

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (T) No. 5376 of 2011**

S.K. Drugs a registered partnership firm through partner Salil Shrivastava, S/o Dr. S.K. Shrivastava, aged about 47 years, Bastar Road, Dhamtari (C.G.)

---- Petitioner

Versus

1. Additional Commissioner, Commercial Tax, Raipur (C.G.)
2. Assistant Commissioner, Commercial Tax, Raipur (C.G.)
3. State of Chhattisgarh, through Secretary, Department of Commercial Tax, D.K.S. Bhawan, Mantralaya, Raipur (C.G.)

---- Respondents

For Petitioner :	Ms. Smriti Sharma, Advocate.
For Respondents/State:	Mr. Gary Mukhopadhyaya, Dy. Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

03/04/2018

(1) The petitioner was assessed to commercial tax under the Chhattisgarh Commercial Tax Act, 1994 (hereinafter called as "Act of 1994") on 28.06.2008 for the assessment year 2004-2005. Thereafter, he was also reassessed for the same year by issuing notice under Section 28(1) of the Act of 1994 on 21.12.2009. In the assessment proceeding, penalty of Rs.4,09,230/- was also imposed upon the petitioner under Section 69(2) of the Act, 1994, and in reassessment proceeding, interest of Rs. 55,650/- was levied. The petitioner preferred revision there-against. The revisional Authority i.e. Additional Commissioner Commercial Tax dismissed the revision by its order dated 08.12.2009.

(2) The Chhattisgarh Commercial Tax Act, 1994 was repealed and the Chhattisgarh Value Added Tax Act, 2005 (hereinafter called as "VAT Act, 2005") came into force with effect from 1.4.2006. This writ petition has been filed calling in question the order of assessment, reassessment and the revisional order dated 08.12.2009 only on the ground that since the Act of 1994 was repealed by VAT Act, 2005 with effect from 1.4.2006, therefore, reassessment for the year 2004-2005 could have been initiated under Section 22 of the VAT Act, 2005 and proceeding initiated and order passed under the Act of 1994 deserves to be quashed.

(3) Return has been filed opposing the averments made by petitioner in the writ petition and supporting the order impugned stating the impugned order is strictly in accordance with law.

(4) Ms. Sharma, learned counsel appearing for the petitioner would submit that once the VAT Act, 2005 came into force with effect from 1.4.2006 and the reassessment proceedings has not been saved by Section 72 (iii) of the Act, 2005. Reassessment for the year 2004-2005 could not be done under Section 28 of the Act, 1994 after repeal of Act of 1994 and, therefore, entire proceedings of reassessment initiated and order of re-assessment passed is liable to be set aside. She would further submit that while assessing the tax, penalty has also been imposed upon the petitioner without initiating any separate proceedings and without recording a finding to the effect that there was intention or *mens rea* to evade tax on the part of assessee, which is also liable to be set - aside.

(5) On the other hand, counsel for the State while supporting the impugned order would submit that penalty proceedings is saved by 3rd proviso to Section 72 of the

VAT Tax Act, 2005 and the order impugned is strictly in accordance with law.

(6) I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and also gone through the record with utmost circumspection.

(7) It is not in dispute that the Chhattisgarh Commercial Tax Act, 1994 was repealed by Section 72 of Chhattisgarh Value Added Tax Act, 2005 with effect from 1.4.2006. Section 72 (iii) of the VAT Tax Act, 2005 provides for repeal and savings, which states as under :-

“Section 72 (iii) : Any assessment, appeal, revision or other proceedings arising under the repealed Act and the rules made thereunder and/or pending before an officer or authority duly empowered to make assessment or hear and decide such appeal, revision or other proceeding immediately preceding the commencement of this Act shall, on the date of such commencement stand transferred to the officer or authority competent to make assessment or to hear and decide appeal or revision or other proceedings under this Act and thereupon such assessment shall be made or such appeal or revision or other proceedings shall be heard and decided within the period, if any, specified therefor, by such officer or authority in accordance with the provisions of the repealed Act or the rules made thereunder as if they were the officer or authority duly empowered for the purpose under the repealed Act.”

(8) A careful perusal of the aforesaid provision would show that any assessment, appeal, revision or other proceedings under the repealed Act are saved by repealing

Act but the reassessment proceeding is not saved. Non -saving of the reassessment proceeding is apparent from the provisions contained in Section 72 of the Act, 2005, which is quoted hereinabove.

