

[2022] 139 taxmann.com 69 (Andhra Pradesh)/[2022] 92 GST 426 (Andhra Pradesh)/[2022] 63 GSTL 190 (Andhra Pradesh)[05-05-2022]

GST : Penalty imposed through rectification order being an additional liability, such order passed without providing opportunity of hearing was not sustainable

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[2022] 139 taxmann.com 69 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

Spy Agro Industries Ltd.

v.

Union of India*

C. PRAVEEN KUMAR AND SMT. V. SUJATHA, JJ.

WRIT PETITION NO.256 OF 2022

MAY 5, 2022

Penalty - Imposition by rectification order - Principles of natural justice - Best judgment assessment order was passed for failure to file returns - Penalty was imposed through Corrigendum-cum-Addendum - Para relating to such penalty was subsequently inserted in assessment order by order of rectification - Writ petition was filed to quash rectification order imposing penalty as it was passed without giving reasonable opportunity of hearing - HELD : Penalty imposed in rectification order was an additional liability as no penalty was imposed in assessment order - Opportunity of hearing was not provided while imposing penalty - Impugned order substantially affected petitioner by imposing penalty which was not a part of demand in assessment order - Impugned order was to be set aside [Sections [62](#) and [161](#) of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017] [Paras 17, 18 and 19] [In favour of assessee]

Dr. M.V.K. Moorthy and P. Rosi Reddy, Ld. Counsels for the Petitioner. N. Harinath, Ld. Assistant Solicitor General and S.V.S. Prasada Rao, Ld. Standing Counsel for the Respondent.

ORDER

C. Praveen Kumar, J. - Heard Sri Dr.M.V.K.Moorthy, learned Senior Counsel representing Sri P.Rosi Reddy, learned counsel for the petitioner, Sri N.Harinath, learned Assistant Solicitor General for respondent No. 1 and Sri Sri S.V.S.Prasada Rao, learned Standing Counsel for the respondent Nos.2 to 4.

2. The present writ petition is filed under article 226 of the Constitution of India, seeking the following relief:

"....pleaded to issue an appropriate writ, order or direction particularly in the nature of Writ of CERTIORARI after calling for the entire connected records relating to the impugned proceedings of the Additional Commissioner of CT (Appeals), Guntur dated 29-7-2021 in order in Appeal No. TTD-GST-000-APP-008-21-22/Appeal No. 02/2020-21e(T) GST as also the proceedings of assessment in GSTR Asmt-13 bearing No. 03/2020 dated 13-8-2020 and communication dated 27-8-2020 in the shape of Corrigendum-cum-Addendum and the impugned order of rectification dated 12-11-2020 issued under section 161 of the CGST Act by holding the impugned proceedings as illegal, without authority of law, without jurisdiction....."

3. The circumstances, which lead to filing of the writ petition are as under:

The petitioner herein is a company incorporated under the provisions of the Companies Act, 2013. It manufactures grain based extra neutral alcohol and also bottles Indian made foreign liquor. It is also registered under Central Goods Services Tax Act, 2017. While things stood thus, the 3rd respondent herein issued a letter dated 21-7-2020 in Form GSTR-3A under section 46 of the CGST Act on the ground that the petitioner failed to submit its returns in GSTR-3B for the months of January, 2020 to June, 2020 and as such, the petitioner was directed to file fresh returns within 15 days. In view of the non-response on the part of the petitioner in furnishing returns, an assessment order came to be passed by the 3rd respondent on 13-8-2020 determining the liability at Rs. 1,85,17,721/- towards IGST and Rs. 1,39,39,656/- each towards CGST and APGST apart from a sum of Rs. 3,36,798/- as cess payable by the petitioner for the tax period January, 2020 to June, 2020. The petitioner was also directed to pay amounts towards interest for belated submission of the returns. It is to be noted here that an order came to be passed in exercise of power conferred under section 62 of the CGST Act, 2017, which provides a procedure for framing assessments on non filers of returns. On 27-8-2020, the very same authority, in exercise of its power under rule 100(1) of CGST and SGST Rules, 2017 r/w section 62(1) of the two GST Acts enlarged the order with certain additional liabilities by styling the said order as Corrigendum-cum-Addendum. This Corrigendum-cum-Addendum was directed to be inserted as para No. 4.8 after para No. 4.7 and consequently, directed the petitioner herein to pay penalty of Rs. 18,51,772/- under IGST, Rs. 13,93,966/- each under CGST and APGST Acts apart from cess. This communication dated 27-8-2020 determining the penalty payable came to be made for the first time in terms of section 122(2)(a) of CGST Act. Thereafter, the very same authority namely, the 3rd respondent herein issued another communication titling it as rectification order on 12-11-2020 under section 161 of CGST Act in order to ratify the Corrigendum-cum-Addendum dated 27-8-2020, by which additions were inserted to the original order of assessment dated 13-8-2020. Since the rectification order dated 12-11-2020 being the latest one having imbibed the earlier two orders dated 13-8-2020 and 27-8-2020, was appealed in the prescribed form under section 107 of the CGST Act. It is stated that without looking into the rule position, the 2nd respondent passed the order dated 29-7-2021 confirming the proceedings of the 3rd respondent dated 12-11-2020. As there is no Tribunal functioning, the petitioner was forced to file this writ petition challenging these orders.

