AFR

HIGH COURT OF CHHATTISGARH, BILASPUR
WPT No.7162 of 2010

1. M/s. Kedia Castle Delleon Industries Limited Kedia Nagar Kumhari Distt. Durg (CG) a company incorporated under the provisions of the Companies Act 1956 through Director C.D. Saji
2. C.D. Saji S/o Late C.P. Devassy Street No.3, Sector No. B Panchsheel Housing Colony Borsi Durg (CG)

---- Petitioners

Versus

1. Additional Commissioner Commercial Tax Vanijyik Kar Bhavan Civil Lines, Raipur (CG)
2. Assistant Commissioner of Commercial Tax Durg (CG)

---- Respondents

For Petitioners	:	Mr.Neelabh Dubey, Advocate
For Respondents	:	Mr.Anand Dadariya, Deputy Government Advocate

Hon'ble Shri Justice Sanjay K. Agrawal
Order on Board

01/05/2018

1. The jurisdiction of this Court is invoked by the petitioners herein calling in question the revisional order dated 15.12.2009 (Annexure P/4) passed by the revisional authority affirming the imposition of penalty made by the Assistant Commissioner, Commercial Tax, Durg on 16.7.2008 (Annexure P/2) in exercise of the powers and jurisdiction conferred under Section 69 (3) of the Chhattisgarh Commercial Tax Act, 1994 (hereinafter called as "the Act of 1994") read with Section 13 of the Entry Tax Act, 1976 (hereinafter called as "the Act of 1976").

2. The petitioner company is engaged in the business of manufacture and sale of liquor. In the assessment year 2004-05, the petitioner company filed its annual return for entry tax and shown the total taxable purchase as ₹ 9,79,00,000/- and upon the said amount, deposited tax at the rate of 1% i.e. ₹ 9,79,000/-. The respondent-department on the basis of calculation-sheet filed by the petitioners held that total taxable purchase was ₹ 16,09,21,239/- and imposed entry tax on the said amount at the rate of 1% i.e. ₹ 16,09,212/- and after deducting deposited amount i.e. ₹ 9,79,000/-, the total entry tax due upon the petitioner company was ₹ 6,13,212/-. Thus, it was found that total tax shown as payable by the petitioner company was less than 80% of the total tax assessed and holding that the petitioner company has (a) deliberately concealed its turnover/aggregate amount of purchase prices; (b) has furnished false particulars of his purchases in his return for the year 2004-2005 and (c) has furnished a false return for the assessment year 2004-2005 initiated proceedings for imposition of penalty against the petitioner and imposed penalty of ₹ 31,51,062/- in exercise of its jurisdiction conferred under Section 69(3) of the Act of 1994. On revision being preferred, the revisional authority reduced the penalty to the extent of ₹18,90,636/-. Questioning legality and validity of the impugned order, this writ petition has been filed by the petitioners herein stating that the penalty proceedings are unsustainable and bad in law.

3. Mr.Neelabh Dubey, learned counsel appearing for the petitioners, would submit that penalty has been imposed against the petitioners in view of the provisions contained in Section 69 (3) of the Act of 1994, but the assessing authority has not given a reasonable opportunity to the assessee to rebut the presumption before levying the penalty and to produce the material which is to be produced by the assessee in rebuttal. Therefore, the impugned order of penalty passed by the assessing authority as affirmed by the revisional authority are liable to be set aside.

4. Mr.Anand Dadariya, learned Deputy Government Advocate appearing for the respondents/State, would support the impugned order and submit that by virtue of the provisions contained in Section 69(3) of the Act of 1994 presumption has been drawn against the petitioners which the petitioners have failed to rebut despite an opportunity having been granted. Therefore, the impugned order is strictly in accordance with law and no interference is called for by this Court and the writ petition deserves to be dismissed.

5. I have heard learned counsel appearing for the parties and considered their rival submissions made herein-above and also gone through the records with utmost circumspection.

