

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

WRIT PETITION No.25437 of 2016

M/s.M.J.Tirumala Aqua & Agro Products Pvt. Limited.

.... Petitioner

Vs.

Deputy Commercial Tax Officer-II and others.

.... Respondents

DATE OF JUDGMENT PRONOUNCED: 06.09.2016

SUBMITTED FOR APPROVAL:

**THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO**

1. Whether Reporters of Local newspapers may
be allowed to see the Judgments? -----
2. Whether the copies of judgment may be marked
to Law Reports/Journals? Yes
3. Whether Their Ladyship/Lordship wish to see the
fair copy of the Judgment? Yes

RAMESH RANGANATHAN, ACJ

*** THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN**
AND
*** THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO**

+ Writ Petition No.25437 of 2016

% Dated 06.09.2016

BETWEEN

M/s.M.J.Tirumala Aqua & Agro Products Pvt. Limited.

....Petitioner

AND

\$ Deputy Commercial Tax Officer-II and others.

....Respondents

! Counsel for the petitioner : Sri P.Balaji Varma
 ^ Counsel for respondents : Sri S.Suri Babu, Spl. Standing
 Counsel for Commercial Taxes

< GIST:

> HEAD NOTE:

? CASES REFERRED:

1. (2009) 11 SCC 687
2. (2013) 9 SCC 753
3. 1964 (5) SCR 64 = AIR 1964 SC 447
4. (2004) 3 SCC 682
5. (2008) 16 SCC 14
6. AIR 1990 AP 171 (FB)
7. 2004(8) SCC 579
8. Full Bench Judgment in TRC Nos.274 of 2001 and batch dated 25.11.2011
9. 1995 Supp(3) SCC 462
- 10.(2005) 2 SCC 168
- 11.(1995) 6 SCC 117
- 12.(2005) 7 SCC 749
- 13.1995 Supp(3) SCC 322
- 14.(2003) 3 SCC 410

**THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO**

Writ Petition No.25437 of 2016

ORDER: (Per the Hon'ble The Acting Chief Justice Ramesh Ranganathan)

The proceedings under challenge in this writ petition is the order passed by the Appellate Deputy Commissioner dated 07.06.2016, for the tax period April, 2013 to August, 2015, confirming the order passed by the 2nd respondent dated 26.03.2016 levying penalty on the petitioner under Section 53(3) of the A.P. Value Added Tax Act, 2005 (for short "the Act").

The petitioner herein is a registered dealer on the rolls of the 2nd respondent, and is engaged in the business of milling of paddy and sale of rice. An assessment order was passed by the 1st respondent dated 30.11.2015 holding that there was a huge variation, between the turnover reported in the returns and in the audited books of accounts, for the tax period 2013-14 and 2014-15. The petitioner invoked the jurisdiction of this Court by way of W.P.No.1858 of 2016 which was dismissed by order dated 25.01.2016 on the ground that the petitioner had the alternative remedy of preferring an appeal to the Appellate Deputy Commissioner. The petitioner approached the Appellate Authority who dismissed the appeal on 30.05.2016. Consequent thereto, the assessment order attained finality.

Even before the appeal was dismissed by the appellate authority on 30.05.2016, the 1st respondent issued notice dated 28.12.2015 proposing to levy 100% penalty on the petitioner under Section 53(3) of the Act. The petitioner submitted their reply thereto. However, by order dated 26.03.2016, penalty of

Rs.24,85,358/- was imposed on them. Aggrieved thereby, the petitioner carried the matter in appeal and, by the order impugned in this writ petition, the appellate authority dismissed the appeal affirming the order of penalty passed by the assessing authority.

