

***HON'BLE SRI JUSTICE G. CHANDRAIAH**
&
HON'BLE SRI JUSTICE CHALLA KODANDA RAM

+T.R.C. No. 66 of 2002

%07-07-2015

M/s.Durga Rice & Decordicatorspetitioner

Vs.

\$ The State of A.P. rep. by the State
Representative before the Sales Tax Appellate
Tribunal Respondent

!Counsel for the Petitioner: Sri Tejprakash Toshniwal

Counsel for Respondent: The Special G.P. for Commercial Tax (Telangana)

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>Head Note:

? Cases referred:

- 1) (1993) Vol.17 APSTJ 98
- 2) (1983) 53 STC 340

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IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH
T.R.C. No. 66 of 2002

Between:

M/s.Durga Rice & Decordicators .. Petitioner

The State of A.P. rep. by the State
Representative before the Sales Tax
Appellate Tribunal .. Respondent

SUBMITTED FOR APPROVAL:

1. Whether Reporters of Local newspapers may be allowed to see the judgments?	Yes
2. Whether the copies of judgment may be marked to Law Reporters/Journals	Yes
3. Whether Their Ladyship/Lordship wish to see the fair copy of the judgment?	No

The order dated 21.12.1998 passed by the A.P. Sales Tax Appellate Tribunal, Hyderabad (for brevity “the Tribunal”) confirming the penalty proceedings issued by the first appellate authority is

challenged in this Tax Revision Case.

The brief facts of the case are that the petitioner is a dealer in ground-nuts and groundnut seeds. For the assessment year 1987-88, the petitioner was assessed by the Commercial Tax Officer, vide assessment order dated 19.10.1990, levying sales tax on the sale turnover relating to the sales of groundnut seeds to M/s.Satish Kumar Trading Company, Nandhyal. In the assessment proceedings, the petitioner claimed exemption from sales tax on the ground that M/s. Satish Kumar Trading Company was a registered dealer and the groundnut is liable to be taxed in terms of Entry 6 in Schedule-III of A.P. General Sales Tax Act, 1957 (for short "the Act"). The Assessing Officer rejected the declarations made in Form-E on the ground that M/s.Satish Kumar Trading Company was involved in bogus and fictitious transactions. Consequent upon the rejection of the sales made to M/s.Satish Kumar Trading Company, the petitioner was treated as the last selling dealer, and accordingly, tax for a sum of Rs.18,147/- was levied on the petitioner. The petitioner paid the tax without any demur, but immediately, the petitioner did not appeal against the assessment order. Thereafter, the petitioner was invited with penalty proceedings and a show cause notice was also issued under Section 7-A(2) of the Act, but the petitioner did not submit any explanation to the notice. The penalty proceedings were concluded against the petitioner with a penalty of Rs.54,442/- as prescribed under Section 7-A(2)(i) of the Act which is three times the tax sought to be levied. The appeals filed by the petitioner before the first appellate authority as well as the Tribunal ended up in dismissal. Against the order of the Tribunal, the present Tax Revision Case is filed invoking the provisions of Section 22 of the Act. Though as many as ten questions of law are said to be arising from the order of the Tribunal, basically, in the present case, we consider only the following questions of law for adjudication:

- 1) Whether, in the facts and circumstances of the case, the penalty

proceedings are initiated within reasonable time?

- 2) Whether, in the facts and circumstances of the case, merely because the dealer-assessee did not file an appeal against the assessment proceedings, can a conclusion be drawn that the ingredients under Section 7-A(2) are attracted thereby justifying levy of penalty.
- 3) Whether the Tribunal is justified in stating that there is no audit objection or not looking to the assessment file the fact of audit objection and in fact there was an audit objection and at the instance of the audit objection only, 7-A(2) penalty was initiated by the Commercial Tax Officer, and as such, initiation of penalty at the instance of audit party is sufficient ground for levy of 7-A(2) penalty (para 10 of the Tribunal order). The petitioner shall point out the same at the time of hearing of the case?
- 4) Mere non-raising of objection at the initiation i.e. at show-cause notice does it mean that the proceedings have become concluded and the petitioner is liable to pay penalty? Is it not that appeal is a continuation of the proceedings initiated by the assessing authority?

Sri Tejprakash Toshniwal, learned counsel for the petitioner, submits that there is an error of appreciation of the fact by the Tribunal as well as the authorities below. All the authorities below had concluded that elements of misfeasance as specified under Section 7-A(2) is present in the case without there being any factual basis. By drawing specific attention to the order dated 06.11.1992, the learned counsel contends that merely because the petitioner has chosen at the relevant point of time not to appeal against the order of assessment in order to buy peace and particularly considering the small amounts involved, there cannot be any automatic conclusion that there was an attempt on the part of the assessee to evade the tax by resorting to actions specified under Section 7-A(2) of the Act. He further contends that even assuming for arguments' sake that the ingredients under Section 7-A(2) are satisfied, the initiation of penalty proceedings after a long lapse of time i.e. in November, 1992 should be considered as barred by limitation as the limitation even for reopening the assessment was four years and at any rate it would end by March, 1992 and the proceedings initiated in the month of November, 1992 are beyond the period of limitation. He further submits that the Tribunal has failed to appreciate the ratio of the judgments

