
(1958) 07 OHC CK 0007

In the Orissa High Court

Case No : O.J.C. No's. 289, 296 and 300 of 1956

Basudeb Hota and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 08-07-1958

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 12(7), 23(3)
Orissa Sales Tax Rules, 1947 — Rule 54

Citation : AIR 1958 Ori 283 : (1958) 24 CLT 366 : (1958) 9 STC 663

Hon'ble Judges : S. Barman, J;P.V.B. Rao, J

Bench : Division Bench

Advocate : Asok Das, for the Appellant; Government Advocate and G.K. Misra, for the Respondent

Final Decision : Allowed

Judgement

P.V.B. Rao, J.—These three applications under Article 226 of the Constitution are directed against the orders of the Collector of Sales Tax

assessing the petitioners to each of the applications to sales tax on the ground that their turn-over escaped assessment and had been under-

assessed. As these three applications involve a common question of law, they are heard together and are disposed of by this judgment.

2. The common question argued before us with regard to these three applications is whether the said re-assessment can be made after 36 months

of the original assessment. In O. J. C. No. 289-of 1956, the petitioner is a dealer in cocoanuts at Salchigopal in Puri district and is a registered

dealer under the Orissa Sales Tax Act, his registration number being 279. For the quarters ending 31-12-50 to 30-9-51, 31-3-52 to 30-9-52 and

31-3-53 the assessing officer assessed the dealer and disallowed the deductions claimed by him u/s 5 (2) (a) (ii) of the Orissa Sales Tax Act.

But the appellate authority allowed them as claimed by the dealer in pursuance of the orders of the Board of Revenue in the case of Khemchand

Chandanmal of Balangir on the ground that the deduction was legal till the amendment of the provisions of the Orissa Sales Tax Act on 26-11-51.

In view of a subsequent decision of this Court in the case of Hindusthan Cellulose and Paper Mills Ltd. v. Collector of Sales Tax and the State,

AIR 1957 Orissa 232 (A), the Collector of Sales Tax verified the records of this case under Rule 54 of the Orissa Sales Tax Rules and coming to

the conclusion that the appellate Orders were incorrect, issued a notice to the dealer and revised the appellate orders on 23-11-55 and ordered

that the taxable turnovers allowed to be deducted by the Assistant Collector should be raised and fresh demand notices should be served on the

dealer accordingly.

3. In O. J. C. No. 296 of 1956 the petitioner is a dealer under the Orissa Sales Tax Act and was assessed on his taxable turnover for the quarters

ending 30-6-51, 30-9-51 and 31-12-51. Out of the total claims made by the dealer on account of sales of cocoanuts outside the state Rs. 7627-

11-6. Rs. 34788-4-3 and Rs. 30731-9-0 were disallowed by the Sales Tax Officer, Puri, on assessment for the three quarters respectively on the

ground that the dealer having purchased the goods of the value noted above in the respective quarters free of tax on the strength of his registration

certificate from other registered dealers utilised otherwise than resale in Orissa.

But on appeal by the dealer against the orders of assessment disallowing the claims in full, the Assistant Collector of Sales Tax, Puri, held that the

dealer was entitled to claim deductions towards the value of goods purchased free of tax from other registered dealers prior to 26-11-51 and sold

outside the State and allowed further deductions of Rs. 7627-11-6, Rs. 34788-4-3 and Rs. 25737-1-0 for the said three quarters, being of .the

view that prior to the passing of the Orissa Sales Tax (Amendment) Act, 1951, on 26-11-51, re-sale for the purpose of Section 5 (2) (a) (ii) will

also include a re-sale outside the State.

But the Collector of Commercial Taxes, Orissa, after the decision of this Court above referred to, holding) that the resale., for the purpose of

Section 5 (2) (a) (ii) meant re-sale in Orissa even prior to 26-11-51> revised the assessment on 28-2-56 under Rule 54 of the Orissa Sales Tax

Rules, 1947 after giving an" opportunity to the petitioner of being heard and assessed him on the said sums of Rs. 7627-11-6, Rs. 34788-4-3 and

Rs. 30569-8-0 for the three quarters,

4. In O. J. C. No. 300 of 1956, the petitioner is a dealer under the Orissa Sales Tax Act and was assessed on his taxable turnover for the quarters

ending 30-6-51 and 30-9-51. At the assessment stage the Sales Tax Officer who completed the assessment held the petitioner liable to pay tax for

the value of goods purchased free of sales tax on the strength of his registration certificate for re-sale but utilised by him otherwise by means of

export outside the State.

