

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD
(Special Original Jurisdiction)

, THE DAY OF JANUARY
TWO THOUSAND AND NINE

PRESENT

**THE HON'BLE MR JUSTICE V.ESWARAIAH
AND
THE HON'BLE MR JUSTICE VILAS V. AFZULPURKAR**

WRIT PETITION Nos.4801, 4170, 4216, 3319, 4346, 4342, 4344, 4339,
4345, 3307, 3312, 4348, 4341, 4347, 4340, 4343, 4484, 4650, 4656, 4660,
2085, 2079, 3556 and 3557 of 2009

BETWEEN

M/s. Omicron Bio-Genesis Limited and others.

AND

...PETITIONERS

Commercial Tax Officer, Srinagar Colony Circle, Panjagutta Division and
others.

...RESPONDENTS

**Counsel for the Petitioners: MR. S.R. ASHOK, Senior Counsel
for MR. A. SUDERSHAN REDDY
MR. G. MADHUSUDHAN REDDY**

**Counsel for the Respondents: GP FOR COMMERCIAL TAX
GP FOR REVENUE**

The Court made the following:

COMMON ORDER: (per Hon'ble Sri Justice Vilas V. Afzulpurkar)

This batch of writ petitions are directed against the final assessment orders made against the writ petitioners under the Andhra Pradesh General Sales Tax Act, 1957 (for short 'the APGST Act'). WP.Nos.4801, 4170, 4216 and 3319 of 2009 relate to the assessment order for the assessment year 2002-2003. WP.Nos.4346, 4342, 4344, 4339, 4345, 3307 and 3312 given in the serial order, as above in the cause title, relate to the assessment order for the year 2003-2004 and the rest of the writ petitions i.e. WP.Nos.4348, 4341, 4347, 4340, 4343, 4484, 4650, 4656, 4660, 2085, 2079, 3556 and 3557 of 2009 relate to the assessment order for the year 2004-2005.

2. For the sake of convenience, brief facts, as they appear in the first of the writ petitions i.e. WP.No.4081 of 2009 are mentioned herein.

3. The first petitioner company is a public limited company engaged in the business of manufacture and sale of iron and steel products. It is registered as a dealer under the provisions of the APGST & CST Act under the rolls of the first respondent – Commercial Tax Officer, Panjagutta Division. For the year 2002-2003 a turnover of Rs.42,03,07,094/- was determined after disallowing exemption.

The said turnover represents the turnover other than the first sale of iron and steel. The disallowing of the exemption was questioned by the writ petitioners in WP.No.12059 of 2006 before this Court but the writ petition was withdrawn to enable the petitioners to pursue alternative remedy. An appeal was accordingly filed before the Appellate Deputy Commissioner, which came to be dismissed on 08.11.2007 and aggrieved thereby, a second appeal before the Sales Tax Appellate Tribunal, Hyderabad was preferred. The registry of the tribunal notified the petitioner to deposit 37.5% of the disputed tax apart from other queries. Since the petitioner could not deposit the same, the appeal came to be rejected on 31.07.2008. Questioning the same the present writ petition is filed.

4. The said assessment order is questioned by the petitioner,

inter alia, on the ground that the disallowed part of the turnover clearly represents the second sales of iron and steel and the petitioner had produced the purchase details and requested grant of exemption but the respondents insisted on proof of payment being produced and ignored all other material produced by the petitioner. The petitioner, therefore, contended that since he is the second purchaser from the registered dealers and the said registered dealers having not disputed the transaction, without even making any enquiry from the said dealers, the assessments are made against the petitioner by disallowing the said turnover relating to second sale. The petitioner, therefore, contended that the respondents have jurisdiction under the APGST Act to collect the tax only of first sales and subsequent sales thereafter, are automatically exempt under the APGST Act and as such, disallowing of the exemption by ignoring the proofs produced by the petitioner resulted in huge demand from the petitioner, which amounts to fastening the liability on the petitioner, which is not sanctioned by law. The petitioner has also relied upon the decisions of this Court **BANDAMIDI RAJAIAH & SONS v. BOARD OF REVENUE**^[1] and **STATE OF AP v. THUNGABHADRA INDUSTRIES LTD.**^[2]

