(2005) 04 AP CK 0003

Andhra Pradesh High Court

Case No: Writ Petitions No''s. 6812, 6813 and 6829 of 2005

Associated Auto Service		APPELLANT
	Vs	
Commercial Tax Officer and Others		RESPONDENT

Date of Decision: April 13, 2005

Acts Referred:

- Andhra Pradesh General Sales Tax Act, 1957 - Section 14(4), 14(8), 22
- Constitution of India, 1950 - Article 226
- Income Tax Act, 1961 - Section 34

Citation: (2006) 144 STC 623

Hon'ble Judges: P.S. Narayana, J; G. Bikshapathy, J

Bench: Division Bench

Advocate: Bhaskar Reddy Vemireddy, for the Appellant; The Government Pleader, A.V. Krishna Koundinya and K. Raji Reddy, Special Standing Counsels, for the Respondent

Final Decision: Allowed

Judgement

G. Bikshapathy, J.
The three writ petitions can be disposed of by a common judgment as the question of law to be decided is identical in all the matters.

2. Petitioners are authorised dealers for Hero Honda Motor Cycles for the Districts of Krishna, Guntur and Prakasham. They have own branches at Vijayawada, Guntur, Ongole, Piduguralla, Gudivada and Machilipatnam. It is also the case of the petitioners that they appointed as sub-dealers in these three districts. The Hero Honda Motors, New Delhi, dispatches two-wheelers of various models and also parts and accessories, in turn petitioners also despatches the required number of two-wheelers to its branches and sub-dealers for sale.

3. It is the case of the petitioners that they are maintaining the records in accordance with the provisions contained in the Sales Tax Act and reporting the sales turnover to the assessing authorities from time to time. In effect, the submissions of the petitioners is that they have been conducting the business in accordance with law. The assessments for the years 2002-03, 2003-04, 2004-05 were also completed by the assessing authorities and the assessments have become final.

4. While so, the business premises of the petitioners was inspected by the first respondent-Commercial Tax Officer, Krishna Lanka Circle, Vijayawada and seized the entire books of accounts. It is also alleged that the first respondent recorded the statement of the staff under the threat and coercion. Similar inspections were also conducted in all the branches on March 18, 2005 and seized the books of accounts and other documents. They did not even furnished acknowledgement of the seizure of various books of accounts. The petitioners submit that the inspection was conducted on the instructions of the fourth respondent-Commissioner of Commercial Taxes. Even inspection was conducted only in the showrooms and that the actual stocks lying in the godowns and available with the sub-dealers were not taken.

5. Show cause notices were served on the petitioners on March 24, 2005 proposing to undertake reassessment by exercising the power u/s 14(4) of the Andhra Pradesh General Sales Tax Act for the years 2002-03, 2003-04 and 2004-05 basing on the information alleged to have been obtained from the manufacturer of two-wheelers and directed the petitioners to submit the objection within 7 days. It is the principal grievance of the petitioners that the proposed reassessment order is wholly illegal and without jurisdiction and no grounds exist for initiating reassessment. Further, in the guise of the show cause notice, respondents have already made up their mind as indicated in their respective notices. Thus, the respondents are proceeding with the predetermined notion. Further it is contended that apart from proposed reassessment, the very indication of the levy of penalty without completing the assessment by the department indicates their firm intention that they were determined to reassessment even though the circumstances do not warrant. It is also the complaint of the petitioners that the first respondent has not supplied any material basing on which the reassessment is sought to be made. A copy of the records seized were not furnished nor statements of the employees recorded were furnished. Even the communication said to have been received from the manufacturer was also not furnished. Therefore, without giving proper opportunity and without providing necessary incriminating material, resorting to reassessment with heavy tax is illegal and contrary to law. If the respondents are allowed to proceed with the reassessment, it will virtually cripple the entire business.

6. A common counter was filed in all the writ petitions by the respondents. It is stated that the writ petitions itself are not maintainable at the show cause notice level and it is always open for the petitioner to submit the explanation and

thereafter final orders will be passed basing on the contentions raised in the show cause notices. Therefore, on this ground alone the writ petitions are liable to be dismissed.