But at the appellate stage the Assistant Collector of Sales Tax wrongly allowed the contention of the petitioner that the said amounts should be

deducted from the turnover. The Collector of Sales Tax under Rule 54 of the Orissa Sales Tax Rules, 1947 issued notice to the petitioner to show

cause against the revision of the said assessment by the appellate authority. The Collector of Sales Tax revised the order of the appellate authority

on 2-3-56 and assessed the turn-over which was deducted by the appellate authority.

The petitioner in this case did not file the order of the Collector along with his application and it is regrettable that this defect was not noticed by the

Stamp Reporter and no defect was noted at the time of the stamp reporting. I could not get at the order at the time of writing the judgment as it is

not in the record. The Stamp Reporter should, if any necessary document is not filed along with the application, note that defect in the Stamp

report.

5. The petitioners"" case in all these three applications is that as u/s 12 (7) of the Orissa Sales Tax Act nobody shall be assessed on amounts that

had escaped assessment or that had been under-assessed after 36 months of the end of the period for which the tax is payable, the assessments in

these cases which are admittedly after 36. months are contrary to law and without jurisdiction. The petitioners further contend that Rule 54 of the

Sales Tax Rules is subordinate to and controlled by Section 12 (7) of the Sales Tax Act.

The petitioners also contend that the amendment of the Orissa Sales Tax Act by Orissa 1 of 1955 by enacting a proviso to Clause (6) of Section

12 does not in any way alter the position, but that on the other hand it would show that it was not the intention of the Legislature by enacting

Clause (7) to Section 12 that it should be subordinate to R. 54 or Section 23 (3) of the said Act.

6. The contention of the Department is that Rule. 54 of the Orissa Sales Tax Rules is subordinate to Section 23 (3) and not to Section 12 (7) of

the Orissa Sales Tax Act, 1947 and that the assessments made in these three cases by the Collector in revision do not amount to fresh assessments

or re-assessments u/s 12 read with Rule 31 of the Orissa Sales Tax Act and the period of limitation set forth in Section 12 of the Act does not

apply to revisions under Rule 54.

Mr. Misra contends that Rule 54 envisages a revision by the Collector of Sales Tax of any order passed by any subordinate officer from which no

appeal has been preferred; that in these cases the orders which had been revised under Rule 54 by the Collector of Sales Tax, Orissa, are the

appellate orders of the Assistant Collectors of Sales Tax, Pun, from which no appeals had been preferred; and that therefore the said orders of

revision passed by the Collector of Sales Tax are in conformity with the requirements of the said Rule 54.

7. Section 12 of the Orissa Sales Tax Act, 1947 is the assessment section. Clause "(7) provides :

(7) 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, the

Collector may at any time within thirty-six months of the end of that period 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 is due to the dealer having? concealed particulars of his turnover or having without sufficient causes has furnished

incorrect particulars thereof, that the dealer shall pay, by way of penalty, in addition to the tax assessed under this sub-section, a sum not

exceeding one and a half times of the said tax so assessed.

Section 23, Clause (3) provides :

(3) Subject to such rules as may be prescribed and for reasons to be recorded in writing, the Collector may, upon application or of his own

motion, revise any order passed under this Act or the rules thereunder by a person appointed u/s 3 to assist him, and, subject as aforesaid, the

Revenue Commissioner may, in like manner, revise any order passed by the Collector :

Provided that before rejecting any application for the revision of any such order the Collector or the Revenue Commissioner, as the case may be, shall consider it and shall record reasons for such rejection.""

Rule 54 of the Orissa Sales Tax Rules, 1947, is as follows :

54. Revision by Collector and Revenue Commissioner suo motu -- The Collector may, of his own motion, at any time within one year" from the date of passing of any order by the Assistant Sales Tax Officer or by the Sales Tax Officer or by the Assistant Collector, as the case may be, call

for the record of the proceeding in which such order was passed and revise any such order from which no appeal has been preferred, and the

Revenue Commissioner may in like manner, at any time within one year from the date of passing of any order by the Collector call for the record of

proceeding in which such order was passed and revise any such order from which no appeal has been preferred :

X X X X

By Section 7 of the Orissa Sales Tax (Amendment) Act, 1954 (Orissa Act 1 of 1955), it was enacted,

7. To the existing provisos to Sub-section (6) of Section 12 of the said Act, the following new proviso shall be added, namely :

Provided further that the period of limitation fixed in the proviso immediately preceding shall not apply to assessment under Sub-section (7) of this

section or to enhancement of assessment or order of fresh assessment made or passed u/s 23,

8. It may be noted that the original assessments in all these three applications by the appellate authority were completed before the Orissa Act 1 of

1955 which received the assent of the President on 14-1-55 and was first published in an extra-ordinary issue of the Orissa Gazette on 1-2-55.

