[2022] 138 taxmann.com 391 (Andhra Pradesh)/[2022] 92 GST 405 (Andhra Pradesh)[06-05-2022]

GST : Where petitioner-dealer opted for composite scheme, made self-declaration and paid 1 per cent GST but revenue found turnover for previous year exceeding limit specified under said scheme, since from petitioner's self-declaration, intentional and wilful non-disclosure of crucial facts was inferred by Writ Court, review application against order of Writ Court upholding levy of penalty and interest was to be dismissed

[2022] 138 taxmann.com 391 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

Godway Furnicrafts

v.

State of A.P.*

C. PRAVEEN KUMAR AND B. KRISHNA MOHAN, JJ.
REVIEW I.A. NO.1 OF 2021
W.P. NO. 10350 OF 2020
MAY 6, 2022

Penalty - Intentional and wilful non-disclosure in self-declaration - Petitioner was dealer opted to pay taxes under composite scheme and paid 1 per cent GST on turnover - Revenue rejected claim of petitioner under composite scheme on ground that turnover for previous year under VAT regime exceeded limit under composite scheme and directed petitioner to pay 28 per cent GST and levied penalty and interest - High Court rejected writ petition filed against levy of penalty and interest - In instant review petition, it was urged that section 10 encompasses sections 73 and 74 of GST Act as well; and that in absence of any fraud, authorities erred in invoking section 74 and imposing 100 per cent penalty - HELD : In writ, High Court held that option exercised by petitioner was self-declaratory, which required sometime for authorities to verify and ultimately same was found to be incorrect - Further, order of Writ Court clearly indicated that intentional and wilful non-disclosure of crucial facts was inferred from self-declaration made in web portal - Thus, there was no ground to interfere with impugned writ order - Review application was to be dismissed [Section 74 of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017 - Order XLVII rules 1 and 2 read with section 114 of Code of Civil Procedure, 1908] [Paras 6, 17, 24 to 26] [In favour of revenue]

CASES REFERRED TO

Continental Foundation Joint Venture v. *CCE* 2007 taxmann.com 532 (SC) (para 9), *Haridas Das* v. *Usha Rani Banik* [2006] 4 SCC 78 (para 12), *Gopal Singh* v. *State Cadre Forest Officers Association* [2007] 9 SCC 369 (para 13), *Ram Sahu* v. *Vinod Kumar Rawat* 2020 SCC Online SC 896 (para 14), *Ku. A. Prabhavathi, W.G.* v. *State of A.P. Revenue Department* [W.P. No. 16450 of 2004, dated 8-11-2019] (para 15), *T.D. Dayal* v. *Madupu Harinarayana* [2013] 6 ALT 681 (DB) (para 15) and *Mohammadiya Educational Society* v. *Union of India* [Writ Petition No. 31371 of 2015, dated 20-4-2016] (para 15).

P.S.P. Suresh Kumar, Adv. *for the Petitioner.*

ORDER

B. Krishna Mohan, J. - The present application is filed under Order XLVII Rules 1 and 2 read with Section 114 of Code of Civil Procedure, 1908, seeking review of the Order, dated 11-11-2020, passed in W.P. No. 10350 of 2020, wherein this Court dismissed the Writ Petition confirming the Order of the Joint Commissioner (ST), Appellate Authority under GST Act, Vijayawada, who in turn upheld the Order of the Assistant Commissioner (ST), Circle-II Division, Suryaraopeta, Vijayawada.

2. The review petitioner is the writ petitioner and the respondents are the respondents in the writ petition.

3. Heard the learned counsel for the petitioner and the learned counsel for the respondents.

4. The grounds for review are that the imposition of penalty by the authorities is not automatic and the same can be imposed only when there is a fraud or willful intention to defraud the revenue and there is no finding in the original rejection order dated 19-9-2018 to the effect that the petitioner opted for composite scheme with a fraudulent intention to defraud the revenue and the same was confirmed in the appeal *vide* order dated 12-2-2020.

5. But in the writ petition, a comprehensive relief was sought challenging the proceedings of the 3rd respondent as confirmed by the 2nd respondent *vide* order dated 12-2-2020 wherein the petitioner was levied with tax and imposition of penalty with interest.