7. It is further stated that M/s. Hero Honda Motors furnished details of 38 dealers as their distributors in the State of Andhra Pradesh. Department has verified the transactions of the distributors and out of these, 34 distributors have truly and correctly furnished. However, four found to have been suppressed the purchases. Out of four, three petitioners are the petitioners before this Court and the other distributor has paid the tax to the department without any dispute. It is also stated that no incriminating material is relied upon and what all information furnished from Honda Motors has been furnished in the show cause notice served on the petitioner. It is denied that the books of accounts and invoices and floppies were seized and it is stated that certain branches Ongole, Piduguralla and Guntur were kept in the custody for verification. The respondents tried to establish that there was suppression of purchases and even imposing tax. We find it inappropriate at this point of time to go into the merits of the case as the matter is only at the stage of show cause notice.

8. The question that calls for consideration is whether the show cause notice issued is sustainable ?

9. The learned counsel appearing for the petitioners vehemently submits that the issuance of the show cause notice cannot be treated as of routine requirement, but it has several ramifications. There are no grounds to initiate the reassessment proceedings. When once the authorities have finalised the assessment by referring to various documents including the invoices, etc., unless there is any incriminating material over and above the documents already verified, it is not appropriate for them to reopen the assessment, merely on the basis of some informations furnished by the manufacturer which were not even supplied to the petitioner. The learned counsel would submit that the show cause notices are not to be based on mere surmises and conjectures, and there must be reasonable and reliable material to initiate reassessment proceedings. In the instant case, no such material is forthcoming and even according to the respondents, it is stated that the proceedings are initiated on the communication of the manufacturers, which has not furnished to the petitioners. Secondly also the learned counsel would submit that the show cause notice is issued only as a make believe arrangement and the authorities have firmly decided to levy tax. In order to comply with the principle of reasonable opportunity, the show cause notice is issued which in reality is not a show cause notice and it is only a final order for all purposes. Therefore, such a show cause notice is liable to be set aside. In such a situation, the writ petition is maintainable and the learned counsel would refer to Rashid Ahmed Vs. The Municipal Board, Kairana, , State of U.P. v. Mohd. Nooh AIR 1958 SC 86 , K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., , A.V. Venkateswaran,

Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, , Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , and also Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, .

10. In Rashid Ahmed Vs. The Municipal Board, Kairana, , the Supreme Court observed that the existence of an adequate legal remedy was a factor to be considered in the matter of granting writs and the same was followed by another decision in K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., , which reiterated the above proposition and held that where alternative remedy existed, it would be a sound discretion to refuse to interfere in a petition under article 226 of Constitution of India. Paras 17, 18 and 19 of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, reads thus :

17. Specific and clear rule was laid down in The State of Uttar Pradesh Vs. Mohammad Nooh, as under (at P. 93 of AIR) :

But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.

18. This proposition was considered by a Constitution Bench of this Court in A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, and was affirmed and followed in the following words (para 10) :

The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor-General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only to add that the broad lines of the general principles on which the court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the court, and that in a matter which is thus preeminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the court.

19. Another Constitution Bench decision in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, laid down :

Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an

executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against Income Tax Officer acting without jurisdiction u/s 34, Income Tax Act.

After referring to the aforesaid decisions, the Supreme Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , observed as follows :

20. Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

21. That being so, the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show cause notice issued to the appellant was wholly without jurisdiction and that the registrar, in the circumstances of the case, was not justified in acting as the ''TRIBUNAL''.

Thus, the existence of alternative remedy is not a bar for entertaining the writ petition.