In the show cause notice, proposing imposition of penalty under Section 53(3) of the Act, the 1st respondent stated that, even though the dealer had admitted their sales turnover in their audited trading and P&L account for the years 2013-14 & 2014-15, and had also uploaded the utilised waybills information into C.T. Department website, the said sale turnover was not reported by them in their monthly VAT 200 returns; they had, thereby, under-declared the sale turnover, and had evaded payment of the legitimate tax due to the Government, which was clear cut evidence of wilful neglect on their part; and non-disclosure of the sales turnover in the VAT 200 returns, and non-payment of tax on the suppressed sales turnover, established that wilful neglect has been committed by the dealer with a view to evade payment of the tax legitimately due to the exchequer.

In their reply to the said show cause notice, the petitioner stated that the audit officer had levied tax of Rs.24,85,358/- based mainly on the way bills without considering whether the dealer had actually received the sale consideration; they did not receive any sale consideration in respect of the way bills alleged to have been issued; the control order required the dealer to supply 75% of its milled rice, and the balance could be sold in the open market; with an intention to supply the entire rice milled under the levy, they had inflated the figures by another 25%; and, though this fact was brought to the notice of the audit officer, tax was levied.

In the order, whereby penalty was imposed, the 1st respondent observed that, as per the Act, the audit officer was not required to wait, till receipt of consideration, to assess the dealer to tax; even on the deferred consideration, by way of credit invoices, the dealer was liable for payment of tax; the demand was raised, in the assessment, on the strength of the recorded evidence like invoices, waybill utilization and the audited trading and P&L account; the objection of the dealer in this regard was untenable; the dealer had, themselves, stated that the figures adopted in their books of accounts were inflated, and hence tax should be levied on the actual sales as per Section 4 of the Act; it was clear from the waybill utilisation statement that the dealer had effected sales only to VAT dealers, and the sales turnover tallied with their audited trading and P&L account; in the instant case the petitioner had raised invoices, and had issued waybills; sales were brought into the account books, and were reflected in their audited trading and P&L account; the used waybills record was also uploaded into the VATIS package; however this sales turnover was not reported in the monthly returns, and tax was not paid on such sales; all these factors were taken into account before arriving at the conclusion that the dealer had, intentionally, not reported the sales turnover in their monthly VAT 200 returns with a view to evade the legitimate tax due to the department; a demand was raised accordingly; and this clearly showed wilful neglect on the part of the dealer in not reporting the sales turnover in their monthly returns. After extracting Section 53 of the Act, in its entirety, the 1st respondent held that, from the aforesaid findings, it was established that the petitioner had intentionally under-declared tax

to the department in order to escape the tax liability on the sales turnover; and hence the contention that penalty could not be imposed under Section 53(3) of the Act was not correct.

In the order under challenge in this writ petition, the Appellate Deputy Commissioner observed that the audit officer had inspected the business premises of the petitioner on 21.09.2015 for conducting VAT audit; on verification of the books of accounts, and other documents produced by them, the audit officer had noticed that there was a huge variation in the sales turnover, for the years 2013-14 and 2014-15, between the books of accounts and the VAT 200 returns; the audit officer had determined a variation in the sales turnover during the period April, 2013 to August, 2015; he levied tax @ 5%, amounting to Rs.24,85,358/-, on the under-declared sales turnover of Rs.4,97,07,157/-; there was force in the finding of the assessing officer that the petitioner had intentionally not recorded the said turnover in their monthly VAT 200 returns, and had thereby evaded the legitimate tax due to the Government; they had declared the sales turnover in their audited trading and P&L account for the years 2013-14 and 2014-15, and had uploaded the utilized waybills information into the Commercial Tax department website; all the above factors showed that the petitioner had committed a wilful offence by not disclosing their sales turnover in the VAT 200 returns filed by them; and, as such, the petitioner was liable to be imposed penalty @100% under Section 53(3) of the Act.