cited before it particularly the judgments of this Court in 53 STC 169(A.P.), 53 STC 370 (A.P.), 71 STC 437, 10 VST 180 and 31 VST 85 and to buttress his argument the learned counsel also relies on the Full Bench judgment of this Court reported in 17 APGST 98 wherein it is held that the penalty proceedings should be initiated within a proximate time of the assessment order, and in that view of the matter, the learned counsel submits that initiation of penalty proceedings after two years 11 months cannot be called proximate in time. He also places reliance on the judgment of the Supreme Court reported in 168 ITR 705 wherein it is observed that merely because certain objections in the assessment proceedings have been accepted without demur it *ipso facto* does not lead to the conclusion that there is an element of suppression of the income. By drawing the analogy from that judgment, the learned counsel submits that merely because the petitioner has chosen not to file an appeal it does not lead to conclusion that the ingredients as specified under Section 7-A(2) are satisfied for the purpose of levying penalty on the petitioner.

On the other hand, the learned Special Government Pleader for Commercial Tax (Telangana) supports the order of the Tribunal and contends that the fact that the petitioner had not appealed against the assessment order itself is a proof positive that there was an element of mis-declaration and submission of false documents, as such, the appeal is liable to be dismissed.

Heard the learned counsel for both the parties and perused the material on record.

At the outset it is to be noticed that though in not precise terms, the petitioner challenges the finding of the assessing authority as perverse, as such, the authorities are required to consider the facts on record. In the penalty proceedings dated 06.11.1992 the assessee had recorded the following:

“At the time of final assessment, the dealers claimed exemption on the

purchases of G.N. Seeds 825.00 bags on the plea that they sold the same to the registered dealers of A.P. The declarations issued by M/s.Satish Kumar Trading Company, Nandyal, for the sales of G.N. Seeds of 825.00 bags have been examined and found to be bogus as Departmental enquiries revealed that the dealer viz. M/s. Satish Kumar Trading Company, Nandyal dealt in illicit transport of Groundnuts and its products, etc. and issued bogus way-bills and sale bills with false and forged official stamps to the traders in the State. As such, this transaction is treated as bogus and the claim for exemption is rejected. Accordingly, the purchase value of 825.00 bags of groundnut seeds is estimated at Rs.4,53,680/- or 549.92 average rate per bag and assessed to tax at 4% vide proceedings cited. The tax on such purchase turnover worked out to Rs.18,147/- The dealers have admitted the liability and they have not raised any objections against the levy of tax. Thus, goes to prove that the dealers filed a bogus declaration in order to claim wrong exemption.”

A careful reading of the extracted portion reveals that the exemption claimed by the petitioner on the sale of the groundnut seeds to M/s.Satish Kumar Trading Company was rejected on the ground that the finding of the Department that the M/s.Satish Kumar Trading Company was found to be dealing in illicit transportation of groundnuts and its products and also issuing bogus way-bills and sale-bills with false and forged official stamps to the traders in the State. Nowhere, there is a finding to the effect that there was any role played by the petitioner. The fact that M/s.Satish Kumar Trading Company was a registered dealer is not in dispute. At this point, it may be noticed that the sale of groundnuts are taxable under Entry 6 of Schedule-III.

The Entry 6 of Schedule III of the Act reads as under:

Sl.	Description of Goods	Point of Levy	Rate of Tax
6.	Ground-nut or Peanut (Arachis Hypogaea	When purchased [by an oil miller other than a decorticating miller in the State, at the point of purchase by such miller and in all other cases at the point of purchase by the last dealer who buys in the State	4 paise in the rupee

In other words, according to the sale transaction as enumerated under Schedule-III, the present case reveals that M/s.Satish Kumar Trading Company would be the last dealer who had purchased the goods from the petitioner. In other words, liability to pay tax on the purchase is on M/s.Satish Kumar Trading Company and not on the petitioner. What all the petitioner is required to do to fulfill for claiming the exemption is to file a return in terms of Rule-19A in Form-E claiming exemption, which in fact, has been done by the petitioner. However, the grant of exemption was refused on the ground that M/s.Satish Kumar Trading Company was alleged to be indulging in unauthorized and illegal activities. It may also be noticed that the allegation is M/s.Satish Kumar Trading Company issued bogus way-bills and sale bills with false and forged official stamps to the traders in the State. In the present set of facts, it is the petitioner who would be issuing the sale-bills as well as way-bills in favour of M/s.Satish Kumar Trading Company and way-bills for transportation of the goods would also be issued by the petitioner-assessee to enable the goods to reach M/s.Satish Kumar Trading Company and no question of M/s.Satish Kumar Trading Company issuing either way-bills or sale-bills in favour of the petitioner could arise. By generalizing the conduct of M/s.Satish Kumar Trading Company and by attributing the misdeeds of M/s.Satish Kumar Trading Company, a conclusion was drawn that the petitioner had mis-declared and claimed exemption from the sales tax. In the facts of the present case, this conclusion is something which could not have been arrived at, and such recorded finding is perverse. When these aspects are sought to be canvassed before the authorities, the authorities have brushed them aside merely stating that the petitioner did not file appeal questioning the order of assessment wherein the exemption sought has been denied. For some reason or the other, the assessee did not file objections before the assessing officer in response to the show

cause notice. Though the assessee made efforts to urge differently before the first appellate authority and the Tribunal, he did not succeed. In that view of the matter, on account of wrong appreciation of the facts, a conclusion was drawn that ingredients of Section 7-A(2) are attracted.