4. Sri Dr.M.V.K.Moorthy, learned Senior Counsel, would submit that the entire procedure followed by the authorities in imposing penalty without hearing the petitioner is illegal and incorrect. He further submits that this is a fit case, where the authority should issue a fresh show cause notice and then deal with the same afresh in accordance with law. He further submits that reviewing of the order of the self same authority imposing additional liability, without hearing the petitioner or without giving an opportunity of hearing the petitioner is illegal and against all cannons of law. He took us to provisions of law, in support of his plea.

5. On the other hand, Sri S.V.S.Prasada Rao, learned Standing Counsel for respondent Nos.2 to 4, though opposed the arguments advanced by learned Senior Counsel, however, submits that even if the argument of the learned Senior Counsel is accepted, the matter may have to be remanded for fresh consideration in accordance with law. He further submits that there is no bar for imposing penalty under sections 62 and 122 of the Act. He further submits that the entire action came to be initiated as the petitioner failed to pay its periodical GSTR-3B returns within the prescribed due date.

6. In order to appreciate the arguments advanced, it will be appropriate to refer to certain provisions of law, which are as under:

7. Section 62 of the Act deals with assessment of non-filers of returns, which is as under:

- (1) Notwithstanding anything to the contrary contained in section 73 or section 74, where a registered person fails to furnish the return under section 39 or section 45, even after the service of a notice under section 46, the proper officer may proceed to assess the tax liability of the said person to the best of his judgment taking into account all the relevant material which is available or which he has gathered and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates.
- (2) Where the registered person furnishes a valid return within thirty days of the service of the assessment order under sub section (1), the said assessment order shall be deemed to have been withdrawn but the liability for payment of interest under sub-section (1) of section 50 or for payment of late fee under section 47 shall continue

8. Section 122 of the Act deals with penalty for certain offences. It would be necessary for us to extract the same, which is as under:

- (1) Where a taxable person who—
- (i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;
 - (ii) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder;
 - (iii) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
 - (iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
 - (v) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;
 - (vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;
 - (vii) takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;
 - (viii) fraudulently obtains refund of tax under this Act;
 - (ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;
 - (x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;
 - (xi) is liable to be registered under this Act but fails to obtain registration;
 - (xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;
 - (xiii) obstructs or prevents any officer in discharge of his duties under this Act;
 - (xiv) transports any taxable goods without the cover of documents as may be specified in this behalf;
 - (xv) suppresses his turnover leading to evasion of tax under this Act;
 - (xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;
 - (xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;
 - (xviii) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;
 - (xix) issues any invoice or document by using the registration number of another registered person;
 - (xx) tampers with, or destroys any material evidence or document;
 - (xxi) disposes off or tampers with any goods that have been detained, seized, or attached under this Act, he shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the

Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher.

(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised,

(a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent. of the tax due from such person, whichever is higher;

(b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

(3) Any person who—

(a) aids or abets any of the offences specified in clauses (i) to (xxi) of sub-section (1);

(b) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(c) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(d) fails to appear before the officer of central tax, when issued with a summon for appearance to give evidence or produce a document in an inquiry;

(e) fails to issue invoice in accordance with the provisions of this Act or the rules made thereunder or fails to account for an invoice in his books of account, shall be liable to a penalty which may extend to twenty-five thousand rupees.

9. According to the learned Senior Counsel, this is the only provision, which deals with penalty for certain offences, which includes, cases where tax has not been paid or short paid on persons, who supplies any goods or services or both and where the input tax has been wrongly availed or utilized.

10. Section 161 of the Act deals with rectification of errors apparent on the face of the record. It would be appropriate to extract the same as under:

"Without prejudice to the provisions of section 160, and notwithstanding anything contained in any other provisions of this Act, any authority, who has passed or issued any decision or order or notice or certificate or any other document, may rectify any error which is apparent on the face of record in such decision or order or notice or certificate or any other document, either on its own motion or where such error is brought to its notice by any officer appointed under this Act or an officer appointed under the State Goods and Services Tax Act or an officer appointed under the Union Territory Goods and Services Tax Act or by the affected person within a period of three months from the date of issue of such decision or order or notice or certificate or any other document, as the case may be:

Provided that no such rectification shall be done after a period of six months from the date of issue of such decision or order or notice or certificate or any other document:

Provided further that the said period of six months shall not apply in such cases where the rectification is purely in the nature of correction of a clerical or arithmetical error, arising from any accidental slip or omission:

Provided also that where such rectification adversely affects any person, the principles of natural justice shall be followed by the authority carrying out such rectification."