Sri P.Balaji Varma, learned counsel for the petitioner, would submit that, while every under-declaration of tax by a dealer is liable for penalty under Section 53(1) of the Act, it is only where

the under-declared tax is established to be on account of commission of fraud or wilful neglect, would Section 53(3) of the Act be attracted, enabling the respondents to impose penalty of 100% of the under-declared tax; the onus is on the Revenue to establish that the dealer had under-declared tax committing fraud or because of wilful neglect; this burden cannot be shifted to the dealer; the Revenue has not made out a case of fraud or wilful neglect having been committed by the dealer; the very fact that the books of accounts of the dealer discloses the correct turnover, and the variation is only in the returns submitted by them, would show that there was neither fraud nor wilful neglect; accepting the construction, placed on Section 53 of the Act, by the revenue would result in every error, in the return filed by the dealer, attracting Section 53(3) of the Act; such an interpretation would render Section 53(1) of the Act redundant; and it is only in cases where the Revenue is able to establish the *mala fide* conduct of a dealer, in wilfully and deliberately under-declaring tax in the returns filed by them, can they levy penalty under Section 53(3) of the Act. Learned counsel would rely on **Sree Krishna Electricals v. State of Tamil Nadu**¹ and **Uniworth Textiles Limited v. Commissioner of Central Excise, Raipur**² in this regard.

On the other hand Sri S.Suri Babu, learned Special Standing Counsel for Commercial Taxes, would draw our attention to the order of penalty, and the impugned order passed by the Appellate Deputy Commissioner, to submit that, as against the actual turnover of Rs.3.47 crores for the year 2013-14, the petitioner had only declared a turnover of Rs.6.9 lakhs; again for the year 2014-

¹ (2009) 11 SCC 687

² (2013) 9 SCC 753

15, as against the actual turnover of Rs.1.73 crores, the petitioner had declared a turnover of only Rs.26.65 lakhs; the petitioner had utilised 54 VAT way bills for around Rs.4.97 crores; it was only because an audit was conducted, and the books of accounts were verified, did the undisclosed turnover come to light; the only contention put forth, in justification for such under-declaration, is that the petitioner did not receive the sale consideration; liability to tax under the Act is on the transfer of title to the goods, and the taxable event is not postponed till receipt of the sale consideration; irrespective of whether or not the sale consideration is received by the dealer, a sale takes place the moment title to the goods is transferred from the seller to the buyer; the Act places emphasis on self-assessment; the legislature has placed faith in the dealer declaring the entire turnover in the monthly returns filed by them; the Act, and the Rules made thereunder, also provide for correction of any *bona fide* error on the part of the dealer providing for a revised return to be filed within six months; in the present case, no revised return was filed; it is only when the audit officer verified the books of accounts, did the suppression of a substantial part of the turnover, in the returns filed by the petitioner-dealer, come to light; the distinction between Section 53(1) and Section 53(3) of the Act is that the former is attracted when there is a *bona fide* error on the part of the dealer in under-declaring tax, whereas under the latter the under-declaration must be on account of fraud or wilful neglect; and as, in the present case, it is evident that the petitioner had wilfully neglected to declare the actual tax due in the monthly returns filed by them, the order of the appellate authority does not

call for interference in proceedings under Article 226 of the Constitution of India.

Before examining the rival submissions it is useful to take note of the relevant provisions both under the Act and the Rules. Section 2(36) of the Act defines “tax period” to mean a calendar month or any other period as may be prescribed. The rule making authority has not prescribed any other period and, consequently, the tax period continues to remain a calendar month. Section 20 of the Act relates to returns and self-assessments and, under subsection (1) thereof, every dealer, registered under Section 17 of the Act, shall submit such return or returns along with proof of payment of tax in such manner, within such time, and to such authority as may be prescribed. Section 20(2) stipulates that, if a return has been filed within the prescribed time and the return so filed is found to be in order, it shall be accepted as self-assessment subject to adjustment of any arithmetical error apparent on the face of the said return. Under Section 20(3)(a) of the Act, without prejudice to the powers of the authority prescribed under subsection (3) of Section 21, every return shall be subject to scrutiny to verify the correctness of calculation, application of correct rate of tax and input tax credit claimed therein, and the full payment of tax payable for such tax period. Section 20(3)(b) of the Act stipulates that, if any mistake is detected as a result of the scrutiny made as specified in clause (a), the authority prescribed shall issue a notice of demand in the prescribed form for any short payment of tax or for recovery of any excess input tax credit claimed. Section 20(4) of the Act provides that every dealer shall be deemed to have been assessed to tax based on the return filed by

him, if no assessment is made within a period of four years from the date of filing of the return.

