THE HON'BLE SRI JUSTICE K.C. BHANU

AND

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

<u>Special Appeal No.10 of 2004</u>

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

This appeal by the assessee/dealer under Section 23 (1) of the Andhra Pradesh General Sales Tax Act, 1957 ('the Act' for short) is directed against the order dated 12.09.2003 of the Commissioner of Commercial Taxes, Hyderabad passed in CCT's Ref.No.LV(3)/1870/2000-II.

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

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

The assessee is a registered dealer on the rolls of the Commercial Tax Officer, Aryapuram, Rajahmundry. The assessee was finally assessed under the Act for the year 1998-99 by the assessing authority with the following gross and net turnovers: **Gross turnover: Rs.2,24,15,95,786/-; Exempted turnover: Rs.1,55,25,57,330/-;Net turnover: Rs.68,90,38,450/-** and a tax of Rs.6,53,97,365/- was levied. Even before such assessment, the Assistant Commissioner (CT) (Int), Kakinada ('the AC (Int)' for brevity) had initially, provisionally assessed the assessee for the year 1998-99 under the Act levying turnover tax on the purchase turnover of milk under Section 5-A of the Act *vide* his proceedings dated 26.06.1999. The assessee who is aggrieved of the said orders of the AC (Int) had preferred an appeal before the Appellate Deputy Commissioner (CT), Kakinada (for brevity 'the ADC') disputing that the turnover subjected to tax under Section 6-A of the Act is not liable to turnover tax under Section 5-A of the Act. The ADC while allowing the appeal had held that it is not correct to levy turnover tax under Section 5-A as the purchase turnover of the milk was subjected to tax under Section 6-A. In support of the said finding the ADC had relied upon a decision of the Supreme Court in **A.G.Varadarajulu v. State of**

Tamilnadu [1998 (2) SCALE Vol2 No.4]. In view of the said orders, the Commercial Tax Officer ('the CTO' for short) had passed final assessment orders following the directions in the orders of the ADC and had not levied turnover tax on the purchase turnover of milk. Therefore, the Commissioner who was of the view that the orders of the ADC and the consequential orders of the assessing authority are prejudicial to the interests of the revenue of the State had entertained a revision *suo motu* exercising powers vested in him under Section 20(1) of the Act. The Commissioner had proposed to set aside the orders of the ADC and revise the assessment of the assessee for the year 1998-99 under the Act by levying turnover tax at 1% on the purchase turnover of the milk i.e., Rs.10,52,64,410/-. The assessee had filed objections to the show cause notice and had contended that in view of the circular instructions issued by the Commissioner of Commercial Taxes dated 08.08.1991 it is clarified that if the goods are taxable at the first purchase point or at last sale point, turnover tax will not be levied on the turnover of the goods at the point of purchase or sale. Placing reliance on the provisions of law, it is further contended by the assessee before the Commissioner that the orders of the ADC are in accordance with facts, law and the settled legal position laid down in the precedents. However, the Commissioner has over ruled the objections of the assessee and had observed *inter alia* in his orders that Section 5-A is an independent charging Section and that therefore, under the said Section tax is leviable, in all the appropriate cases, on taxable turnovers at second and subsequent sale at the rates prescribed; He had, therefore, held that the turnover tax under Section 5-A is payable on taxable turnover. Finally, the Commissioner had held that levy of turnover tax on taxable turnover under Section 6-A is in accordance with law and had accordingly confirmed the proposal in the revision show cause notice. Aggrieved of the said orders, the assessee had preferred this appeal.

4. The learned counsel for the appellant/assessee would contend that the turnover tax under Section 5-A cannot be levied on the turnover liable to tax under Section 6-A . He had next contended that the revision orders are not passed by the Commissioner of Commercial Taxes within the period of limitation set out in sub section (3) of Section 20 of the Act.