11. A very reading of 161 of the Act makes it very clear that where any rectification adversely affects any person, principles of natural justice shall be followed by the authority carrying out such rectification.

12. Section 127 of the Act which has some importance deals with power to impose penalty in certain cases. It states that where the proper officer is of the view that a person is liable to a penalty and the same is not covered under any proceedings under section 62 or section 63 or section 64 or section 73 or section 74 or section 129 or section 130, he may issue an order levying such penalty after giving reasonable opportunity of hearing such person.

13. Keeping in view of the provisions of law, we shall now proceed to deal with the case on hand.

14. In the instant case, Form GSTR-3A was issued on 21-7-2020 for not filing the returns within the time prescribed. On 13-8-2020, a notice came to be issued under rule 100(1) of CGST and SGST Rules, 2017/APGST Rules, 2017 read with section 62(1) of the GGST Act, 2017/APGST Act, 2017.

15. A reading of the said order would indicate that if the petitioner fails to furnish the returns within a period of 30 days from the date of service of the said order, this order shall be deemed to have been withdrawn in terms of section 62(2) of the CGST Act, 2017; otherwise, the proceedings shall be initiated against them after the aforesaid period to recover the outstanding dues.

16. Thereafter, Corrigendum-cum-Addendum came to be issued on 27-8-2020 inserting certain clauses, which are as under:

"2. In the said order after para 4.7, para 4.8 is inserted and may be read as

4.8 As per sub-section (2)(a) of section 122 of the CGSTA/APGSTA, any registered person who has not paid tax shall be liable to a penalty of ten thousand rupees or ten percent of the tax due from such person, whichever is higher.

3. In the order cited, after para 7(iii), para 7(iv) is inserted and may be read as

7. (iv) M/s SPYAIL are also ordered to pay penalty of Rs. Rs. 18,51,772/- under IGST, Rs. 13,93,966/- towards CGST & Rs. 13,93,966/- towards SG/UT GST and Rs. 3,36,800/- towards Cess for tax periods January 2020 to December 2020 (detailed in Annexure) as required under section 122(2)(a) of the CGSTA/APGSTA."

As observed earlier another rectification dated 12-11-2020 came to be issued imposing the following:

"2. In the order dated 13-8-2020 after para 4.7, para 4.8 is inserted and may be read as

4.8 As per sub-section (2)(a) of Section 122 of the CGSTA/APGSTA, any registered person who has not paid tax shall be liable to a penalty of ten thousand rupees or ten percent of the tax due from such person, whichever is higher.

3. In the order dated 13-8-2020, after para 7(iii), para 7(iv) is inserted and may be read as

7. (iv) M/s SPYAIL are also ordered to pay penalty of Rs. Rs. 18,51,772/- under IGST, Rs. 13,93,966/- towards CGST & Rs. 13,93,966/- towards SG/UT GST and Rs. 3,36,800/- towards Cess for tax periods January 2020 to june 2020 (detailed in Annexure) as required under Section 122(2)(a) of the CGSTA/APGSTA."

17. A reading of the above would clearly indicate that penalties have been imposed creating additional liability on the petitioner, which was not reflected in the earlier notice dated 13-8-2020. No opportunity of hearing was given to the petitioner while imposing the said penalty.

18. As stated earlier section 62 of the Act does not anywhere speaks about imposing penalty. It only speaks about liability for payment of interest sub-section (1) of section 50 or for payment of late fee under section 47 of the Act. Further, if the penalty is to be imposed in cases, which are not covered under section 62 or section 63 or section 64 or section 73 or section 74 or section 129 or section 130, the authority can impose penalty after giving reasonable opportunity of hearing such person. Further as observed earlier, under section 161 of the Act any rectification, which adversely affects any person is possible only after following the principles of natural justice. Since the order impugned substantially affects the assessee as penalty is sought to be imposed, which demand did not form part of notice dated 13-8-2020, without giving an opportunity of hearing, the orders under challenge are set aside. However, the respondents are permitted to proceed further by issuing a fresh notice and pass orders in accordance with law.

19. Accordingly, the Writ Petition is allowed. No costs.

20. All pending miscellaneous petitions if any, shall stand closed.

*In favour of assessee.