6. To touch the facts in brief, the petitioner was a Proprietrix doing business in furniture with necessary permission and licenses from the concerned Departments including erstwhile Sales Tax Department. After GST Act came into force the petitioner became the registered dealer with GST Registration No. 37AABPA9728J1ZJ with effect from 1-7-2017. The petitioner opted for payment of tax under composite scheme under section 10(1) of the GST Act and started filing GST returns and Form GSTR-IV from the quarter ending September, 2017 by paying 1% GST on the turnover. But the 3rd respondent *vide* show cause Notice dated 14-2-2018 rejected the claim of the petitioner under the composite scheme on the ground that the turnover of the petitioner for the "previous year" under the VAT regime was Rs. 2.09 crores. Even after the explanation was given by the petitioner, the same was rejected on 26-7-2018 in Form-GSTCMP-07. Then another show cause notice dated 27-7-2018 was issued in terms of section 74 and Section 10(5) of the State GST Act informing the petitioner his liability to pay State GST at the rate of 14% and Central GST at the rate of 14% from the date of initial registration *i.e.*, from 1-7-2017 and demanded payment of Rs. 15,93,708/-with interest and penalty *vide* proceedings of the 3rd respondent dated 19-9-2018. In an appeal of the petitioner, the same was confirmed by the 2nd respondent while rejecting the appeal on 12-2-2020. Against which, the above writ petition was filed.

7. On considering the matter on merits, this Court declared that for the purpose of financial year 2017-2018 under GST regime is concerned, the preceding financial year would be 2016-2017 under the VAT regime for the purpose of collection of tax under the GST Act, 2017 and held that the petitioner is not entitled for the benefit under the composite scheme for collection of taxes and penalty and confirmed the findings of the authorities concerned, *vide* its order dated 11-11-2020. The said order of the writ petition dated 11-11-2020 is now sought to be reviewed by the petitioner.

8. The learned counsel for the petitioner submits that the respondents imposed 100% penalty invoking section 74 of the GST Act instead of invoking section 73 of the GST Act by imposing penalty of lesser percentage in the normal circumstances other than in the case of fraud or willful intention to defraud the revenue. As per section 74 of the said Act the petitioner had to pay equal amount of tax towards penalty on the finding of willful intention to defraud the revenue. Section 10(5) of the said Act deals with penalty and the ingredients of sections 73 and 74 of the GST Act would apply equally for the purpose of Section 10 of the said Act. Since the quantum of penalty is heavy under section 74 of the Act, the petitioner seeks reduction of the same under section 73 of the Act, for which this review petition is filed.

9. The learned counsel for the petitioner also relies upon the decision of the Hon'ble Apex Court *Continental Foundation Joint Venture* v. *CCE* 2007 taxmann.com 532, in Paras 11, 12, 14 and 15 which arose under the provisions of Central Excise Act, 1944, in support of his plea.

10. On the other hand, the learned Government Pleader would submit that the authorities rightly rejected the claim of the petitioner under the composite scheme and levied the tax and penalty with interest under section 74 of the GST Act. According to him, on considering the matter on merits this Court dismissed the Writ Petition in toto and as such it cannot be reviewed basing on the grounds raised by the petitioner.

11. Before dealing with the case on hand, it would be appropriate to refer to the authorities on the subject, namely, scope of review by the High Court in an application filed under Order XLVII rules 1 and 2 read with section 114 of Code of Civil Procedure, 1908.

12. In *Haridas Das* v. *Usha Rani Banik* [2006] 4 SCC 78, the Hon'ble Supreme Court in paragraph No. 13 held as under:-

> '13. In order to appreciate the scope of a review, Section 114 CPC has to be read, but this section does not even adumbrate the ambit of interference expected of the court since it merely states that it "may make such order thereon as it thinks fit". The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict. This is amply evident from the *Explanation* to Rule 1 of Order 47 which states that the fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the court should exercise the power to review its order with the greatest circumspection. This Court in *Thungabhadra Industries Ltd.* v. *Govt. of A.P.* [(1964) 5 SCR 174 : AIR 1964 SC 1372] held as follows: (SCR p. 186)
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> "[T]here is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. … where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."'