5. On the other hand, the learned Standing Counsel had contended that a plain reading of the provisions of law would show that the finding of the Commissioner that levy of turnover tax under Section 5-A on taxable turnover under Section 6-A is in accordance with law is a correct finding in the facts and circumstances of the case and that the bar of limitation which is urged in the grounds is not a valid ground and that the said contention is not supported by any factual details and that the question of limitation being a mixed question of fact and law, the contention that the impugned revision orders passed by the Commissioner are not within the period of limitation set out in sub section (3) of section 20 is devoid of merit. He had therefore, supported the orders of the Commissioner and urged that the appeal is devoid of merit and is liable to be dismissed.

6. Now the points that arise for consideration are:

1. **Whether the turnover subjected to tax under Section 6-A would also attract levy of tax under Section 5-A of the Act?**

2. **Whether the revision orders passed by the Commissioner, which are impugned, are passed beyond the period of limitation and are, therefore, liable to be set aside?**

7. <u>POINT No.1</u>:

7. (a) There is no dispute with the facts, which are narrated supra. The AC (Int) who had initially made a provisional assessment had assessed the assessee for the year 1998-99 under the Act and had levied turnover tax under Section 5-A of the Act on the purchase turnover of milk *vide* his proceedings dated 26.06.1999. The aggrieved assessee had preferred an appeal before the ADC disputing that the turnover subjected to tax under Section 6-A is not liable to turnover tax under Section 5-A. The ADC had allowed the appeal of the assessee upholding the said contention of the assessee. The CTO had passed the consequential final assessment orders of the assessee following the orders of the ADC and had thus not levied turnover tax on the purchase turnover of milk. Finding the said orders of the ADC and the consequential final orders of the CTO prejudicial to the interests of the revenue of the State, the Commissioner having entertained a *suo motu* revision had issued a show cause notice and an opportunity of hearing and had finally confirmed the proposal in the show cause notice and had accordingly set aside the orders of the ADC and revised the final consequential assessment orders of the CTO for the year 1998-99 under the Act and had levied turnover tax at the rate of 1% on purchase turnover of milk i.e., Rs.10,52,64,410/-. Thus, the Commissioner had recorded a finding that turnover tax under Section 5-A is leviable and payable on taxable turnover under the charging Section 6A.

7. (b) We have given earnest consideration to the facts and the submissions. In view of the facts and the contentions, it is necessary to refer to infra, the provisions of law namely Sections 6A and 5A of the Act dealing respectively with levy of tax on turnover relating to purchases of certain goods and levy of turnover tax.

6A Levy of tax on turnover relating to purchase of certain goods:

Every dealer, who in the course of business:

i. **purchases any goods (the sale or purchase of which is liable to tax under this Act) from a registered dealer in circumstances in which no tax is payable under Section 5 or under Section 6, as the case may be, or**

ii. **Purchases any goods (the sale or purchase of which is liable to tax under this Act) from a person other than a registered dealer, and**

c. **consumes such goods in the manufacture of other goods for sale or consumes them otherwise, or;**

a. **disposes of such goods in any manner other than by way of sale in the State, or**

b. **despatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce,**

shall pay tax on the turnover relating to purchase aforesaid at the same rate at which but for the existence of the aforementioned circumstances, the tax would have been leviable (on such goods under Section 5 or Section 6.

5A Levy of tax on turnover: (1) Notwithstanding anything contained in this Act, tax shall be levied at the rate of [one paise in every rupee of a turnover of a dealer, other than the dealers mentioned in sub-section (1-A)] whose total turnover in a year exceeds rupees ten lakhs;

Provided that the tax shall not be levied under this section on that part of the turnover of any dealer on which the dealer is liable to pay tax at the point of levy [specified in the First Schedule, except petrol, diesel oil, aviation turbine fuel, engine oils, lubricating oils, greases brake fluids, furnace oil and all kinds of motor vehicles,] Second Schedule, Fifth Schedule and Seventh Schedule to the Act:

Provided further that no tax under this section shall be payable on that part of turnover which relates to;

i. **sale or purchase of goods specified in third Schedule;**

ii. **sale or purchase of goods specified in Fourth Schedule;**

iii. **sale or purchase of goods specified in Sixth Schedule;**

iv. **sale or purchase of goods in the course of inter-State trade or commerce;**

v. **sale or purchase of goods in the course of export out of the territory of India or sale or purchase in the course of import into the territory of India;**

vi. **sale or purchase of goods exempt from tax generally under sub-section (1) of section 9 of the said Act;**

vii. **all amounts collected by way of tax under the provisions of the Central Sales Tax Act, 1956.**