The requirement under Section 20 of the Act, with regards examination of a return, is only to subject such returns to scrutiny to verify the correctness of calculation, application of the correct rate of tax, the input tax credit claimed thereunder, and the full payment of tax payable for such tax period. The correctness of the turnover, declared by the dealer in the return, is not subjected to examination in proceedings under Section 20 of the Act. Assessments are governed by Section 21 of the Act and, under Sub-Section (3) thereof, where the prescribed authority is not satisfied with a return filed by the VAT dealer, he shall assess, to the best of his judgment, within four years of the due date of the return, or within four years of the date of filing of the return whichever is later. Section 21(4) of the Act enables the prescribed authority, based on any information available or on any other basis, to conduct a detailed scrutiny of the accounts of any VAT dealer and, where any assessment as a result of such scrutiny becomes necessary, such assessment shall be made within a period of four years from the end of the period for which the assessment is to be made.

As noted hereinabove, the Act prescribes the tax period as one month and the return, which the dealer is required to file, is for each tax period of one month. In the absence of any assessment being made, the return so filed is deemed to be the assessment. The jurisdiction which the assessing authority exercises under Section 21(3) and (4) of the Act is only where, on verification, he is satisfied that the return is incorrect or incomplete, or he decides to

conduct a detailed scrutiny of the accounts based on the information available, or on any other basis. In the absence of an assessment being made, under Section 21(3) & (4) of the Act, the monthly return filed by the dealer is deemed to be an assessment under the Act.

Section 53 of the Act prescribes the penalty for failure to declare the tax. Under Section 53(1), 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) where the under declared tax is more than ten percent of the tax due, a penalty shall be imposed at twenty five percent of such under-declared tax. It is not in dispute that, in the present case, the under-declaration of tax by the petitioner is far more than 10% of the tax due and therefore, even if the respondent had invoked Section 53(1) of the Act, the petitioner would have been liable to be imposed a penalty of 25% of the under-declared tax.

Section 53(2) of the Act stipulates that where any dealer, prior to the detection by any prescribed authority, voluntarily declares that the tax due for a tax period is under-declared, and he pays the tax due along with interest, no penalty shall be imposed provided that such declaration is made within the time limit and in the manner prescribed. Unlike Rule 23(6) of the Rules, which enables the dealer to file a revised return within six months, and the consequences of filing such a revised return is that the dealer is required to pay the under-declared tax with interest due on the late payment, Section 53(2) of the Act prohibits the Revenue from

imposing any penalty as long as the dealer, prior to detection by the prescribed authority, voluntarily declares that the tax, due for a tax period, is under-declared and he pays the tax due along with interest. Section 53(3) of the Act stipulates that 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.

The power to impose penalty either under Section 53(1) or under Section 53(3) of the Act is only in cases where the under-declaration of tax is detected by the prescribed authority, and not prior thereto. It is not in dispute that, in the present case, Section 53(2) of the Act is not attracted as the under-declaration of tax came to light only during the course of assessment proceedings pursuant to an elaborate audit of the petitioner's books of accounts. In the present case, it is only after the books of accounts of the petitioner were audited, that the huge variation, between the turnover as disclosed in the books of accounts and the turnover declared in the monthly returns, come to light. The fact that the petitioner had disclosed a far less turnover in their monthly returns, as compared to the actual turnover as recorded in their books of accounts, is not in dispute. Nor is it in dispute that the assessment made, pursuant to such audit, has attained finality on the petitioner's appeal, against the assessment order, being rejected by the Appellate Deputy Commissioner. Sri P.Balaji Varma, learned counsel for the petitioner, would fairly concede that the Revenue was entitled, for the tax under-declared by the petitioner, to proceed against them under Section 53(1) of the Act.