13. The Hon'ble Supreme Court in *Gopal Singh* v. *State Cadre Forest Officers Association* [2007] 9 SCC 369 held that, after rejecting the original application filed by the appellant, there was no justification for the Tribunal to review its order and allowed the revision of the appellant. Some of the observations made in are extracted below:

> "40. The learned counsel for the State also pointed out that there was no necessity whatsoever on the part of the Tribunal to review its own judgment. Even after the microscopic examination of the judgment of the Tribunal we could not find a single reason in the whole judgment as to how the review was justified and for what reasons. No apparent error on the face of the record was pointed, nor was it discussed. Thereby the Tribunal sat as an appellate authority over its own judgment. This was completely impermissible and we agree with the High Court (Sinha, J.) that the Tribunal has travelled out of its jurisdiction to write a second order in the name of reviewing its own judgment. In fact the learned counsel for the appellant did not address us on this very vital aspect."
>
> The principles which can be culled out from the abovenoted judgments are:
>
> *"i*. The power of the Tribunal to review its order/decision under section 22(3)(*f*) of the Act is akin/analogous to the power of a civil court under section 114 read with Order 47 rule 1 CPC.
>
> *ii*. The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.
>
> *iii*. The expression "any other sufficient reason" appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.
>
> *iv*. An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power under section 22(3)(*f*).
>
> *v*. An erroneous order/decision cannot be corrected in the guise of exercise of power of

review.

vi. A decision/order cannot be reviewed under section 22(3)(*f*) on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vii. While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

viii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party 33 seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier."

14. Further, the Hon'ble Supreme Court in *Ram Sahu* v. *Vinod Kumar Rawat* 2020 SCC Online SC 896, reviewed the entire case law on the subject and held in paragraph No. 34 as under:

> "34. To appreciate the scope of review, it would be proper for this Court to discuss the object and ambit of section 114 CPC as the same is a substantive provision for review when a person considering himself aggrieved either by a decree or by an order of Court from which appeal is allowed but no appeal is preferred or where there is no provision for appeal against an order and decree, may apply for review of the decree or order as the case may be in the Court, which may order or pass the decree. From the bare reading of section 114 CPC, it appears that the said substantive power of review under section 114 CPC has not laid down any condition as the condition precedent in exercise of power of review nor the said Section imposed any prohibition on the Court for exercising its power to review its decision. However, an order can be reviewed by a Court only on the prescribed grounds mentioned in Order 47 rule 1 CPC, which has been elaborately discussed hereinabove. An application for review is more restricted than that of an appeal and the Court of review has limited jurisdiction as to the definite limit mentioned in Order 47 rule 1 CPC itself. The powers of review cannot be exercised as an inherent power nor can an appellate power can be exercised in the guise of power of review."

15. This Court in *Ku. A. Prabhavathi, W.G.* v. *State of A.P. Revenue Department* [I.A.No.6 of 2018 in W.P. No.16450 of 2004, dated 8-11-2019], after referring to judgments in *T.D. Dayal* v. *Madupu Harinarayana* [2013] 6 ALT 681 (DB) and *Mohammadiya Educational Society* v. *Union of India* [Writ Petition No. 31371 of 2015, dated 20-4-2016] held as under:

> "Review, literally and judicially, means re-examination or reconsideration. The basic philosophy inherent in it is the universal acceptance of human fallibility. Yet, in the realm of law, Courts lean strongly in favour of the finality of a decision legally and properly made. Exceptions have been carved out to correct accidental mistakes or to prevent miscarriage of justice or to avoid abuse of process. So, the power of review would be exercised only to remove the error and not to disturb the finality. There are definitive limits to exercise the power of review. The same can be exercised on the discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made. It can also be exercised where some mistake or error apparent on the face of the record is found. But, it may not be exercised on the ground that a decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with the appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court. The review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except "where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility".

16. The Division Bench after considering all the earlier precedents on the subject, summarised the same as follows:

> "(1) A review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except "where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility".
>
> (2) When a new or important matter or evidence is discovered which was not within the knowledge of

the person seeking review at the time of hearing the case earlier or which could not be produced by him when the order was made.

(3) The normal principle is that a judgment pronounced by the Court is final, and departure from the principle is justified only when circumstances, of a substantial and compelling character, make it necessary to do so.

(4) Review is not a rehearing of an original matter. The power of review cannot be confused with the appellate power which enables the appellate Court to correct all errors committed by a subordinate Court.

(5) A review petition has a limited purpose and cannot be allowed to be "an appeal in disguise".

(6) An error which is not self-evident, and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying exercise of the power of review.

(7) There is a clear distinction between an "erroneous decision" and "an error apparent on the face of the record". While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. So, the earlier order cannot be reviewed unless the Court is satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(8) If the judgment is vitiated by an error apparent on the face of the record, in the sense that it is evident on a mere look at the record without a long-drawn process of reasoning, a review application is maintainable. If there is a serious irregularity in the proceeding, such as violation of the principles of natural justice, a review application can be entertained."