11. The learned counsel also refers to the decision of the Supreme Court reported in Tarlochan Dev Sharma Vs. State of Punjab and Others, . The Supreme Court observed in para 12 thus :

One of the requirements of the principles of natural justice, as incorporated in second proviso to section 22, is that the reasons for the proposed removal have to be communicated to the person proceeded against. The purpose of such communication is to enable him to furnish an explanation of his conduct or his act or omission which is likely to be construed as an abuse of power. It is clear that the facts constituting gravamen of the charge have to be communicated. It follows as a necessary corollary therefrom that what has not been communicated or not relied on in the show cause notice as a ground providing reason for the proposed removal cannot be relied upon as furnishing basis for the order of removal. The person proceeded against u/s 22 of the Act has to be made aware of the precise charge which he is required to meet and, therefore, he must be apprised of the exact content of the abuse of power attributed to him. The authority taking decision must apply its mind also to the explanation furnished by the person proceeded against and this must appear from the order passed u/s 22.

12. It is not in dispute that in the present case, only show cause notices were issued to the petitioners and called upon them to submit the explanation for the proposed levy of tax. But, it is to be noted that before reassessment is proposed to be initiated, the authorities are required to consider the relevant material as to suppression of the purchases and also come to a tentative opinion. In the instant cases, a reading of the show cause notices itself shows that the assessing authority was not proceeding with a open mind and in the show cause notice dated March 18, 2005 issued to M/s. R.M. Motors Pvt. Ltd. in GI No. 2652/2002-03, it was observed thus :

The dealer-company, however, recorded purchases of motor cycles from outside the State to the extent of Rs. 5,38,11,428 only in its books of accounts as disclosed in the trading account. Therefore, the dealer-company suppressed purchases of motor cycles from outside the State to the extent of Rs. 16,09,45,163, i.e., (Us. 21,47,56,592-Rs. 5,38,11,428). The dealer-company disclosed the closing stock of motor cycles from outside the State purchases as Rs. 1,64,47,344. But, in view the fact that the dealer-company is suppressing first purchases, the books of accounts and the closing stocks disclosed by it in the trading account are rejected. It is presumed that the dealer-company sold away all the motor cycles purchased from outside the State during the year of purchase only. By adding gross profit of 5 per cent to the first purchases of motor cycles the first sales of motor cycles by the company for the year 2002-2003 is arrived at Rs. 22,54,94,422. By deducting the first sales turnover of Rs. 3,92,03,055 disclosed in the trading account, the suppressed first sales turnover comes to Rs. 18,62,91,367.

Based on the discussion made above, it is proposed to reassess the dealer-company for the year 2002-2003 u/s 14(4) of the APGST Act, 1957 by adding the suppressed turnovers assessed originally. The tax due on the suppressed sales turnover works out to Rs. 2,42,17,278 (at 12% + 1%). As the dealer-company has clearly evaded huge taxes by suppressing purchases from outside the State on the corresponding sales, penalty provisions u/s 14(8) of the APGST Act, 1957 are attracted which are issued separately.

The show cause notice dated March 18, 2005 in GI No.2652/ 2004-2005, it is stated as follows :

As against this the dealer-company recorded a sales turnover of Rs. 8,28,48,901 only up to March 12, 2005 during the year 2004-05 as per the statement furnished by the dealer-company at the time of inspection. Therefore, the dealer-company has clearly suppressed first sales of motor cycles and evaded tax due thereon.

13. Similarly, in other show cause notice issued to Associated Auto Service, the first respondent in GI No. 1437/2002-03, dated March 18, 2005 observed as follows :

While the purchases of motor cycles from outside the State are Rs. 19,89,19,981 as per the extracts, the dealer disclosed the purchases of motor cycles from outside

the State as Rs. 2,82,67,788 only in the trading account. The dealer therefore, suppressed the first purchases of motor cycles to the tune of Rs. 17,06,52,193 in the year 2002-03.