His submission is only that they could not have proceeded against the petitioner under Section 53(3) of the Act.

The question which necessitates examination, in this writ petition, is whether, in the present case, it is established that under-declaration of tax by the petitioner is because of wilful neglect; and whether the respondents were justified in invoking Section 53(3) of the Act, and imposing 100% penalty on the petitioner herein.

Section 53(3) of the Act requires the intent of the dealer, to under-declare tax, to be wilful i.e the dealer must have knowingly, deliberately and intentionally under-declared tax. The findings recorded by both the assessing authority and the appellate authority are that the petitioner had knowingly under-declared tax in the returns filed by them. As noted by the 1st respondent, in the order of penalty, the petitioner had themselves admitted that they had inflated the figures by another 25% only to supply the entire rice milled under the levy. The huge variation, in excess of Rs.4.97 crores, between the actual turnover and the turnover declared by the petitioner in their monthly returns, came to light only on an audit of their books of accounts, and on verification of the turnover disclosed in the way bills utilised by them. It only after the petitioner's accounts were audited, did it result in their being subjected to assessment proceedings, and levy of tax under the Act.

As noted hereinabove, both the assessing and appellate authorities have, after giving elaborate reasons for their conclusion, held that petitioner had under-declared tax with wilful intent. Findings of fact reached by statutory authorities/tribunals,

as a result of appreciation of evidence, cannot be reopened or questioned in writ proceedings. While an error of law, apparent on the face of the record, can be corrected by a writ, an error of fact, however grave it may appear to be, cannot. In regard to a finding of fact recorded by the Tribunal, a writ can be issued if it is shown that the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected in writ proceedings. It must, however, be borne in mind that a finding of fact recorded by the Tribunal cannot be challenged in writ proceedings on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point, and the inference of fact to be drawn from the said finding, are within the exclusive jurisdiction of the statutory authority/tribunal, and these points cannot be agitated before a Writ Court. To be amenable to correction in writ proceedings, the error committed by the statutory authority/Tribunal, on whose judgment the High Court was exercising jurisdiction, should be an error which is self-evident. If it is reasonably possible to form two opinions on the same material, the finding arrived at one way or the other, cannot be called a patent error. (**Syed Yakoob v. K.S. Radhakrishnan**³, **Ranjeet Singh v. Ravi Prakash**⁴). The findings of fact, recorded both by the assessing authority and the Appellate Deputy Commissioner, are not even contended by the petitioner to be

³ 1964 (5) SCR 64 = AIR 1964 SC 447

⁴ (2004) 3 SCC 682

either perverse or as based on no evidence. The orders passed by the assessing and appellate authorities cannot be said to suffer from an error apparent from the face of the record necessitating interference in proceedings under Article 226 of the Constitution of India.

It is settled law that the conclusion of the statutory authority should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record. What can be corrected, in proceedings under Article 226, is an error of law and the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions, and one construction has been adopted by the inferior Court or Tribunal, its conclusion may not always be open to correction in Writ proceedings. Whether or not the impugned error is an error of law, and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case, and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 can be legitimately exercised. (**Syed Yakoob**³). It is not even the case of the petitioner that they suffered from any doubt that the turnover was liable to tax under the Act, as the only justification given in this regard is that they had not received the sale consideration. The liability to pay tax under the Act is on the transfer of title to the goods, and not when consideration for the sale is received.

Even if no consideration is received, it would nonetheless be a sale as long as the title to the goods has been transferred by the seller to the buyer. No other defence has been put forth by the petitioner in justification of their having under-declared tax. In the facts of the present case, and in the light of the findings recorded by both the assessing authority and the appellate authority that there was a deliberate intention on the part of the petitioner to under-declare tax, we see no reason to take a different view.

In **Sree Krishna Electricals¹**, on which reliance is placed on behalf of the petitioners, the Supreme Court observed:

“.....So far as the question of penalty is concerned the items which were not included in the turnover were found incorporated in the appellant's accounts books. Where certain items which are not included in the turnover are disclosed in the dealer's own account books, and the assessing authorities includes these items in the dealers' turnover disallowing the exemption penalty cannot be imposed. The penalty levied stands set aside.....”

