

(2007) 10 OHC CK 0048
In the Orissa High Court

Bansi Tyre Services

APPELLANT

Vs

Orissa Sales Tax Tribunal and Others

RESPONDENT

Date of Decision : 04-10-2007

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 12(4), 12(8), 24(2)(b)

Citation : (2007) CLT 338 Supp : (2007) 2 OLR 947 Supp : (2009) 20 VST 475

Hon'ble Judges : A.K. Ganguly, C.J.; I. Mahanty, J

Bench : Division Bench

Judgement

I. Mahanty, J.—The petitioner, M/s. Bansi Tyres Services has filed this revision u/s 24(2)(b) of the Orissa Sales Tax Act, 1947, inter alia, seeking to raise certain questions of law arising out of the order dated May 20, 1993, passed by the Orissa Sales Tax Tribunal, Cuttack. By the order dated July 14, 1997, this Court was pleased to admit the revision application on the following questions of law:

(i) Whether on facts and in the circumstances of the case, any nexus exists between the alleged suppression and enhancement made by the authorities ?

(ii) Whether on facts and in the circumstances of the case, levy of penalty u/s 12(8) of the Orissa Sales Tax Act, 1947 (in short, "the Act") to the extent of Rs. 10,000 was justified ?

2. Mr. J. Sahoo, learned Counsel for the petitioner, inter alia, submitted, that the Vigilance Inspector of Sales Tax Department inspected the premises of the petitioner-assessee on April 3, 1985 and submitted a report. It is alleged that although the said report was available with the assessing officer prior to passing of the regular order of assessment u/s 12(4), the self-same vigilance report was used as the basis for initiation of a proceeding of suo motu revision u/s 12(8) of the Act, which concluded with a finding that the petitioner has suppressed transaction amounting to Rs. 11,000 for which, the turnover of the petitioner was enhanced by Rs. 2,00,000, consequently, raising additional tax demand of Rs. 20,000 and further amount of Rs. 20,000 was levied by way of penalty u/s 12(8)

of the Act.

3. The petitioner challenged the aforesaid suo motu revisional order in appeal. The first appellate authority while affirming the order passed u/s 12(8) of the Act regarding suppression and enhancement of turnover and the consequential demand of tax, reduced the penalty levy from Rs. 20,000 to Rs. 10,000. The petitioner further challenged the first appellate order before the Sales Tax Tribunal and by order dated May 20, 1993, the Sales Tax Tribunal dismissed the appeal and confirmed the order passed by the first appellate authority. Thereafter, on the petitioner's application for reference was being rejected by the Tribunal by its order dated March 21, 1994, it has filed the present application u/s 24(2)(b) of the Act.

4. Mr. Sahoo, learned Counsel for the petitioner, in course of hearing, inter alia, advanced two contentions ; the first being that merely because the dealer is found to have made certain suppressions, the assessment cannot be enhanced to any extent as a punitive measure. In this regard, learned Counsel for the petitioner has relied upon a judgment of this Court in the case of Bherodhan Jethmal (Private) Ltd. v. State of Orissa [1970] 26 STC 536 as well as on a decision of this Court in the case of Badriprasad Agarwalla v. State of Orissa [1993] 91 STC 114.

5. The second contention of the learned Counsel for the petitioner is that the penalty of Rs. 10,000 imposed on the petitioner was wholly unjustifiable and was imposed mechanically without any application of discretion. Mr. Sahoo further submitted that the liability to pay penalty does not arise merely upon the proof of any default. In this regard, Mr. Sahoo relied upon a decision of the Supreme Court in the case of Hindustan Steel Ltd. Vs. State of Orissa, in which the honourable Supreme Court has held that the liability to pay penalty does not arise merely upon proof of default... An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances.

6. Relying on the aforesaid dicta of the Supreme Court, Shri Sahoo submitted that in the case at hand the authorities have failed to exercise their discretion in the matter of levy of penalty judiciously since they have failed to take into consideration all relevant circumstances of the case.

7. Shri Kar, learned Additional Standing Counsel for the Revenue, on the other hand, supported the order passed by the Tribunal and submitted that the questions of law framed in the present case ought to be answered in negative

and in favour of the Revenue since "suppression" has been proved in the present case and further that the authority has the jurisdiction to levy penalty up to one and half times of the tax imposed originally. He submitted that there was no jurisdictional error in levying penalty which has been reduced to 50 per cent of the amount demanded by the first appellate authority. Therefore, he submitted that no case for interference of this Court has been made out by the petitioner. Mr. Kar further submitted, if the court finds that there has been "suppression" on the part of the assessee, then the court ought not to interfere with the amount of penalty levied unless and of course it is held to be "capricious and arbitrary". According to Mr. Kar, the impugned orders would clearly indicate that the authorities have exercised their power judiciously and therefore, the present revision merits no consideration.