5. So far as the decision in **BANDAMIDI RAJAIAH's** case (1 supra) is concerned, it is a case relating to second sales and exemption was claimed, which was disallowed. The case of the assessee in the said decision was that the second sales are not taxable as the assessee has furnished details regarding the dates of purchase, name and address of parties therein, bill number and quantity of the amount involved. Thus, in spite of full details being furnished by the appellant without making verification the assessing authority has negatived the claim of the appellant for exemption. This Court held that when the burden laid on the assessee is discharged by him and when there is nothing to rebut the said evidence furnished by him, it is not open for the revenue to say that the burden cast on the assessee is

not discharged. This Court, therefore, held that the burden laid on the assessee has been discharged by him and in view of that the second sales clearly being not taxable at the hands of the assessee, the assessment was not sustainable. In the second decision in **THUNGABHADRA INDUSTRIES**'s case (2 supra) also the assessee claimed exemption on the ground that it is the second sale in his hands and as such he is entitled for exemption and though the assessing authority had granted exemption, the appellate authority had revised the order on the ground that certain dealers from whom the assessee had purchased were fictitious and as such, the first sales were not subjected to tax. When the matter ultimately reached this Court, the test laid down in earlier decisions were applied and it was held that first test is that the first seller should be real and identifiable within the State and second that mere non payment of tax by the first seller within the State does not shift the liability to pay the tax on to the second seller. In that case the also the assessee had furnished the registration number of the dealers from whom he had purchased.

6. The writ petitions were originally filed seeking relief to read down the provisions of Section 19 of the APGST Act in some writ petitions and Section 21 of the APGST Act in some other writ petitions but the learned senior counsel appearing for the petitioners has fairly stated that he is not pressing the said contention. Reliance is placed by the learned senior counsel for the petitioners on the above decisions and contended that the petitioners have submitted all the details regarding first seller from whom they have purchased and without making any enquiry from the said first seller and without there being any rebuttal evidence the exemption is disallowed and the petitioners are now subjected to an unjust and onerous liability, which is otherwise not taxable in the hands of the assessee. Learned senior counsel also relied upon a decision of this Court in WP.No.11780 of 2006 dated 27.10.2009 where similar situation relating to one of the group companies of the petitioners herein was considered by this Court and by the aforesaid

order, the assessment order was set aside and the matter was remitted with liberty to the petitioner therein to produce additional material papers before the assessing authority. Learned senior counsel, therefore, seeks similar orders in the present batch as well.

7. The respondents have filed separate counter affidavits in this batch of cases and the primary contention raised by the respondents is that the assessee have failed to discharge the burden inasmuch as the material produced by them is not adequate. Learned Special Government Pleader has drawn our attention to the statutory position as existed earlier and the amended provision as exists now.

Pre-amended sub-section (1-A) of Section 7-A of the APGST Act was as follows:

“7-A. Burden of proof and liability of the dealer to pay (tax and penalty):

(1-A) Notwithstanding anything contained in this Act, or in any other law, a dealer in any of the goods liable to tax in respect of the first sale or the first purchase in the State shall be deemed to be the first seller or first purchaser, as the case may be, of such goods and shall be liable to pay tax accordingly on his turnover of sales or purchases relating such goods, unless he proves to the satisfaction of the assessing authority that the sale or purchase, as the case may be, of such goods had already been subjected to tax under this Act.”

