

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (T) No.136 of 2014**

M/s. Budhia Auto T.P. Nagar Korba (CG) a partnership firm through partner Vijay Budhia S/o Late Shyam Sundar Budhiya, aged about 50 years, resident of Plot No.236/237 T.P.Nagar, Korba (CG)

-----Petitioner**Versus**

- 1.** Additional Commissioner Commercial Tax Vanijyik Kar Bhavan Civil Lines, Raipur (CG)
- 2.** Divisional Deputy Commissioner Commercial Tax Circle-2, Bilaspur (CG)
- 3.** State of Chhattisgarh through Secretary Department of Commercial Tax Mantralaya Naya Raipur (CG)

---- Respondents**And****Writ Petition (T) No.137 of 2014**

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---- Respondents

For Petitioner	:	Mr.Siddharth Dubey, Advocate
For Respondents	:	Mr.Anand Dadariya, Dy.G.A.

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

12/04/2018

1. Since common question of law and fact is involved in these writ petitions, they are clubbed together and are being disposed of by this common order.
2. The petitioner/assessee is a partnership firm engaged in business of sale and purchase of motor-cycles. The petitioner filed its annual statement in Form-18 and Form-8 under Section 20 of the Chhattisgarh Value Added Tax Act, 2005 (hereinafter called as "the Act of 2005") for the period 2011-2012 and the Chhattisgarh Entry Tax Act, 1976 (hereinafter called as "the Act of 1976") respectively and had furnished information as per books of account containing requisite details as per books of accounts and had paid the requisite tax on 8.8.2012, which is more than 80% of the disputed demand. Thereafter, proceedings were initiated under Section 57 of the Act of 2005 read with Section 13 of the Act of 1976 on 25.10.2012 to check tax evasion. During pendency of the said proceedings, penalty proceedings were also initiated against the petitioner under Section 54 of the Act of 2005 read with Section 13 of the Act of 1976 and ultimately, penalty order was passed by the Deputy Commissioner of Commercial Tax, Bilaspur in VAT and Entry Tax cases against the petitioner under Section 54(2) of the Act of 2005 read with Section 13 of the Act of 1976 levying penalty of ₹ 5,74,91,781/- (five times of the total tax liability) and in the Entry Tax Act, penalty of ₹ 43,27,515/- was

imposed. Feeling dissatisfied with the said order, the petitioner preferred the revisions before the Revisional Authority. The Revisional Authority dismissed the revisions, but modified the extent of amount of penalty by reducing it. The petitioner still dissatisfied with the order of the Revisional Authority has filed these writ petitions under Article 226/227 of the Constitution of India questioning the order passed by the Revisional Authority branding the same as unsustainable and bad in law.

3. Mr.Suddharth Dubey, learned counsel for the petitioner, would submit that the order passed by the Assessing Officer as affirmed by the Revisional Authority though partly modified the order imposing penalty in both cases is unsustainable and bad in law as a condition precedent for exercise of power under Section 54 of the Act of 2005 is not available and there is no finding of *mens rea* by the Revisional Authority which is *sine-qua-non* for attracting and imposing penalty under Section 54 of the Act of 2005 read with Section 13 of the Act of 1976 and thus, a condition precedent of filing of false return does not exist. Thus, the act of imposing penalty would be without jurisdiction and therefore, the impugned orders passed under VAT and Entry Tax Act are liable to be quashed and the writ petitions be allowed with cost(s).

4. Mr. Anand Dadariya, learned Deputy Government Advocate for the respondents/State, would submit that it is a civil liability of the petitioner that he has evaded tax in which theory of *mens rea* is not applicable and the petitioner was required to file revised return as prescribed in Section 19(2) of the Act of 2005 which was admittedly not filed, therefore, learned Assessing Officer as well as the Revisional Authority both are justified in imposing penalty upon the petitioner. He would further submit that the petitioner has not furnished any explanation for difference in sale price mentioned in the annual statement and quarterly returns. Even otherwise, the amount of penalty has been substantially reduced by the Revisional Authority. Therefore, the writ petitions deserve to be dismissed. He would rely upon the judgment of the Supreme Court in the matter of **Mak Data Private Limited v. Commissioner of Income Tax-II**¹.

5. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

6. In order to decide the plea raised at the Bar, it would be appropriate to trace the legislative history of provision relating to imposition of penalty.

7. Section 43 (1) of the Madhya Pradesh General Sales Tax Act, 1958 (hereinafter called as “MPGST 1958”) provided for

¹ (2014) 1 SCC 674

power of Commissioner or appellate authority to impose penalty which reads as under:-

“43 (1) If the Commissioner or the Appellate Authority in the course of any proceedings under this Act is satisfied that the dealer has concealed his turnover or the aggregate amount of purchase prices in respect of any goods or has furnished inaccurate particulars of such sales or purchases, as the case may be, or furnished a false return, the Commissioner or the appellate authority, as the case may be, after giving the dealer a reasonable opportunity of being heard may direct that the dealer shall in addition to the tax payable by him, pay by way of penalty a sum, which shall not be less than 20 per cent but shall not exceed one and one half time the amount of the tax, if any, which would have been avoided if the returns furnished by the dealer had been accepted as correct or the concealment of the sales or purchases or inaccurate particulars of sales or purchases had not been detected.”

8. The aforesaid Act came to be repealed by the Madhya Pradesh Commercial Tax Act, 1994 (hereinafter called as “the Act of 1994”) w.e.f. 1.4.1995 in which there was also provision for penalty in Section 69(1) which reads as under:-

“Sec. 69 : Power of Commissioner or appellate or revisional authority to impose penalty in certain circumstances

(1) If the Commissioner or the appellate or revisional authority, in the course of any proceedings under this Act is satisfied that a dealer has concealed his turnover or the aggregate amount of purchase prices in respect of any goods or has furnished false particulars of his sales or purchases, as the case may be, in his return or returns for any year or part thereof or has furnished a false return or returns for such period, the Commissioner or the appellate or the revisional authority as the case may be, may initiate proceeding separately for imposition of penalty under this Section.”

9. The Act of 1994 came to be repealed by the Chhattisgarh Value Added Tax Act, 2005 (hereinafter called as “the Act of 2005”) w.e.f. 1.4.2006 in which Section 54 (1) & (2) of the said Act provides for imposition of penalty by the authority concerned which states as under:-

“54 Power of Commissioner or Additional Commissioner or Appellate Deputy Commissioner or Tribunal to impose penalty in certain circumstances

(1) If the commissioner or the Additional Commissioner or Appellate Deputy Commissioner or the Tribunal in the course of any proceedings under this Act is satisfied that a dealer has concealed his turnover or the aggregate amount of purchase prices in respect of any goods or has furnished false particulars of his sales or purchase, as the case may be, in his return or returns for any year or part thereof or has furnished a false return or returns for such period, the commissioner or Additional Commissioner or the Appellate Deputy Commissioner or the Tribunal as the case may be, may initiate proceeding separately for imposition of penalty under this section.

(2) The proceeding under sub-section (1) shall be initiated by the commissioner or the Additional Commissioner or the appellate deputy commissioner or the Tribunal, as the case may be, by issue of a notice in the prescribed form for giving the dealer an opportunity of being heard. On hearing the dealer, the commissioner or the Additional Commissioner or the appellate deputy commissioner or the Tribunal as the case may be, shall pass an order not later than one calendar year from the date of initiation of such proceeding, directing the dealer that he shall be in addition to the tax payable by him, pay by way of penalty a sum which shall not be less than three times but shall not exceed five times of the amount of tax evaded.”