8. From a perusal of the records of the present proceeding and in particular, the order passed u/s 12(8) of the Act, it appears that the following vigilance report was taken into consideration:

The said report goes to show that the place of business was inspected by the (Vigilance) Inspector of Sales Tax on February 18, 1983 and in course of search of the business premises three loose-hand-written chits were detected as follows:

Slip No. 1 : In this slip the dealer has purchased bearing No. 6204-20 pieces, and 1312-K-six pieces out of which the dealer has accounted for 10 pieces 6204 bearing only leaving balance goods unaccounted for.

Slip No. 2 : This is a slip of sales made by the dealer on February 14, 1983. Out of this sales of Rs. 712 had not been reflected in the sales register.

Slip No. 3 : In this slip, the sales on February 15, 1983 and February 16, 1983 of the business has been written. Out of this sale of Rs. 216.50 has not been accounted for in the sales register and the expenditure of Rs. 156.50 paid to Sri S. Paul of Calcutta Co. has not been reflected in regular books of account.

9. On the basis of the aforesaid vigilance report, the assessing officer came to the following conclusion:

As per this sale the dealer is seen to have effected sales of Rs. 4,989.08 on February 16, 1983 and Rs. 3,040.95 on February 15, 1983. The charges of suppression of purchases and sales have clearly been established. The total suppression detected stand at Rs. 11,000 apparently.

Having due regard to the suppression detected, size and location of the business and nature of trade, the escaped G.T.O. which is also the escaped T.T.O. is determined at Rs. 2,00,000. This is computed as follows:

8% - Rs. 1,00,000

12% - Rs. 1,00,000

Tax payable comes to Rs. 20,000. Penalty of Rs. 20,000 is imposed u/s 12(8) of

the O.S.T. Act. Tax and penalty which comes to Rs. 40,000 shall be paid by the dealer as per the demand notice enclosed.

10. The aforesaid Vigilance report formed the basis for which extra demand and penalty has been levied in the proceeding u/s 12(8) of the Act. At this stage it is important to take note of the fact that this Court in the case of Bherodhan Jethmal (Private) Ltd. [1970] 26 STC 536, in paragraph 5 of the judgment came to hold as follows:

5. The petitioner kept two sets of accounts : (i) which was publicly kept showed an underestimate of business transactions and profits and (ii) a genuine account was kept to reflect the true transactions. Once the genuine accounts were available and the finding is that there were no other accounts and the secreted accounts were exhaustive, there was no scope for making a further estimate of the suppressions de hors the genuine accounts seized. Law is now well-settled that estimate of suppression must bear a reasonable nexus to the materials available. Merely because a dealer or assessee is found to have made certain suppressions the assessment cannot be raised to any extent as a punitive measure.....

11. Therefore, in order to ascertain as to whether there is any "reasonable nexus" between the materials available and the materials under suppression, it is required to verify the Vigilance report noted herein above in detail.

12. Three slips were detected in course of visit of the Inspector of Vigilance Department.

Slip No. 1: Pertains to the alleged failure on the part of the petitioner to enter purchase of certain goods in the books of account. In other words, it is alleged that whereas the petitioner had purchased 26 pieces of tyres, he had accounted for only 10 pieces in his books of account thereby leaving the balance 16 pieces of purchased goods un-accounted for. To a query made to the learned Counsel for the Revenue as to whether "any purchase tax" is payable on the purchase of tyres. Shri Kar submitted that purchase tax was not payable on tyres. Therefore, we fail to understand as to how "suppression of purchase" by a dealer would have any bearing on the question of "suppression to sales". It is obvious therefore, that the purchase of 16 tyres and not accounting the same, cannot have any nexus with the "suppression of sales" and therefore to this extent it must be held that the authorities have failed to substitute any "nexus" between the same.

