THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SMT JUSTICE T.RAJANI

WRIT PETITION NO.4983 OF 2005

ORDER: {Per the Hon'ble the Acting Chief Justice Ramesh Ranganathan}

The order under challenge in this Writ Petition is the order dated 29.12.2004 levying penalty of Rs.1,79,165/-, equivalent to five times the tax due of Rs.35,833/-, on the escaped turnover of Rs.4,47,915/-. The petitioner was finally assessed to tax for the assessment year 2001-02 on 27.12.2002, and the net turnover of Rs.1,23,76,100/- was held exempt from tax. Subsequently, basing on the inspecting material received from the Regional Vigilance and Enforcement Officer, Vijayawada, the petitioner was further assessed, on the escaped turnover of Rs.4,47,915/-, by proceedings dated 11.11.2004.

The Regional Vigilance and Enforcement Officer, Vijayawada had inspected the premises of the petitioner on 17.09.2004, and had noticed that the petitioner had manufactured children series books worth Rs.4,47,915/- which were exclusively meant for cursory writing and, consequently, tax at 8% on the said turnover i.e. for Rs.35,833/- was imposed. On the ground that suppression of turnover was detected at the time of inspection, and the petitioner had wilfully evaded the tax due to the department, the assessing authority came to the conclusion that it is a fit case to invoke the penal provisions under Section 14(8) of the Andhra Pradesh General Sales Tax Act, 1957 ("the Act" for brevity). A penalty notice was issued on19.11.2004 to which the petitioner submitted a reply on 18.12.2004, which in turn resulted in the impugned order of penalty being passed. The revised assessment order is said to have been challenged by the petitioner before the Appellate Deputy Commissioner and, on the appeal being dismissed, the petitioner claims to have preferred a second appeal to the Sales Tax Appellate Tribunal. Except for a bare averment that an appeal has been preferred thereagainst to the Tribunal, no particulars, such as the T.A. number or the date on which it was filed, are forthcoming. In any event it is not even the petitioner's case that the order of the assessing authority, as confirmed by the Appellate Deputy Commissioner, has been stayed pending disposal of the appeal before the Tribunal. It is evident, therefore, that the revised assessment order continues to remain in force.

Section 14(3) of the Act empowers the assessing authority to assess, to the best of his judgment, the amount of tax due from the dealer under the circumstances mentioned therein. The power to revise the assessment is under Section 14(4) and, under clause (cc) thereof, where the whole or any part of the turnover of a business of a dealer has escaped assessment to tax, or has been under-assessed or assessed at a rate lower than the correct rate, the assessing authority may, after issuing a notice to the dealer and after making such enquiry as he may consider necessary, by order, setting out the grounds therefor, assess the correct amount payable in case it has been wrongly allowed. Schedule I of the Act contain a list of goods liable to tax at 8% and, under Entry 225, includes exercise note books.

Schedule IV details the goods exempt from the tax. Entry 11 thereof relates to school and college textbooks. The turnover, representing exercise note books, was earlier exempted from tax on the premise that they fell within Entry 11 of Schedule IV. A perusal of the assessment order shows that the petitioner had disclosed the entire turnover as sale of printed books, without classifying them under Entry 225 of Schedule I and Entry 11 of Schedule IV as exercise note books and textbooks respectively.

Be that as it may, as the assessment order is not under challenge in this Writ Petition. We are only concerned with the validity of the penalty order passed pursuant thereto. The power to impose penalty is conferred by Section 14(8) of the Act, whereunder the penalty leviable under sub-section (2), sub-section (3) or sub-section (4) (a) shall extend to five times the tax or the fee due in cases where the assessing authority is satisfied that failure of the dealer to disclose the whole or part of the turnover, or any other particulars, correctly was wilful. In the show cause notice, the assessing authority observed that failure, to disclose the particulars correctly by the petitioner, was wilful.

Reliance placed by Sri P.Girish Kumar, learned counsel for the petitioner, on the judgments of the Supreme Court in **State of Kerala v. C.Velukutty**[1], and the Division Bench judgment of this Court in **The State of Andhra Pradesh v. Ruldu Ram & Sons**[2], are misplaced. In both the cases, the contention urged on behalf of the assessee was that no power was conferred on the CTO to levy penalty on a best judgment assessment being

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[1] **(1966) 60 ITR 239 : (1966) 17 STC 465**
[2] **1984 SCC OnLine AP 351 : (1987) 64 STC 465**

passed under a provision similar to Section 14(3) of the Act. As noted hereinabove, while the tax levied pursuant to a best judgment assessment is under Section 14(3) of the Act, the power to revise the assessment order is under Section 14(4) of the Act. Section 14(8) confers power to levy penalty both pursuant to a best judgment assessment passed under Section 14(3) of the Act, and a revised assessment passed under Section 14(4) of the Act. As both the aforesaid judgments relate to a case where the jurisdiction to impose penalty was invoked in terms of a provision similar to Section 14(3) of the Act, the said judgments have no application to the present case where the penalty is sought to be imposed is pursuant to the earlier assessment order being revised under Section 14(4)(cc) of the Act.

Section 14(8)(a) of the Act mandates imposition of penalty of not less than three times the tax due. The assessing authority has been conferred discretion to impose penalty upto five times the tax due. In the reply to the show cause notice, the petitioner has specifically asserted that imposition of penalty at five times was arbitrary and unreasonable, and the assessing authority should enquire, investigate and use its discretionary powers as the said power is quasi-judicial in nature, and is independent and distinct from the assessment order.

The assessing authority was obligated to consider the objections raised by the petitioner in its reply to the show cause notice, while imposing penalty of upto five times the tax due. The order under challenge in this Writ Petition is modified, and the said order, to the extent penalty at the minimum stipulated rate of three times the tax due was imposed, is upheld. In case he intends to impose penalty at the maximum prescribed five times the tax due, the assessing authority is bound to consider the objections put forth by the petitioner in reply to the show cause notice, and pass a reasoned order in accordance with law.

Leaving it open to the Commercial Tax Officer to do so, the Writ Petition is disposed of. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand closed.

(RAMESH RANGANATHAN, ACJ)

(T.RAJANI, J)

19th June 2017
RRB