The turnover of the present assessee exceeded Rs.10 lakhs during the subject year is not in dispute. Section 5A, which starts with a non-abstante clause, clearly says that tax shall be levied at the rate of 1% in every rupee of a turnover of a dealer other than the dealers mentioned in sub-section 1-A whose total turnover in the year exceeds Rs.10 lakhs. Thus, Section 5A specifically mentions the turnovers which are not liable to tax and in that turnovers mentioned therein, the transactions under Section 6A are not specifically mentioned. Further, the purchase of milk from unregistered dealers does not come under the points of levy mentioned in the provision of law. It is also pertinent to note that by an amendment to Section 6A the words 'or Section 5A' were omitted from Section 6A by Act 22 of 1995 with effect from 01.04.1995. Therefore, on a plain and harmonious reading of both the provisions, it appears that there is no prohibition from levying turnover tax under Section 5A on the transactions covered by Section 6A. Since the purchase turnover which is disputed turnover related to purchase of milk made from unregistered dealers, the same is not eligible for exemption as no exemption was granted by the Government under Section 9(1) of the Act in respect of such turnovers. It is not in dispute that levy of tax under Section 9(1) on sale of fresh milk, curd and butter milk sold by the dealers exclusively dealing in them and also their products are exempt from tax. Therefore, on a plain consideration of the provisions of law, we are of the considered view that the orders of the Commissioner levying tax of 1% on the disputed turnover involved in the matter on a finding that turnover tax under Section 5A is payable on taxable turnover under charging Section 6A is correct. Point is accordingly answered.

8. POINT No.2:

8. (a) The contention of the assessee is that the revision order passed by the Commissioner is not one passed within the period of limitation set out in sub-section (3) of Section 20 of the Act. The facts pleaded by the appellant are as under: 'The order of the ADC was passed on 21.09.1999. The order of the ADC was served on the appellant on 13.10.1999. The CTO had passed the consequential final assessment orders *vide* proceedings dated 30.03.2001. The impugned orders of the Commissioner were passed on 12.09.2003. The order of the Commissioner, which is dated 12.09.2003 was served on the appellant on 09.01.2004. In view of the said fact and in the absence of any explanation, much less satisfactory explanation, for the delay in service of the order of the Commissioner on the assessee, it should be construed that the revision order is passed beyond the period of limitation.' In other words, the contention of the assessee is that though the order of the Commissioner bears the date 12.09.2003, since the said order was belatedly served on the assessee on 09.01.2004 and as no explanation for the said delay in service of the order is forthcoming, it shall be presumed that the order which was purportedly passed on 12.09.2003 was not passed on that day but it was ante dated. As already noted, the Commissioner's order bears the date 12.09.2003 and if that date is to be reckoned as the date of the passing of the order, it is *ex facie* clear that the said order was passed within four years from the date of service of the orders of the ADC. However, since there is a delay of about four and a half months in service of the orders of the Commissioner on the assessee, it is sought to be contended that it shall be construed that the said orders are passed beyond the period of four years. The facts urged by the learned counsel for the appellant are not disputed by the learned Standing Counsel.

8. (b) In support of the said contentions, the learned counsel for the assessee had relied upon the following decisions:

(1) State of Andhra Pradesh v. M.Ramakishtaiah & Co.. In this cited decision the facts are as under: 'The order of assessment was made in the month of September 1969. The said order was sought to be revised by the Deputy Commissioner under sub section (2) of Section 20 of the Act. The Deputy Commissioner had passed orders prejudicial to the assessee. The said orders are said to have been made on 06.01.1973. But, the same was served on the assessee on 21.11.1973 i.e., precisely 10 ½ months later. There was no explanation from the Deputy Commissioner why it was so delayed.' In that factual background, the Supreme Court held as follows: '**If there had been a proper explanation, it would have been a different matter. But, in the absence of any explanation, whatsoever, we must presume that the order was not made on the date it purports to have been made. It could have been made after the expiry of the**

prescribed four years' period. The civil appeal (preferred by the State) is accordingly dismissed.'