10. From comparative analysis of the provisions contained in Section 43(1) of the MPGST 1958, Section 69(1) of the Act

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of 1994 and Section 54(1) of the Act of 2005, one basic distinction which appears is that in the MPGST 1958 furnishing of inaccurate particulars of sales and purchases was also amenable to imposition of penalty, which is omitted in Section 69 (1) of the Act of 1994 and same is the position in Section 54 (1) of the Act of 2005 which is applicable to the present case, whereas furnishing of false return is exigible to imposition of penalty in all three provisions.

11. Now the point involved in these writ petitions is whether furnishing of inaccurate/defective return or filing of incorrect return(s) would invite imposition of penalty under Section 54 (1) & (2) of the Act of 2005.

12. The design and purport of Section 54 (1) of the Act of 2005 would show that proceeding for penalty under Section 54(1) of the Act of 2005 may be initiated if (a) a dealer has concealed his turnover or the aggregate amount of purchase prices in respect of any goods, (b) has furnished false particulars of his sales or purchases on his return or returns for the year or part thereof and (c) has furnished a false return or returns for such period. Thus, the condition precedent for initiation of proceedings for imposing of penalty under this provision is concealment of turnover or furnishing false particulars of sales or purchases or filing of false return or returns.

13. Pausing here, a pertinent judgment of the Supreme Court in the matter of **Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax, Indore and others**² may be noticed herein profitably in which Their Lordships were considering the imposition of penalty under Section 43 of the M.P. General Sales Tax Act, 1958 in which penalty was imposed with the assessee as the assessee has furnished inaccurate return by not including the amount of freight in the taxable turnover disclosed in the returns. The Supreme Court has held that imposition of penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, provision for penalty cannot be invoked for imposing penalty. Their Lordships pertinently held as under:-

“5.....What Section 43 of the Madhya Pradesh General Sales Tax Act, 1958 requires is that the assessee should have filed a 'false' return and a return cannot be said to be 'false' unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the Court may, in a given case, infer deliberateness and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bonafide belief that he is not liable so to include it, it would not be right to condemn the return as a 'false' return inviting imposition of penalty. This view which is being taken by us is supported by the decision of this Court in Hindustan Steel Limited v. State of Orissa³, where it has been held that "even if a minimum penalty is prescribed, the authority competent to

2 (1980) 1 SCC 71

3 (1969) 2 SCC 627

impose the penalty will be justified in refusing to impose penalty, when there is a technical venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute....." It is elementary that Section 43 of the Madhya Pradesh General Sales Tax Act, 1958 providing for imposition of penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, the section cannot be invoked for imposing penalty. If the view canvassed on behalf of the Revenue were accepted, the result would be that even if the assessee raises a bonafide contention that a particular item is not liable to be included in the taxable turnover, he would have to show it as forming part of the taxable turnover in his return and pay tax upon it on pain of being held liable for penalty in case his contention is ultimately found by the Court to be not acceptable. That surely could never have been intended by the Legislature."

- 14.** The principle of law laid down by the Supreme Court in the matter of **Cement Marketing Co. of India Ltd.** (supra) was followed with approval subsequently by Their Lordships in the matter of **Commissioner of Sales Tax, Uttar Pradesh v. Sanjiv Fabrics**⁴ in which Their Lordships while considering the requirement of *mens rea* held that finding of *mens rea* is a condition precedent for levying penalty under Section 10-A read with Section 10(b) of the Central Sales Tax Act, 1956. It was observed as under:-

"30. To put it succinctly, in examining whether *mens rea* is an essential element of an offence created under a taxing statute, regard must be had to the following factors:

- (i) the object and scheme of the statute;
- (ii) the language of the section: and

4 (2010) 9 SCC 630

(iii) the nature of penalty.

31. It is true that the object of Section 10(b) of the Act is to prevent any misuse of the registration certificate but the legislature has, in the said section, used the expression “falsely represents” in contradistinction to “wrongly represents”. Therefore, what we are required to construe is whether the words “falsely represents” would cover a mere incorrect representation or would embrace only such representations which are knowingly, wilfully and intentionally false.”