The said provision was amended by AP Act 22 of 1995 with effect from 01.04.1995 and the amended provision reads as follows:

“7-A. Burden of proof and liability of the dealer to pay (tax and penalty):

(1-A) Notwithstanding anything contained in this Act, or in any other law, a dealer in any of the goods liable to tax in respect of the sale or the purchaser in the State shall be deemed to be the seller or purchaser, as the case may be, of such goods and shall be liable to pay tax accordingly on his turnover of sales or purchases relating such goods, unless he proves to the satisfaction of the assessing authority that the goods sold or purchased as the case may be, have already suffered tax under this Act.”

Learned Special Government Pleader has laid emphasis on the words 'subjected to tax' under the pre-amended provision, which are being substituted by words 'already suffered tax' under the amended provision. He, therefore, contends that the decisions relied upon by the learned senior counsel for the petitioners relate to and are based upon unamended statutory provisions then existing and after the amendment, since the words used are 'already suffered tax', the same obviously means that the assessee must produce proof of payment of tax by the first seller and mere furnishing of bills and invoices etc. cannot be construed as discharge of burden. It is also contended by the respondents that all the assessees, who are petitioners in this batch of cases, are various group companies. The entire claim of second sales similarly made by each of the assessees/petitioners in this batch of cases is one claiming that they have purchased from other and it is in the nature of a circular bill trading with the result the tax is not paid by anyone of the said dealers. It is also claimed that the said claim of second sales are bogus and unreal and therefore, the assessing authority had rightly held that the burden cast on the petitioners/assessee was not discharged and therefore, rejection of exemption was justified.

8. Various contentions, as briefly referred to above, have been elaborated by both the learned counsel and while the learned senior counsel contended that even after amended sub-section (1-A) of Section 7-A referred to above, no change as such has occurred and according to him, the dictionary meaning of the words 'suffered tax' is same as 'subjected to tax'. He, therefore, submits that even after the amendment, the burden cast on the petitioners is only with reference to providing necessary details with respect to the registered dealer from whom the second seller/assessee has purchased and the entire turnover being exempt from tax for further points of sale, the entire assessment is without jurisdiction.

9. Learned Special Government Pleader has placed strong reliance on

the words used in the amended provision to contend that the words 'suffered tax' have definite meaning and the Legislature had intended to depart from earlier words used viz. subjected to tax and as such,

it is incumbent on the assessee to prove that the first seller had paid tax.

The discharge of burden on the assessee under the pre-amended provision and the post-amended provision has, therefore, undergone a sea change and it is more rigorous now than it was under the pre-amended situation.

10. We had entertained the writ petitions on account of the relief sought for with respect to reading down of Sections 19 and 21 of APGST Act. However, as noted above, that contention is not pressed any more. But, as has been discussed above, the APGST Act does not sanction taxing the second and subsequent sales and as such, assessments against each of the petitioners without identifying the first seller clearly amounts to the assessing authority acting beyond jurisdiction. There is, therefore, no impediment to entertain this batch of writ petitions against the assessment orders. During the course of hearing, it was also pointed out by the learned senior counsel and which fact is not in serious controversy that the respondents have assessed each of the petitioners in a similar manner disallowing the second sales, some of such assessment orders were produced by one of the petitioner group companies in WP.No.11780 of 2006 referred to above and based on that it is contended by the learned senior counsel that when the said goods are taxable only at the first point of sale passing of multiple assessment orders against each of the second and subsequent sellers amounts to the respondents seeking to recover tax at multiple points of sale contrary to the scheme of APGST Act. Learned Special Government Pleader contend that such assessment orders had to be passed because none of the assessees could discharge the burden cast on him and as such, the only consequence was to disallow the exemption against each one of them. It is also necessary to note the following averment

of the first respondent in the counter affidavit filed in WP.No.2085 of 2009.