The aforesaid observations of the Supreme Court are relied upon by Sri P.Balaji Verma, Learned Counsel for the petitioner, to contend that, as long as the turnover is disclosed in the books of accounts, failure of the dealer to disclose it in their monthly returns does not attract penalty. This submission of the learned counsel runs contrary to his own submission that the petitioner is liable to penalty not under Section 53(3), but under Section 53(1) of the Act. Even otherwise, judgment of Courts are not to be read mechanically as Euclid's theorems or as if it were a Statute. (**Deepak Bajaj v. State of Maharashtra⁵**). Law does not develop in a casual manner. It develops by conscious, considered steps. Judgments are an authority for what they decide. A word here or a word there, should not be made the basis for inferring inconsistency. (**Sri Konaseema Co-operative Central Bank Ltd v.**

⁵ (2008) 16 SCC 14

N. Seetharama Raju⁶). Observations of Courts should not be taken out of context, and must be read in the setting in which they appear to have been stated. Judges interpret the words of statutes. Their words are not to be interpreted as statutes. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. (**Bharat Petroleum Corporation Ltd v. N.R. Vairamani**⁷; **The State of A.P. v. M/s Seven Hills Constructions**⁸).

A few lines in the judgment of the Supreme Court, in **Sree Krishna Electricals**¹, should not be read out of context to hold that it is the declaration of law, notwithstanding the statutory provisions to the contrary. Both Section 53(1) & (3) of the Act confer jurisdiction on the assessing authority to impose penalty for under-declaration of tax. As the assessee is required to declare their sales turnover, and the tax payable thereon, in their monthly returns, and as the Act does not mandate that, in each and every case, an assessment order should be passed, accepting the contention that no penalty can be levied if the turnover is disclosed by the dealer in their books of accounts, would only encourage them not to disclose the turnover, recorded in their books, in the monthly returns for, even if the books of accounts were to be verified later, they would only have to pay the differential tax with interest thereon, and not be liable to penalty. Such a construction would also render Section 53(2) redundant, and obliterate the distinction between voluntary disclosure of turnover and the under-declared tax under Section 53(2), and under-declaration

⁶ AIR 1990 AP 171 (FB)

⁷ 2004(8) SCC 579

⁸ Full Bench Judgment in TRC Nos.274 of 2001 and batch dated 25.11.2011

unearthed during the course of assessment justifying imposition of penalty either under Section 53(1) or under Section 53(3) of the Act.

In **Uniworth Textiles Limited**², on which also reliance is placed on behalf of the petitioner, Section 28 of the Customs Act, and the proviso thereto, was under consideration. The proviso to Section 28(1) stipulated that it is only where duty has not been levied, by reason of collusion or wilful mis-statement or suppression by the person concerned, would the extended period of limitation of five years apply. It is in this context that the Supreme Court, relying on its earlier judgments in **Pushpam Pharmaceuticals Co. v. CCE**⁹, **Sarabhai M.Chemicals v. CCE**¹⁰, **Cosmic Dye Chemical v. CCE**¹¹, **Anand Nishikawa Co. Ltd. v. CCE**¹², **CCE v. H.M.M. Ltd.**¹³ and **Easland Combines v. CCE**¹⁴, observed that it was not correct to state that there could be suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A of the Act; mere failure to declare, did not amount to wilful suppression; there must be some positive act from the side of the assessee to find wilful suppression; mere non-disclosure of certain items, assessable to duty, does not tantamount to mala fides; there could be a bona fide belief on the part of the assessee that duty was not liable to be paid, but that per se did not prove that there was an intention to evade payment of duty; if non-disclosure of certain items assessable to duty does not invite the