Section 7-A of the A.P. General Sales Tax Act, 1957 may be noticed as under:

7-A. Burden of proof and liability of the dealer to pay tax and penalty.

- (1) In the case of an assessment made under sub-section (2) of Section 5, Section 6 or the notification issued under Section 9, the burden of proving that any sale or purchase effected by a dealer is not liable to any tax or is liable to be taxed at a reduced rate shall lie on the dealer.

[(1A) Notwithstanding anything contained in this Act, or in any other law, a dealer in any of the goods liable to tax in respect of the sale or the purchase in the State shall be deemed to be the seller or purchaser, as the case may be, of such goods and shall be liable to pay tax accordingly on his turnover of sales or purchases relating to such goods, unless he proves to the satisfaction of the assessing authority that the goods sold or purchased as the case may be, have already suffered tax under this Act.]

- (2) 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.]

In the facts of the present case, there is no allegation of production of any false bill, voucher, certificate or other document with a view to supporting or making a claim for exemption. There was also no declaration made by the petitioner. The declaration contemplated under Section 7-A(2) read with Rule-19-A is the one which is required to be made by M/s.Satish Kumar Trading Company. The same is evident from the order dated 06.11.1992 wherein it has been categorically recorded that declarations were issued by M/s.Satish

Kumar Trading Company, in other words, there is no declaration made by the petitioner. In that view of the matter, we are satisfied that by improper appreciation of facts, a perverse finding has been arrived at by the authorities that the ingredients of Section 7-A(2) are satisfied/attracted and penalty came to be levied on the petitioner. Hence, the order levying penalty is not sustainable.

Further, we are also in agreement with the argument advanced by the learned counsel for the petitioner that the penalty proceedings dated 06.11.1992 are not within reasonable time. In the present case, the order of assessment was passed in 19.10.1990 wherein exemption claimed by the petitioner with regard to the sales of groundnut seeds to M/s.Satish Kumar Trading Company was not accepted and tax was levied. In other words, making a wrong claim was detected at the time of making assessment. In normal circumstances, penalty proceedings could have been initiated immediately thereafter or within reasonable time though there is no specific time prescribed in the provisions of the Act.

A Full Bench of this Court in **Mahaveer Bangles vs. The Commercial Tax Officer**^[1] while holding that there is no requirement of making penalty orders simultaneously with the assessment orders, observed that there should be close proximity to the assessment orders. While considering the scope of Section 7-A of the Act, their Lordships had made a reference to the judgment of this Court in **Eswara Oil Company vs. State of A.P.**^[2] The Full Bench also held that while simultaneous levy of penalty along with assessment is not an essential requirement, there should be close proximity in point of time between the date of assessment and the date of initiation of penalty proceedings. We may also notice that the action for issuance of penalty proceedings requiring the assessing officer detecting the alleged malpractice as specified in Section 7-A of the Act. In the

present case, such detection arose on 19.10.1990. The penalty proceedings came to be initiated in the year 1992 that too on audit objection having been raised. In other words, the assessing officer by himself did not find any cause warranting initiation of any penalty proceedings at the time of making assessment. In that view of the matter, issuance of penalty proceedings without there being any reasonable cause after a lapse of 2 years 11 months cannot be said to be within reasonable time. Even on that score, penalty proceedings cannot be sustained. Further, merely because the petitioner-company had chosen not to file an appeal for reasons best known to them against the quantum of assessment it does not mean that the petitioner had accepted guilt with respect to the action attributing to the petitioner especially with regard to the specific acts as contemplated under Section 7-A of the Act. This aspect of the matter is well settled by the judgment of the Courts in 168 ITR 705, etc.

The entire exercise is the culmination of misreading of the facts by the primary authority at the first instance which was not corrected either at the first appeal stage or at the second appeal stage. In other words, by misreading of the facts, wrong conclusion was drawn by the authorities, which was the basis for levy of penalty on the petitioner. Hence, the questions of law which have been raised above are answered in favour of the assessee and against the Revenue.

Hence, the Tax Revision Case is allowed setting aside the order dated 21.12.1998 passed by the Tribunal. No order as to costs.

As a sequel to allowing of the case, Miscellaneous Petitions, if any pending, shall stand disposed of as infructuous.

G. CHANDRAIAH, J

07.07.2015

bcj

CHALLA KODANDA RAM,J

[\[1\]](#) (1993) Vol.17 APSTJ 98

[\[2\]](#) (1983) 53 STC 340