

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI

WRIT PETITION NO.33777 OF 2018

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

Heard Sri P.Balaji Varma, learned counsel for the petitioner and Sri Shaik Jeelani Basha, learned Special Standing Counsel for Commercial Taxes and, with their consent, the Writ Petition is disposed of at the stage of admission.

The proceedings under challenge in this Writ Petition is the order passed by the second respondent on 20.08.2018, for the tax period March, 2018, directing the petitioner to pay tax and penal interest without issuing an assessment order under Section 61 of the Andhra Pradesh Goods and Services Tax Act, 2017 ("the APGST Act" for brevity), and without issuing a show cause notice, as illegal, arbitrary and without jurisdiction. By the order, impugned in the Writ Petition, dated 20.08.2018 the Assistant Commissioner directed payment of penalty at 15% along with interest under Section 50 read with Section 79(5) of the APGST Act and Rule 143 of the APGST Rules, failing which recovery proceedings would be initiated under Section 79 of the said Act.

While fairly admitting that the petitioner is liable to pay tax and penal interest, Sri P.Balaji Varma, learned counsel for the petitioner, would, however, question the validity of the assessment order in so far as the petitioner was called upon to pay penalty at 15%, contending that any proceedings for recovery of penalty must be preceded by a show cause notice which, admittedly, was not issued in the present case.

Section 74(5) of the APGST Act stipulates that a person, chargeable with tax, may, before service of notice under subsection (1), pay the amount of tax along with interest payable under Section 50 and a penalty equivalent to 15% of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer, and inform the proper officer in writing of such payment. Section 74(1) of the APGST Act stipulates that, where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been short paid or to whom refund has erroneously been made, or who has wrongly availed or utilised input tax credit requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under Section 50, and a penalty equivalent to the tax specified in the notice.

While a show cause notice is required to be issued under Section 74(1) of the APGST Act for recovery of penalty equivalent to the tax specified in the notice, Section 74(5) of the said Act enables the dealer to pay 15% penalty on his own accord before receipt of a notice under Section 74(1) of the Act. Section 74(5) of the APGST Act enables the dealer to avoid payment of penalty beyond 15%, if penalty at 15% is paid before receipt of a show cause notice. That does not mean that, even without a show cause notice being issued, the dealer is obligated to pay penalty at 15% under Section 74(5) of the Act. Section 74(5) of the Act merely enables the

petitioner to pay penalty at 15% on his own accord, in which event the assessing authority cannot thereafter issue a notice seeking recovery of the balance 85% penalty (i.e penalty equivalent to the tax specified in the notice). Whether penalty at 15% should be paid or not is for the assessee to decide. While he would, undoubtedly, run the risk of being subjected to penalty at 100% of the tax specified, the power conferred on the assessing authority to recover penalty, equivalent to the tax specified in the notice, is only after a notice is issued calling upon the petitioner to show cause why penalty should not be imposed on him.

The impugned order, to the limited extent the petitioner was called upon to pay penalty at 15%, is set aside. As the validity of the order is not subjected to challenge in this Writ Petition on any other ground, it is wholly unnecessary for us to examine the said order on its merits.

Suffice it, therefore, to set aside the impugned order to the limited extent the petitioner was called upon to pay penalty at 15%. The Writ Petition stands disposed of accordingly. Needless to state that this order shall not disable the respondent from issuing a penalty notice and recover the penalty payable in terms of Section 74(1) of the APGST Act. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand closed.

(RAMESH RANGANATHAN, J)

(KONGARA VIJAYA LAKSHMI, J)

26th September 2018
RRB