(2) Sanka Agencies v. Commissioner of Commercial Taxes, Hyderabad. As could be seen from the facts of the cited case, the Commissioner's order was challenged before this Court by way of a batch of special appeals and in the grounds it was urged that while the impugned order bears the date 17.05.1996 the order was sent to the appellants by dispatching it only on 01.11.1996. This court having examined the record found that the said submissions made on behalf of the appellants are true. This court also found that there is no explanation in the record nor any explanation has been given by the respondent as no counter is filed and that therefore, there is strong apprehension that in order to give an impression that the impugned order was passed within the period of limitation, the order bears the date 17.05.1996 whereas it has been passed much after that. Therefore, this Court having followed the judgment in **The State of A.P. v. M.Ramakishtaiah (1st cited)** had allowed the special appeals and had set aside the order passed in the revisions.

(3) Vamshi Art Printers (P) Ltd., Hyderabad v. Commercial Tax Officer, Basheerbagh Circle, Hyderabad and others. The facts of the cited case are as follows: - 'The original assessment had been made on 28.02.2002. The order of assessment was served on the petitioner on 09.03.2002. Therefore, the revision order should have been passed by the 2nd respondent on or before 08.03.2006 i.e., within four years. The order bore the date 23.01.2006. However, the petitioner was served with the order on 29.11.2006. Therefore, it was contended that the revision order was actually passed after 08.03.2006 and it was pre dated as 23.01.2006. Nowhere the explanation has been given as to why it took ten months to the 2nd respondent/Deputy Commissioner to serve the order'. In this factual backdrop this court held as follows: - **'Nowhere the explanation has been given as to why it took ten months for the second respondent-Deputy Commissioner to serve the order. Therefore, this Court would be just in believing that the order had not been passed on 23.01.2006 and it had been passed much later. Such a presumption can be drawn in the absence of any explanation on behalf of the respondent-authorities for not serving the order. Earlier, this Court has taken the same view in a judgment reported in *Sanka Agencies v. Commissioner of Commercial Taxes, Hyderabad [(2005)142 STC 496] and the same view was***

taken by the Supreme Court also in State of Andhra Padesh v. M.Ramakishtaiah & Co.[(1994)93 STC 406]. **Following those judgments, we allow the Writ Petition and quash the order passed by the second respondent.'**

8. (c) Reverting to the facts of the instant case, which are undisputed, it is necessary to restate the following facts and submissions: - 'The Commissioner had revised the orders dated 21.09.1999 passed by the ADC. The orders of the ADC are served on the appellant on 13.10.1999. Therefore, the revision orders ought to have been passed before 13.10.2003. Though the said revision order of the Commissioner bears the date 12.09.2003, since the said order was belatedly served on the assessee on 09.01.2004 i.e., about 4 ½ months later and as no explanation for the said delay in service of the order is forthcoming, the appellant contends that this Court must presume that the order was not made on the date it purports to have been made.' It is also the submission that the revision order was actually passed after 13.10.2003 and it was pre dated to show as if it was passed on 12.09.2003. As already noted the Supreme Court in **The State of A.P. v. M.Ramakishtaiah (1st cited)** had held that in the absence of any explanation, whatsoever, for the delayed service of the order on the appellant the Court should presume that the order was not made on the date it was purported to have been made.

8. (d) Following the judgment of the Supreme Court and the judgments of this Court referred to supra, we hold that this Court would be just in drawing a presumption and believing that the order impugned has not been passed on 12.09.2003 and that it has been passed much later. Therefore, we are of the considered view that this special appeal deserves to be allowed by setting aside the order impugned. The point is accordingly answered in favour of the appellant.

9. In the result, and in view of the finding under point No.2, the Special Appeal is allowed and the order impugned is set aside. There shall be no order as to costs.

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

K.C. BHANU, J

M. SEETHARAMA MURTI, J

30th April 2015

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