(9) Section 22(1) of the VAT Act, 2005 provides as under:-

“22. Assessment/reassessment of tax in certain circumstances.-

(1) Where an assessment or re-assessment of a dealer has been made under this Act or the Act repealed by this Act and for any reason any sale or purchase of goods liable to tax under this Act or the Act repealed by this Act during any period,-

- (a) has been under assessed or has escaped assessment; or
- (b) has been assessed at a lower rate; or
- (c) any wrong deduction has been made while making the assessment; or
- (d) a rebate on input tax has incorrectly been allowed while making the assessment; or
- (e) is rendered erroneous and prejudicial to the interest of revenue consequent to or in the light of any judgment or order of any Court or Tribunal, which has become final.

the Commissioner may at any time within a period of three calendar years from the date of order of assessment, or from the date of judgment or order of any Court or Tribunal proceed in such manner as may be prescribed, to assess or re-assess, as the case may be the tax payable by such dealer after making such enquiry as he considers necessary and assess or re-assess to tax.

(10) The assessment done under the Act of 1994 is to be reassessed, reassessment is only permissible to be done under Section 22(1) of the Act, 2005 subject to the existence of the grounds mentioned therein and, therefore, no

proceedings for reassessment can be initiated under the Act of 1994 after coming into force of the VAT Tax Act, 2005.

(11) Issue raised in this writ petition is also come up for consideration before this Court in Writ Appeal No. 235 of 2014 in the matter of **State of Chhattisgarh & another Vs. M/s. Budhia Auto**¹, in which Division Bench of this Court while upholding the order of learned Single Judge has held as under:-

“5. A bare reading of Section 22 reveals that where an assessment of a dealer had been made under the repealed Act and for any reason goods liable to tax under the repealed Act had been under assessed, had escaped assessment, was assessed at a lower rate, wrong deductions made, rebate incorrectly allowed, or otherwise erroneous and prejudicial to the interest of the revenue, after the promulgation of the new Act, the Commissioner may at any time within a period of three calendar years from the date of order of assessment, which in the present case is 20.9.2004, could proceed to re-assess the tax payable in accordance with law.

6. The statutory provisions is therefore very clear and admits of no ambiguity. An assessment made under the repealed Act on 20.9.2004 was open to re-assessment even after coming into force of the new Act if the Commissioner was satisfied with regard to the existence of any of the grounds mentioned in Section 22(1)(a) to (e), but such re-assessment of a closed assessment done under the repealed Act was to be done within a period of three calendar years from the date of the original assessment.”

1 Decided on 13.08.2015

(12) In view of the aforesaid legal position, it is quite vivid that if the dealer has been assessed and liable to pay tax under the repealed Act i.e. Act of 1994, reassessment is permissible under Section 22(1) of the Act, 2005 and it is impermissible under Section 28 (1) of the Act, 1994. Therefore, proceedings initiated by the assessing officer on 21.12.2009 reassessing the petitioner under the Act of 1994 is without jurisdiction and without authority of law, therefore, the order dated 21.12.2009 is liable to be and is hereby quashed. However, the said authority is at liberty to proceed in accordance with law.

(13) This would bring me to the question of penalty imposed under Section 69(2) of the Act, 1994.

(14) As stated above, the penalty proceedings initiated under Section 69(2) of the Act, 1994 is saved by 3rd proviso to Section 72 of the VAT Tax Act, 2005 and, therefore, penalty can not be held to be without jurisdiction and without authority of law.

(15) Next submission raised by learned counsel appearing for the petitioner is that no separate penalty proceedings was initiated and while passing the assessment order vide Annexure P-1, order imposing penalty has been passed without recording a finding that the petitioner has any intention to evade the tax by the Assistant Commissioner, Income Tax.

(16) In the matter of **Maya Devi Vs. Raj Kumari Batra**², the Supreme Court has held that where an authority is vested with discretionary powers, discretion has to be exercised by application of mind and by recording reasons to promote fairness, transparency and equity.

2 (2010) 9 SCC 486

(17) It is settled law that an order imposing a penalty for failure to carry out a statutory obligation is the result of quasi-criminal proceedings and penalty will not ordinarily be imposed unless the party obliged has either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation. A penalty will not also be imposed merely because it is lawful to do so. In spite of a minimum penalty prescribed, the authority competent to impose the penalty may refuse to impose the penalty if the breach complained of was a technical or venial breach, flew from a bona fide thought mistaken belief. (See ***Karnataka Rare Earth & anr. Vs. Senior Geologist***³, ***Department of Mines & Geology, Bharjaty Steel Industries v. Commissioner, Sales Tax***⁴ and ***M/s. Hindustan Steel Ltd. v. State of Orissa***⁵).

(18) It is correct to say that no separate proceedings has been initiated and while assessing the tax, penalty has been imposed without recording a finding that the petitioner has any intention to evade tax deliberately. Thus, the order imposing penalty is liable to be and is hereby quashed. However, the assessing authority is at liberty to initiate separate penalty proceedings against petitioner in accordance with law.

(19) The writ petition is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

D/-

3 (2004) 2 SCC 783

4 UP (2008) 11 SCC 617

5 1969 (2) SCC 627

