. Since the order of the Appellate Deputy Commissioner setting aside the assessment order of the CTO is prejudicial to the interests of revenue of the State, the Commissioner was justified in exercising the powers vested under Section 20(1) of the APGST Act read with Section 9 of the CST Act and in setting aside the orders of the Appellate Deputy Commissioner and restoring the orders of the CTO. Hence, the orders impugned, which are in accordance with the facts and law, do not brook interference.

8. Before parting with the case, it is necessary to mention that the learned counsel for the appellant had relied upon the decisions in (i) **The Swastik Oil Mills Ltd. V. H.B.Munshi, Deputy Commissioner of Sales Tax, Bombay and (ii) Peekay Re-Rolling Mills (P) Ltd. V. Asst. Commissioner** in support of the contentions that the proceedings of the Commissioner-respondent herein which are started *suo motu* must not be based on mere conjectures and that there should be some ground for invoking the revisional powers and that the exemption does not negate the levy of tax altogether and that despite the exemption allowed, the tax remained unaffected and that only the subsequent requirement of payment of tax to fulfil the liability is done away with. In view of the facts peculiar to this case, particularly, the terms of the final eligibility certificate and the terms of the GO, the ratios in the decisions are not helpful to the appellant to advance its case. Further, in the case on hand, the assessment order was passed by the CTO; and the appellant's appeal assailing the order of the CTO was allowed by the Appellate Deputy Commissioner. Therefore, the Commissioner took up *suo motu* revision. Section 20(1) of the APGST Act enables the Commissioner to *suo motu* call for and examine the record of any order passed or proceeding recorded by any authority, officer or person subordinate to him, under the provisions of this Act, including sub-section (2) of this section. And, if such order or proceeding recorded is prejudicial to the interests of the revenue of the State, the Commissioner is empowered to make such enquiry, or cause such enquiry to be made and subject to the provisions of this Act, may initiate proceedings to revise, modify or set aside such order or proceeding and may pass such order in reference thereto as he thinks fit. The Commissioner had only revised the order of the ADC and not that of the CTO. Therefore, the contention of the appellant that the Commissioner had exercised the powers contrary to the provisions of law cannot be countenanced. While enjoying the tax holiday, the appellant which was dealing in bulk drugs while raising sale invoices had shown in the sale invoices of the distributors, the sale consideration. In the Central Excise invoice-cum-gate passes, the sales tax component was separately shown but the total amount in the said invoice corresponded to the total sale value shown in the commercial invoice. Therefore, the exact matching of the values in the two invoices would lay bare that the sales tax was collected during the period of sales tax exemption. The Commissioner had only revised the orders of the Appellate Deputy Commissioner. Therefore, the contention raised on the maintainability of the revision is also devoid of merit. Viewed thus, we find that there is no merit in the special appeal.

9. Accordingly, the appeal is dismissed. No costs.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

K.C.BHANU, J

M. SEETHARAMA MURTI, J

12th March 2015

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