6. Section 69(3) of the Act of 1994 provides for imposition of penalty where the tax shown as payable according to the return and paid by a dealer for any period or part thereof is less than eighty per cent of the total tax assessed under Section 27 of the Act of 1994. Section 69(3) of the Act of 1994 provides as under:-

> "**Sec. 69** : **Power of Commissioner or appellate or revisional authority to impose penalty in certain circumstances**
>
> (3) If the total tax shown as payable according to the return or returns and paid by a dealer for any period or part thereof is less than eighty per cent of the total tax assessed under Section 27 such dealer shall be deemed to have concealed his turnover or aggregate of his purchase prices or to have furnished false particulars of his sales or purchases in his return or returns or to have furnished a false return or returns for the purpose of sub-section (2) unless he proves to the satisfaction of the Commissioner or the appellate or the revisional authority, as the case may be, that the concealment of the said turnover or the aggregate of purchase prices or furnishing of particulars of sales or purchases or furnishing of the false return or returns was not due to any fraud or gross negligence on his part."

7. A focused glance of the aforesaid provision would show that rebuttable presumption is to be drawn in case a dealer has paid the tax less than eighty percent of the total tax under Section 27 of the Act of 1994. Thus, presumption under Section 69(3) of the Act of 1994 is rebuttable presumption and this provision shifts the burden on assessee to prove to the satisfaction of the authorities that the concealment of the said turnover or the aggregate of purchase prices or furnishing of particulars of sales or purchases or furnishing of the false return or returns was not due to any fraud or gross negligence on his part.

8. The Supreme Court in the matter of **Sodhi Transport Co. v. State of U.P.**[1], while considering Section 28B of the U.P. Sales Tax Act, 1948, which provides for drawing the presumption of sale of goods within the State on failure to deliver the transit pass on last check-post or barrier before exit from the State, has held that such a presumption is a rebuttable presumption and the transporter concerned is not shut out from showing by producing reliable evidence that the goods have not been actually sold inside the State and it is only where, the presumption is not successfully rebutted, the authorities concerned, are required to rely upon the rule of presumption in Section 28B of the Act and further that the authority concerned is required to arrive at the conclusion by a judicial process before levying sales tax, that the goods have been sold inside the State and in doing so, can rely upon the statutory rule of presumption contained in Section 28B of the Act, which may be rebutted by the person against whom action is taken.

9. The Supreme Court in the matter of **State of Madhya Pradesh v. Bharat Heavy Electricals**[2] while dealing with the similar provision contained in Section 7(5) of the Madhya Pradesh Stahaniya Kshetra

1 [1986] 62 STC 381
2 [1997] 106 STC 604

Me Mal Ke Pravesh Par Kar Adhiniyam, 1976, has held that:

> "10.....There can be several good reasons why a registered dealer may have failed to make the statement required to be furnished by him by sub-section (1) and sub-section (2) of section 7. In our opinion it could not be the intention of the Legislature that an accidental omission or non-furnishing of the statement for a good and valid reason must necessarily lead to the presumption that the registered dealer had the intention of facilitating the evasion of entry tax....
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> 12. In our opinion Mr.Sanghi is right in submitting that section 7 should be read as containing a rebuttable presumption. This would mean that it will be open to the registered dealer to satisfy the authorities concerned that the non-submission of the statement under sub-sections (1) and (2) of section 7 was not with the intention to facilitate the evasion of the entry tax. In other words, sub-section (5) of section 7 places the burden of proof on the registered dealer to show that the non-submission of the statement under sub-sections (1) and (2) of section 7 was not with a view to facilitate the evasion of entry tax. If a registered dealer is unable to satisfy the authorities in this regard then, in the absence of satisfaction, the presumption is that non-submission of statement has facilitated the evasion of entry tax. Construing section 7(5) to contain a rebuttable presumption, it does not suffer from any vice....."