9. Mr. G. K. Misra, the learned counsel for the Department contends that Section 12 (7) contemplates a re-assessment of escaped assessment or

under-assessment by the original taxing officer and does not in any way control the powers vested in the Collector of Sales Tax u/s 23 (3) and

Rule 54 of the Sales Tax Act. He referred us to the definition of "Collector" u/s 2 (a) of the Act which is,

(a) "Collector" means any Collector of Sales Tax appointed under Sub-section (1) of Section 3;

and contended that the word "Collector" in Section 12 (7) contemplated an assessing officer in the first instance and the word "Collector" in

Section 23 (3) contemplated the revising authority under the Act and therefore he contends that the provision of Section 12 (7) does not apply to

the case of revision by the Collector of Sales Tax u/s 23 (3). According to the definition in Section 2 (a), Collector means any Collector of Sales

Tax appointed under Sub-section (1) of Section 3 and Section 3 (1) says,

(1) The Provincial Government may appoint any person to be a Collector of Sales Tax, and such other persons under any prescribed designations

to assist him as it thinks fit.

Under Rule 2 of the Orissa Sales Tax Rules, 1947, Clause (b) defines "Assistant Collector which is stated to mean an Assistant Collector of Sales

Tax appointed by that designation by the Provincial Government u/s 3 of the Act to assist the Collector, Clause (c) defines Assistant Sales Tax

Officer as to mean in respect of any place of business of a dealer the Assistant Sales Tax Officer appointed by that designation by the Provincial

Government u/s 3 of the Act to assist the Collector, within whose jurisdiction that place of business is situated; and Clause (e) says, "'Collector

means the Collector of Sales Tax and includes any officer to whom the Collector of Sales Tax may delegate u/s 17 his powers and duties under the

Act.

No delegation of such power u/s 17 by the Collector to the Assistant Sales Tax Officer is placed before us. Consequently on a reading of the

various definitions stated above, I cannot accept the contention of the learned counsel that the word "Collector" as used in Section 12 (7) refers to

only the officer making the re-assessment as an officer in the first instance and does not refer to a Collector revising a re-assessment u/s 23 (3).

Rule 3 enumerates the Sales Tax Authorities and it says,

1. u/s 3 of the Act the Provincial Government may appoint the following classes of Sales Tax Authorities, with jurisdiction over specified areas,

namely :

(a) Collector of Sales Tax,
(b) Assistant Collectors of Sales Tax,
(c) Sales Tax Officers,
(d) Assistant Sales Tax Officers, and
(e) Inspectors of Sales Tax. 2. The Assistant Collectors of Sales Tax, the Sales Tax Officers and the Assistant Sales Tax Officers shall be subordinate to the Collector of Sales Tax.....

3. The authorities specified in Clauses (b), (c), (d) and (e) shall be under the administrative control of the Collector of Sales Tax." Though, as

stated above, according to the classification of the various officers under the Sales Tax Act "Collector" seems to refer to a Collector contemplated

u/s 23 (3) yet by a reading of Section 12, Clauses (1) and (2), it appears, the original assessing authority also is referred to as Collector. In my

opinion, therefore, as the sections stand in the Act and as the rules stand, the word "Collector" seems to apply both to the original assessing officer

as also the revising authority and it cannot, as contended by Mr. Misra, be held that the Collector in Section 12 (7) is different from the Collector

in Section 23 (3) and that the word in the form means only the original assessing officer and not the revising authority. In my opinion, therefore,

Section 12 (7) includes also the re-assessment made by the revising authority u/s 23 (3).

10. Mr. Misra next contended that the revisional powers of the Collector u/s 23 (3) cannot be said to be controlled by the prior Section 12 (7).