17. From the judgments referred to above, it is clear that the scope of reviewing an order is very limited. Knowing the limitations of the High Court in an application filed under Order XLVII rules 1 and 2 of Code of Civil Procedure, 1908, we shall now proceed to deal with the case on hand.

18. As seen from the record, the learned Counsel for the Petitioner, in this Review Application, mainly found fault with the authorities in imposing 100% penalty by invoking section 74 of the G.S.T. Act. According to him, section 74 can be invoked only while imposing penalty of equal amount of tax in case of fraud or willful intention to defraud the revenue. Referring to section 10, which deals with composition of tax, he submits that, sections 73 and 74 of G.S.T. Act mutatis and mutandis would apply to section 10. When once sections 73 and 74 are made applicable even in case of Composite Tax Scheme, imposing 100% penalty in the absence of any fraud is illegal. In other words, his argument appears to be that imposing of penalty under section 74 is not automatic and the burden is on the authority to prove there was willful intention to defraud the revenue.

19. The same was seriously opposed by the learned Government Pleader mainly on the ground that, in a review, even if the order is erroneous, the Court cannot review the same unless an error is apparent on record, which is not so in the instant case. Even otherwise, he submits that the Bench which heard the Writ Petition dealt with these aspects and came to a conclusion and if the Petitioner is aggrieved by the same, remedy lies elsewhere but not by way of a Review.

20. In order to appreciate the same, it would be used to refer to arguments advanced in the Writ Petition, which are referred to in paragraph no. 2 of the Order, as under:

> "According to him, the respondents having accepted the option exercised by the petitioner in the web portal and having permitted him to pay tax at 1% of the total turnover in terms of the composite scheme, cannot now turn around and reject the option exercised and consequently direct the petitioner to pay GST as per the regular rates. He would further plead that a reading of section 10(1) of the Act, does not anywhere prescribe inclusion of VAT regime for the purpose of deciding the tax to be paid under section 10(1) of GST Act. In other words, his plea is that the provisions of GST Act are not retrospective in operation and that the word "preceding financial year" has no relevance for the taxes paid for the financial year 2017-2018. He further pleads that even if the turn over from 1-7-2017 is taken into consideration, the petitioner's turn over would be below Rs. 1 crore and hence the word 'preceding financial year' appearing in section 10(1) would be from financial year, after the GST regime came into force and not otherwise. He took us through the provisions of GST Act in support of his plea."

21. Dealing with the arguments advanced, the Bench of this Court after referring to the Judgment on the subject dealt with the contentions raised in paragraphs Nos. 7, 8, 9, 9, and 10 to 12 of the Judgment and ultimately negated the plea of the Petitioner holding that the collection of tax under GST Act, 2017, is not in addition to the provisions of the VAT but this being introduced as a substitute to VAT Act to deal with both goods and services, so as to maintain uniformity across the length and breadth of the country and, accordingly, confirmed the order of the 2nd Respondent.

22. It would be appropriate to extract paragraph No. 7, where an issue was framed.

> It is now to be seen whether the authorities were right in directing the petitioner to pay tax at 28% (14% S.GST and 14 % C.GST) and also as to what the word "preceding financial year" appearing in section 10(1) of Act would mean?