10. Likewise, the Madhya Pradesh High Court in the matter of **Food Corporation of India v. Commissioner of Sales Tax**[3] dealing with pari materia provisions contained in Section 43(2) of the Madhya Pradesh General Sales Tax, 1958 has clearly held that imposition of penalty under Section 43 of the said Act without considering explanation or without recording a finding that explanation offered by

3 [1991] 81 STC 2199 (MP)

assessee was false or not acceptable, imposition of penalty is not sustainable.

11. Likewise, in the matter of **Hindustan Lever Ltd. and Another v. Assistant Commissioner of Commercial Tax, Indore and Others**[4] a Division Bench of the Madhya Pradesh High Court while dealing with the provisions contained in Section 43(6) of the Madhya Pradesh Commercial Tax Act, 1994 holding the presumption to be rebuttable, has held that the authorities are required to give a reasonable opportunity to the assessee to rebut the presumption before levying the penalty and the material which is produced by the assessee in rebuttal is required to be looked into.

12. Thus, from the above-stated judgments, it is quite vivid that presumption under Section 69(3) of the Act of 1994 is rebuttable presumption and the authorities are required to consider the explanation and record a finding that explanation offered by the assessee is either false or not acceptable and submission of false return was not due to any fraud or gross negligence on his part.

13. Reverting to the facts of the present case, it is quite vivid that the petitioner was issued notice for his appearance before the assessing authority on 25.6.2008, which was received by the petitioner on 4.6.2008, thereafter the petitioner made application for adjournment

4 (2011) 39 VST 479 (MP)

on 18.6.2008, but it appears from the record that the matter was not taken up by the assessing authority on 25.6.2008 as no order-sheet has been recorded by the assessing authority of that date and thereafter, the matter was taken up by the assessing authority on 16.7.2008, however, that date of hearing was not intimated to the petitioner and straightway, on that day the order imposing penalty has been passed.

14. It is well settled law that if on the date fixed, the Presiding Officer is on leave or the matter could not be taken on that day, fresh notice should be issued to a person concerned for his appearance, which has not been done in the present case by the assessing authority and straightway order imposing penalty under Section 69(3) of the Act of 1994 was passed. Even otherwise, Rule 48 of the Chhattisgarh Commercial Tax Rules, 1995 (hereinafter called as "the Rules of 1995") clearly provides the manner of imposition of penalty by stating that in every case covered under Rule 48(1) (a) to (h) of the Rules 1995 the assessing authority shall serve a notice on the dealer which shall be in Form 47 specifying the default, escapement or concealment, as the case may be, and calling upon him to show cause by such date why penalty should not be imposed upon him and directing him to produce on the said date his books of accounts and other documents which the assessing authority may require. That notice, as has been specified in Section 69 (3) of the Act of 1994, was not issued to the petitioner company and without issuing and serving notice, the order imposing penalty was passed that too without intimating the date of hearing as presumption under Section 69(3) of the Act of 1994 is a rebuttable presumption as held by the Madhya Pradesh High Court in **Hindustan Lever Ltd.** (supra) and the petitioner could have offered explanation on being asked from him by the assessing officer and could have proved that omission to file correct return was not due to any fraud or gross negligence on his part and it was bonafide error on his part, as such, the petitioner was deprived of not availing an opportunity of hearing and show-cause notice is also blissfully silent as to the establishment as required in Rule 48(1) of the Rules of 1995. The revisional authority perpetuated the illegality committed by the assessing authority.

15. As a fallout and consequence of the above-stated discussion, the impugned order passed by the assessing authority as affirmed by the revisional authority are hereby set aside. The matter is remitted to the assessing authority for hearing and disposal afresh in accordance with law after issuing notice and after hearing the petitioner company under Rule 48 of the Rules 1995 or substituted Act. The assessing authority shall conclude the proceedings within a period of three months from the date of receipt of certified copy of this order.

16. The writ petition is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).

Sd/-

(Sanjay K. Agrawal)

Judge

B/-