The dealer disclosed a closing stock of outside the State purchase motor cycles as Rs. 1,59,26,765. In view of the fact that the dealer suppressed the purchases of motor cycles from outside the State, the books of accounts, the trading account prepared on the

basis of the books of account and the closing stock of first purchase of motor cycles shown in the trading account are rejected. It is presumed that the dealer sold away all the purchases of motor cycles from outside the State during the year itself. By adding a gross profit of 5 per cent to the outside State purchases of motor cycles the turnover of first sales of motor cycles is arrived at Rs, 20,88,65,980. As the dealer had already disclosed the first sales of turnover of motor cycles as Rs. 2,42,58,272 and the Commercial Tax Officer also determined the same first sales turnover in his assessment order the turnover of suppressed first sales of motor cycles is worked out as Rs. 18,46,07,708 (i.e., 20,88,65,980-2,42,58,272).

As the dealer-company clearly evaded tax by suppressing purchases and sales of motor cycles penalty provisions u/s 14(8) of the APGST Act, 1957 are attracted. The proceedings for levy of penalty are initiated separately.

The show cause notice dated March 19, 2005 issued to Associated Auto Service in GI No.4656/02 up to February, 2005 the first respondent observed as follows :

It is concluded that the sales reported in A-2 return is incorrect and incomplete.

14. It is well-settled that normally the courts are not to interfere with at the show cause notice level, but if show cause notice is found to be wholly without jurisdiction or power is being abused for extraneous reasons, it cannot be said that this Court cannot interfere with the show cause notice. It is not an answer to say that it is open for the dealer to challenge the final order of assessment if any made. It is to be noted that if the appeal has to be filed onerous conditions are to be fulfilled. It would be nothing but humiliation and harassment to the dealer. Under these circumstances, it has to be considered whether the first respondent has properly initiated the proceedings on the basis of the reliable material with them and whether it has come to a tentative conclusion or it is proceeding with predetermined idea. The learned Advocate-General, however, submits that a mere inappropriate usage of the words or sentences should not be considered as the authorities have already reached a firm conclusion and show cause notice is issued conforming to the principles of natural justice. The show cause notice is to enable the dealer to file a representation, which will be considered basing on the material furnished in the explanation. But, in the instant case, we are required to scrutinise the contents of the show cause notice with reference to the reassessment process, The reasons for forming an opinion to initiate reassessment proceedings appear to be based on the

information obtained from the manufacturer, but that material was not furnished to the petitioner at all. When the assessment is sought to be reopened, necessary material has to be furnished to the petitioner warranting reassessment. In the instant case, even according to the respondents, the assessment is sought to be reopened only on the basis of the uncommunicated information behind and back of the petitioners from the manufacturer and the mind of the assessing authority has already been indicated in the show cause notice itself and the first respondent has virtually come to a definite conclusion to levy the tax on the premise that the petitioner suppressed the purchases. Further, the first respondent went a step further indicating that penalty proceedings will also be initiated. Under those circumstances the first respondent has recorded a definite finding of facts without there being any material on record and without affording proper opportunity. Issuing show cause notice is not an empty ritual and the forming of opinion and affording opportunity should be real and effective.

15. The very issuance of show cause notices recording the definite findings cannot be construed as the show cause notices and it has to be held that it was issued as a mere compliance of principles of natural justice. We also find that basing on the uncommunicated information from the manufacturer, the first respondent had recorded categorical finding that there was suppression of purchases both on two wheelers and also accessories. Further, it is the clear case of the dealer that basing on the actual sales reported by the dealer and not on actual dispatch by the manufacturer the assessments were made earlier and tax was paid. Such a procedure followed by the dealer cannot be faulted. But, proceeding on the premise of suspicion of suppression of sales even when actual sales in fact had not taken place, is wholly arbitrary and unwarranted. Therefore, in view of the above facts and circumstances of the case, we are constrained to hold that the first respondent had already predetermined the issue without giving proper opportunity. Hence, we have to necessarily hold that the impugned show cause notices are not sustainable and accordingly they are set aside.

16. The writ petitions are accordingly allowed. The impugned show cause notices are quashed. The petitioner in W.P. No. 6813 of 2005 shall however, pay two sets of additional court fee since it filed writ petition challenging three separate reassessment show cause notices.

17. There shall be no order as to costs.