23. Paragraph Nos. 9, 10, 12, 14 and 15 reads as under:

> "9. A reading of section 10(1) of A.P. GST Act, 2017 would indicate that notwithstanding anything contrary to the provisions of the Act, but, subject to sub-sections (3) and (4) of section 9, a registered person, whose aggregate turnover in the "preceding financial year" does not exceed fifty lakh rupees may opt to pay tax as prescribed, but not exceeding 1% of the turnover in State in case of manufacturer; 2 ½ % of the turnover in State in case of persons engaged in making supplies referred to in clause (*b*) of paragraph 6 of Schedule II; and ½ % of the turnover in State in case of other suppliers.
>
> 10. Sub-section (3) of section 10 postulates that the option availed of by a registered person under sub-section (1) shall lapse with effect from the day on which his aggregate turnover during a financial year exceeds the limit specified under sub-section (1).
>
> 12. It may be true that the petitioner had paid GST under a composite scheme as per the option exercised in the web portal, for nearly four quarters, but, the option exercised by the petitioner was self-declaratory, which requires verification. Therefore, the argument of the learned Government Pleader that it took sometime for the authorities to examine the options exercised by all the taxpayers in the State cannot be brushed aside. Merely because the petitioner has exercised an option (which should be a correct one) and that it took time for the authorities to verify the genuinity or otherwise of the option exercised, cannot stop the respondents from directing the petitioner to pay tax as regulated under the provisions of the GST Act, if the option exercised was found to be incorrect.
>
> 14. Therefore, the argument that the turnover in the financial year starting from 1-7-2017 has only to be taken into consideration ignoring the previous turn over in the VAT regime does not sound to reason, because when the legislature at more than one place used the word 'preceding financial year', it would only mean that as on 1-7-2017, the turnover of the previous year under the VAT regime has to be reckoned with for the purpose of extending benefit under GST regime, provided the self-declarations made are correct. It is also to be noted that if during the course of business in subsequent year, the turnover comes down, such a declaration can be made seeking reduction of tax liability. But, the turnover of the previous year declared under a different tax collection process cannot be eschewed for fixing the liability under a new tax collection process. As stated earlier, by switching over from VAT to GST system, tax payment/collection on intra state supply of goods is being continued, but, however, in a different mode, thereby avoiding inconvenience and hardship to one and all.
>
> 15. In the instant case, the dispute in so far as interpretation of the word 'previous financial year' arose only for the financial year 2017-2018, as the GST regime commenced from 1-7-2017. If the intention of the legislature was that the turnover of the financial year under GST regime is only to be taken into consideration, then there would have been a clarification of the word 'preceding financial year'. Section 10(1) of the Act would not carry any meaning if such an interpretation, as sought by the petitioner, is given, namely, the turnover in the VAT regime has to be excluded while computing the tax liability. If such a narrow interpretation to section 10(1) is given, as observed earlier, many of the businessmen would not only escape payment of GST for the year 2017-2018, though the self-declaration made is incorrect or false, but also end up paying minimum GST though their turn over is on a higher side. It is to be noted here that word 'preceding financial year' is appearing at more than one place in section 10 itself, hence, it cannot be said that there was any error in usage of the word "preceding" in section 10. The legislature was conscious enough, when the word 'preceding' was used before the word 'financial year' in section 10(1) and also in the second proviso to section 10(1)(*c*), while extending benefits under a scheme. The legislature in its wisdom observed that such a benefit can be extended to those whose turn over in the

previous financial year does not exceed Rs. 50 lakhs. Therefore, the word 'preceding' appearing before the word 'financial year' cannot be ignored and if done, one would doing mockery of the words 'financial year does not exceed Rs. 50 lakhs'. Therefore, to fix a parameter for extending the benefits under the scheme and for payment of less tax in case of manufacturers and for those engaged in making supplies, the legislature thought it fit to take into account the turnover of the previous financial year. In so far as the financial year 2017-2018 under GST regime is concerned, the preceding financial year would be 2016-2017 under the VAT regime. The collection of tax under the GST Act, 2017 is not in addition to the provisions of VAT, but, this is being introduced as a substitute to VAT Act to deal with both goods and services, so as to maintain uniformity across the length and breadth of the country. This has been introduced to meet the requirements under the recommendations of the GST council, in which all the States and Union territories are the stakeholders."

24. From the above, it is clear that the argument that was advanced at the time of hearing of the Writ Petition was with regard to inclusion of VAT regime for the purpose of deciding the tax to be paid under section 10(1) of GST Act. In the Review Petition, it is now urged that section 10 encompasses sections 73 and 74 of GST as well and in the absence of any fraud, the authorities erred in invoking section 74 of the GST Act and imposing 100% penalty.

25. The averments in the affidavit filed in support of the Writ Petition does not anywhere refer to the plea now taken, though such plea was available at the time of filing of the Writ Petition, more so, when it involves only interpretation of the provisions of GST. Without taking such plea, namely, that 100% penalty can be imposed only when there is fraud or willful concealment, in the Review Application such a plea is sought to be raised. It is not as if that such a plea was not available at the time filing of the Writ Petition. Even otherwise, in paragraph no. 12 of the judgment, the Court held that the option exercised by the Petitioner was self-declaratory, which requires sometime for the authorities to verify and ultimately found it to be incorrect. The order under review would clearly indicate that intentional and willful non-disclosure of crucial facts can be inferred from the self-declaration made in the web-portal. Viewed from any angle, we do not find any grounds to interfere with the order impugned in the review.

26. Accordingly, the Review application is dismissed. No order as to costs.

SB

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*In favour of revenue.