Slip No. 2 : relates to sale of Rs. 712 which the petitioner had not reflected in the sale register and Slip No. 3 relates to sale amount of Rs. 216.50 which had not been accounted for apart from "expenditure" of Rs. 156.50 which had not been reflected in regular books of account. Obviously non-disclosure of expenditure is of no relevance to "suppression of sales" amounting to Rs. 712 in Slip No. 2 and further suppression of sale amounting to Rs. 216.50 paise in Slip No. 3, taken together establish suppression of sales to an extent of Rs. 928.50 paise. But the

assessing officer erroneously computed total suppression at Rs. 11,000, and then enhanced the petitioner's turnover to Rs. 2,00,000 i.e., nearly 20 times of the amount of suppression. Therefore, taking the total suppression as Rs. 928.50 paise and adopting the same multiplier of "20" the turnover enhancement would work out to Rs. 18,570.

13. In this case, we answer the question of law framed herein above to the following effect:

In the facts and circumstances of the present case, suppression of sales has been determined by us to be Rs. 928.50 paise and therefore, the enhancement of sales turnover amount by the authority is determined to be Rs. 18,570 for the purpose of levy of tax thereon.

14. The view expressed in the aforesaid case has been reiterated by our High Court in the case of Badriprasad Agarwalla [1993] 91 STC 114 wherein this Court while considering the basis for enhancement of turnover came to hold that in a case where suppression is detected, there must be "further evidence on record" to indicate that the assessee had indulged in further trading in order to justify enhancement beyond the amount detected. In the aforesaid judgment, this Court has held that "Had there been any other transaction during the course of the year relating to unaccounted purchase, the authorities would have been right to take a view that the assessee was taking recourse to such transactions repeatedly" and therefore, answered the question of law "Whether, on the facts and in the circumstances of the case, the enhancement of the returned gross turnover by 25 per cent is arbitrary?" in favour of the assessee holding that if the enhancement had been twelve and half per cent, their Lordships would not have regarded the same as arbitrary.

15. The next aspect for determination relates to the levy of penalty. In the present case originally penalty of Rs. 20,000 was levied by the assessing officer, i.e., the amount equal to the additional tax demanded in Section 12(8) proceeding, has been reduced to Rs. 10,000 by the first appellate authority.

16. In the present revision we are concerned with the assessment for the year 1982-83. The provisions u/s 12(8) of the Act at the relevant time are quoted herein below:

12(8) : if for any reason the turnover of a dealer for any period to which this Act applies has escaped assessment or has been under assessed or where tax has been compounded when composition is not permissible under this Act and the Rules made thereunder, the Commissioner may at any time within thirty six months from the expiry of the year to which that period relates call for a return under sub-section (1) of Section 11 and may proceed to assess the amount of tax due from the dealer in the manner laid down in sub-section (5) of this section and may also direct, in cases where such escapement or under-assessment or composition is due to the dealer having concealed particulars of his turnover or having without sufficient cause has furnished incorrect particulars thereof, that

the dealer shall pay, by way of penalty, in addition to the tax assessed under this subsection, a sum not exceeding one and a half times of the said tax so assessed.

17. It is clear from the above that levy of penalty shall not be made automatically or as a matter of course and that is why, the Legislature has used the term "may" which clearly manifest that such levy depends upon exercise of judicial discretion on the part of the Sales Tax Officer before making such levy. In the case at hand, it is clear that there was no reasoning in the order passed u/s 12(8) of the Act to justify levy of such penalty.

18. From the operative portion of the re-assessment order u/s 12(8) of the Act, it clearly reveals that penalty has been levied in a mechanical manner and no reason whatsoever has been stated in the order for the levy of such penalty. From Slip No. 2 and Slip No. 3 which were detected by the Inspector of Vigilance, the total suppression has been determined to Rs. 928.50 paise. Therefore, one we have come to a finding that the petitioner has, in fact, suppressed the sales, then in terms of the judgment in the case of Hindustan Steel Ltd. Vs. State of Orissa, , we are of the view that the petitioner has failed to discharge its statutory obligation and the act of suppression on its part amounts to a deliberate defiance of law and/or establishes the petitioner's dishonest conduct and also establishes its conscious disregard of its statutory obligation and therefore, levy of penalty in the present case is wholly justified. But since we have determined the suppression of sales at Rs. 928.50 paise and further, answer the question No. 1 by directing enhancement of turnover to Rs. 18,570 and levy of tax thereon, we, therefore, answer question No. 2 framed above, in favour of the Revenue and hold that in the facts and circumstances of the case, levy of penalty u/s 12(8) of the Act is justified but should be limited to an amount would extent equal to the tax amount that would be determined on the basis of the answer to question No. 1 framed above.

19. In view of the findings arrived at by us and the answers to the questions framed in this case, the present revision is allowed in part to the extent noted herein above.

A.K. Ganguly, C.J.

20. I agree.