THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

W.P.No.214 of 2016

ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

Heard Sri S.Dwarakanath, learned counsel for the petitioner, and Sri S.Suri Babu, learned Special Standing Counsel for Commercial Taxes, and with their consent, the writ petition is disposed of at the stage of admission. Aggrieved by the order dated 10.12.2015 imposing penalty equal to 100% tax under Section 53(3) of the A.P. Value Added Tax Act, 2005 (for short "the Act"), the petitioner has invoked the jurisdiction of this Court.

Sri S.Dwarakanath, learned counsel for the petitioner, would submit that neither the show cause notice, nor the order of penalty, make any reference to the ingredients of Section 53(3) of the Act and, in the light of the law declared by the Division Bench of this Court in ***Viceroy Hotels Limited vs. Commercial Tax Officer***[1], the impugned order is liable to be set aside.

Section 53(3) of the Act confers power on the authorities to impose penalty for failure to declare the tax due. Under sub-section (1) thereof, where any dealer has under declared tax, and where it has not been established that fraud or wilful neglect has been committed and where the under declared tax is (i) less than ten percent of the tax, a penalty shall be imposed at ten percent of such under-declared tax; and (ii) more than ten percent of the tax due, a penalty shall be imposed at twenty five percent of such under-declared tax.

Under Section 53(3) of the Act any dealer who has under declared tax, and where it is established that fraud or wilful neglect has been committed, shall be liable to pay penalty equal to the tax under declared, besides being liable for prosecution. Under the proviso to Section 53, the authority prescribed is required to give the dealer a reasonable opportunity of being heard before levying penalty under Section 53 of the Act.

While both Sections 53(1) and 53(3) confer power to impose penalty for under declaration of tax by a dealer, the distinction between the former and the latter is that the ingredients of the latter are attracted where fraud or commission of neglect has been established. In the present case, the show notice does not even allege fraud or commission of wilful neglect. The impugned order, whereby penalty was imposed, does not even state that the dealer had committed fraud or wilful neglect, much less establish its ingredients.

In ***Viceroy Hotels Limited***[1] the Division Bench of this Court observed that, while under declaration of tax was liable for penalty under Section 53(1) if fraud or wilful neglect has not been established, and penalty is 10%/25% of the under declared tax, it is only where, in terms of Section 53(3) of the Act, fraud or wilful neglect is established in the under declaration of tax, is the dealer liable to pay penalty equal to the tax under-declared; the jurisdictional facts necessary for imposing penalty under Section 53(3) of the Act must be discernible from the show cause notice; and, in the absence of any such basis being disclosed in the show cause notice, the order levying penalty under Section 53(3) must be set aside.

As the show case notice, in the present case, does not even allege that the petitioner had committed fraud or wilful neglect, the impugned order of penalty must be and is, accordingly, set aside. It is made clear that this order shall not preclude the respondents, if they so choose, from initiating penalty proceedings afresh in accordance with law.

The writ petition is disposed of accordingly. The miscellaneous petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.

RAMESH RANGANATHAN, J

M. SATYANARAYANA MURTHY, J

Date:23.02.2016
JSU

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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[1] (2011) 43 VST 424 (AP)