⁹ 1995 Supp(3) SCC 462

¹⁰ (2005) 2 SCC 168

¹¹ (1995) 6 SCC 117

¹² (2005) 7 SCC 749

¹³ 1995 Supp(3) SCC 322

¹⁴ (2003) 3 SCC 410

wrath of the proviso, it was un-understandable how non-payment of duty on disclosed items, after enquiry from the department concerned, meets with that fate; the Act contemplated a positive action which betrays a negative intention of wilful default; the ingredients postulate a positive act and, therefore, mere failure to pay duty which is not due to any fraud, collusion or wilful mis-statement or suppression of fact or contravention of any provision, is not sufficient to attract the extended period of limitation; the emphasis of the proviso was the intention to evade payment of duty; in each of the cases it would have to be seen as a fact whether there had been a non-levy or short-levy, and whether that has been by reason of collusion or any wilful mis-statement or suppression of facts by the importer or his agent or employee; for the operation of the proviso, the intention to deliberately default is a mandatory pre-requisite; the word “wilful”, preceding the words ‘mis-statement or suppression of facts’, clearly spelt out that there had to be an intention on the part of the assessee to evade payment of duty; Black’s Law Dictionary defined “wilful” to mean “proceeding from a conscious motion of the will; voluntary; knowingly; deliberate; intending the result which actually comes to pass...; an act or omission is ‘wilfully’ done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done..”; an inference of bonafide conduct in favour of the appellant was required to be drawn as he laboured under the very doubt which formed the basis of the issue before them, and had to be decided; the burden of proof, of proving malafide conduct under the proviso to Section 28, lay with the Revenue; in

furtherance of the same, no specific averments found mention in the show cause notice which was a mandatory requirement for commencement of action under the said proviso; and nothing on record displayed a wilful default on the part of the appellant. As noted hereinabove both the assessing and appellate authorities have recorded a finding, on the basis of the material on record, that the petitioner wilfully intended to under-declare tax in the monthly returns filed by them. Reliance placed on behalf of the petitioner on **Uniworth Textiles Limited**² is therefore misplaced.

The distinction between Sections 53(1) and 53(3) of the Act is evident. Section 53(1) is attracted in cases where the under-declaration of tax has arisen on account of a bona fide error on the part of the dealer. Instances of a bona fide error, attracting Section 53(1) of the Act, readily come to mind. A dealer may be under the bona-fide belief that he is liable to tax at the Nil rate under Schedule I to the Act, or at a lesser rate of tax under Schedule IV to the Act, whereas the assessing authority may come to the conclusion that the petitioner is liable to the maximum rate of tax of 14.5% under Schedule V to the Act. There may be situations where only one invoice may have escaped the attention of the dealer, while filing the monthly returns, resulting in his failure to declare the turnover, represented by that invoice, in his monthly return. Several such instances may well arise necessitating action being taken, for imposition of penalty, only under Section 53(1), and it would not be proper to burden this judgment with other such instances. Suffice it to record our satisfaction that under-declaration, of a huge turnover in excess of Rs.4.97 crores, and the

tax payable thereon, by the petitioner is not on account of a bonafide error on their part.

The submission that Section 53(1) of the Act would become redundant, if every error on the part of the dealer in declaring tax is brought within the ambit of Section 53(3) of the Act, is only to be noted to be rejected. The distinction between Sections 53(1) and 53(3) of the Act is the dealer's intent. While a bonafide error would fall within the ambit of Section 53(1) of the Act, wilful or intentional under-declaration of tax would fall within the scope of Section 53(3) of the Act. In the present case, the respondents were justified, in imposing penalty under Section 53(3) of the Act on their coming to the conclusion that the under-declaration of tax by the dealer was with wilful intent. We see no reason, therefore, to interfere with the impugned order, passed by the Appellate Deputy Commissioner, in proceedings under Article 226 of the Constitution of India.

The Writ Petition fails and is, accordingly, dismissed. Miscellaneous petitions pending, if any, shall also stand dismissed. There shall be no order as to costs.

(RAMESH RANGANATHAN, ACJ)

(U.DURGA PRASAD RAO, J)

06th September 2016

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