15. It is well 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 or 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 though mistaken belief. (See **Karnataka Rare Earth & anr. v. Senior Geologist⁵, Department of Mines & Geology, Bharjatya Steel Industries v. Commissioner, Sales Tax, UP⁶ and M/s. Hindustan Steel Ltd. v. State of Orissa⁷.**)

16. Taking note of statutory provisions relating to imposition of penalty and the principle of law laid down in this behalf reverting to the facts of the present case, it is

5 (2004) 2 SCC 783

6 (2008) 11 SCC 617

7 (1969) 2 SCC 627

quite vivid that the Assessing Officer while imposing penalty recorded the following findings:-

(i) The aggregate sale amount has not been shown correctly and it has been shown less with an intention of furnishing false returns.

(ii) The petitioner/assessee has evaded tax with *mens rea* and has not shown turnover properly/correctly.

(iii) The assessee has intentionally furnished false returns.

(iv) The assessee has evaded payment of tax with *mens rea*, thus has deposited entry tax at a lower rate.

17. In the revisions preferred by the petitioner against the order imposing penalty, the Additional Commissioner/revisional authority recorded the following findings partly setting aside the order of the Assessing Officer:-

(A) The annual statement filed in Form-18 and Form-8 under Rule 20 and Rule 8 of the VAT Act and Entry Tax Act respectively had been furnished as per books of accounts and the Assessing Officer has made assessment as per books of account so filed by the petitioner/assessee.

(B) There is no tax evasion on the part of assessee. However, on the basis of defective or incorrect quarterly returns, tax evasion cannot be inferred.

(C) The petitioner has not filed revised return as per Section 19(2) of the Act of 2005 and proceeded to modify the order of penalty and partly reduced the amount of penalty in favour of the petitioner.

18. In the considered opinion of this Court, it is a case where finding of false returns with mens rea has been set aside by the Revisional Authority and the Revisional Authority has come to the specific conclusion that return was filed as per books of account and assessment has been made as per books of account and there is no tax evasion on the part of the assessee and only quarterly returns furnished by the petitioner have been found to be incorrect or defective and as such, there is no such finding of *mens rea* by the Revisional Authority while passing and partly affirming the order of penalty.

19. It is appropriate to mention here that under Section 43 of the MPGST 1958, which was repealed by the Act of 1994, filing of inaccurate particulars of sales and purchases was a condition precedent for levy of penalty which has been consciously omitted in the Act of 2005, as such, inaccurate filing of return is no longer subject to imposition of penalty. The Revisional Authority has simply recorded inaccurate or defective filing of return by the petitioner, but no finding of *mens rea* has been recorded, which is very much necessary as per law laid down by the Supreme Court in **Cement Marketing Co. of India Ltd.** (supra) reiterated in **Sanjiv**

Fabrics (supra). Thus, in absence of finding of *mens rea* which is a condition precedent for invoking in Section 54 of the Act of 2005 and no mens rea having been found by learned Revisional Authority, I am of the considered opinion that the Revisional Authority is absolutely unjustified in partly affirming the order of learned Assessing Officer imposing penalty. The judgment relied on by the respondents i.e. **Mak Data Private Limited** (supra) is distinguishable to the facts of the present case as it relates to concealment of income under Section 271(1) (c) of the Income Tax Act, 1961, whereas the present case relates to imposition of penalty under Section 54 of the Act of 2005.

20. As a fallout and consequence of the above-stated discussion, the order passed by the Assessing Officer dated 21.12.2012 (Annexure P/9 in both writ petitions) in VAT and Entry Tax Case as affirmed by the Revisional Authority on 10.2.2014 (Annexure P/10 in both writ petitions) are hereby set aside.

21. The writ petitions are allowed to the extent sketched hereinabove leaving the parties to bear their own cost(s).

Sd/-

(Sanjay K. Agrawal)
JUDGE

B/-