The relevant portion of Para 4 of the counter affidavit is as follows:

“Further the petitioner in reply to the show cause notice admitted that the purchases as well as their sales are notional and transacted for the purpose of securing book turnover for maintaining working results and to boost up the turnover of the company. They stated that they follow mercantile system of accounting and issue sale bills without really effecting any sale and movement of goods. They stated that in order to meet the projected level of performance of the companies, and to place equity of the company with foreign investment companies, they have recorded transactions of purchases and sales without actually receiving or dispatching goods.”

The aforesaid averment also shows that the very theory of sale as appreciated by the respondent requires deeper examination.

11. Various contentions on merits on the points aforesaid were made on either side but in view of the order proposed, We do not intend to deal with any of those submissions on merits including the interpretation placed by either side on the amended provision as above. Taking into consideration the submissions across the bar and after carefully perusing the judgment of this Court in WP.No.11780 of 2006 referred to above, We are of the view that the assessment orders impugned in this batch of cases are clearly without jurisdiction inasmuch as in each of the cases second sales have been disallowed with respect to each of the petitioners/assessees. Even assuming the respondents contention that it is a circular trading among group companies where each one claims to have purchased from the other and each one claims exemption with respect to such purchase on the ground that is a second sale is correct, it cannot be denied that the respondents have jurisdiction to levy and collect tax only from the first seller and all subsequent sales thereafter are exempt under the APGST Act. In all the assessments no effort has been made to determine as to who is the first seller. The liability under the APGST Act, therefore, has to be first

determined by identifying the first seller and he alone is liable to pay tax. We are, therefore, of the view that even if the respondents contentions are accepted, they have power and jurisdiction to determine and collect tax only against the first seller and without identification thereof, the assessing and taxing each of the second and subsequent sellers would amount to recovery of tax at multiple points of sale, which is impermissible under the scheme of the APGST Act so far as these cases are concerned. As has been noticed above, separate assessment orders have been made against all the assesseees, who claim that they are subsequent purchasers.

We, therefore, feel that one assessee who is identified as the first seller is bound to suffer and pay tax but not all the assesseees.

12. In the decision referred to above in WP.No.11780 of 2006 this Court found from the assessment orders produced before it relating to first sellers and taking that into consideration, remitted the matter to the assessing authority by setting aside the assessment orders by giving opportunity to both sides to place the said additional material before the assessing authority to enable it to identify the first seller and assess and collect the tax from the said first seller. In our view, therefore, the ratio of the said decision would fully apply to this batch of cases, especially, as the petitioner in the aforesaid decision was one of the group companies and if the respondents contention that there is circular trading among the various group companies is correct, the said writ petitioner is also one among the chain of purchasers in this batch of cases. The assessment order in question in the said decision viz. assessment order for the year 2002-2003 is also subject matter of at least four writ petitions in this batch of cases, referred to in the introduction para, which are also group companies of the petitioner in the said writ petition.

13. In totality of the circumstances, as above, therefore, We are of the view that the impugned assessment orders in all these matters deserve to be set aside and the matters deserve to be remitted to the respective assessing authority. The assessing authority shall determine the question as

to whether the sales in question are notional or real and shall also afford an opportunity to the petitioners to produce such additional material as they deem fit so as to enable them to identify and establish the first seller so that the State would be in a position to recover tax from such first seller and thereby all subsequent purchasers would be entitled to exemption from payment of tax under the scheme of the APGST Act. As mentioned above, the first four writ petitions relate to the assessment year 2002-2003, which are fully covered by the decision of this Court in WP.No.11780 of 2006 mentioned above and the rest of the writ petitions though relate to subsequent assessment years, the question involved being identical, all the writ petitions deserve to be allowed and assessment orders in each of these cases stand set aside and assessments shall stand remitted to the respective assessing authority to take into consideration the additional material and pass fresh assessment orders in the light of this order.

In the result, the writ petitions are allowed. There shall be no order as to costs.

V. ESWARIAH, J

January , 2009

DSK

VILAS V. AFZULPURKAR, J

[1] 1978 (42) STC 145

[2] 1986 (62) STC 71