"In support of his contention, he relies upon a decision of the Patna High Court in the case of Gajo Ram Basant Ram v. State of Bihar, reported in

1956-7 STC 248: (AIR 1956 Pat 13) (B). This was a case under the Bihar Sales Tax Act. In this case it was held by a Division Bench of the

Patna High Court consisting of Chief Justice S. K. Das (as he then was) and Justice Kanhaiya Singh, that the proviso to Section 10 (6) of the Bihar

Sales Tax Act, 1944, providing that no order assessing the amount of tax due from a dealer in respect of any period should be passed later than

24 months from the expiry of such period in its true meaning and effect was restricted in its application to an original order of assessment and did

not affect the power of review u/s 20 (4) or apply to a fresh order of assessment directed by the appellate or revisional authority and that the

principle laid down with regard to the provisions of Sections 24, 26 and 27 of the Bihar Agricultural Income Tax Act, 1938, and Sections 33, 34

and 35 of the Indian Income Tax Act, 1922 could not be applied with regard to the provisions contained in the proviso to Section 10 (6) and

Section 20 of the Bihar Sales Tax Act, 1944.

In a very learned Judgment, if I may say so with respect, Das, C. J. (as he then was) discussed the various provisions, referred to above, of the

Bihar Agricultural Income Tax Act of 1938 and of the Indian Income Tax Act of 1922, compared them to the sections in the Bihar Sales Tax Act

and came to the conclusion that as in the said two Acts the revisional power was subject to the other provisions of the Act, the principle laid down

under the said Acts could not be applied to the provisions of the Sales Tax where the revisional power is not subject to that other sections of the

Sales Tax Act. In the course of the judgment, the learned Chief Justice (as he then was) observed :

In my opinion, this argument fails to take note of several important distinctions which exist between the provisions of the Bihar Agricultural Income

Tax Act, 1938, and the Indian Income Tax Act on the one hand and the provisions in the Bihar Sales Tax Act, 1944, on the other. First of all,

Section 24 of the Bihar Agricultural Income Tax Act, 1938, says in clear terms that the power of revision given by Sub-section (2) of that section

is "subject" to the provisions of this Act. Therefore, in express terms Section 24 is made subject to the provisions of Sections 26 and 27.

The position is the same with regard to the Indian Income Tax Act. Sub-section (2) of Section 33 of the Indian Income Tax Act (before the

amendments of 1939 and thereafter) stated in express terms that the power of review given to the Commissioner was "subject to the provisions of

this Act". Therefore, Section 33 was subject to the provisions of Sections 34 and 35. The Bihar Sales Tax Act, 1944, however, contains no

provisions similar to the provisions of Sections 26 and 27 of the Bihar Agricultural Income Tax Act, 1938; nor does it contain provisions similar to

the provisions of Sections 34 and 35 of the Indian Income Tax Act.

Moreover, Sub-section (4) of Section 20 of the Bihar Sale Tax Act states that the power of review is "subject to such rules as may be

prescribed". The power is not subject to the "other provisions of the Act" so as

to attract the operation of the proviso to Sub-section (6) of

Section 10. Then there is another very important distinction. The general rule is that the operation of a proviso should be confined to that clause or portion of the statute which directly precedes it.

Finally he observed,

The proviso to Sub-section (6) of Section 10 will render nugatory the powers given to the appellate authority under Clause (b) of Sub-section (2)

of Section 20. I do not think that could have been the intention of the legislature. Such a construction will result in an absurdity; and after the period

mentioned in the proviso to Sub-section (6) of Section 10 is over, it would not be possible for the appellate authority or revisional authority to pass

the orders which u/s 20 it would be competent to pass.

I think that a distinction must be drawn between an original order of assessment u/s 10, which is subject to the proviso to Sub-section (6) of that

section, and a fresh order of assessment directed by an appellate or revisional authority as mentioned in Sub-sections (2) and (3) of Section 20 of

the Bihar Sales Tax Act, 1944. I am aware that the only section dealing with assessment of tax is Section 10 of the Bihar Sales Tax Act, 1944,

and a fresh order of assessment will also proceed on the principles laid down in Section 10.

That does not, however, mean that a distinction between an original order of assessment u/s 10 and a fresh order of assessment directed by the

appellate or revisional authority cannot be made. In my opinion, such a distinction can and ought to be made in order to avoid absurdity and

repugnancy between the different provisions of the Bihar Sales Tax Act, 1944.

On the authority of this decision which, according to Mr. Misra, is on all fours with the present case before us, he contends that the orders

complained against are perfectly valid as they are not subject to Section 12 (7) of the Orissa Sales Tax Act. I cannot accept this contention. The

provision in Section 10 (6) of the Bihar Sales Tax Act of 1944 is quite different from that contained in Section 12 (7) of the Orissa Sales Tax Act.

There is no provision in the Bihar Sales Tax Act of 1944 or of 1947 corresponding to Section 12 (7) of the Orissa Sales Tax Act. The learned

Chief Justice (as he then was) in the above Patna case himself makes an express reservation by saying

I should make it quite clear at the very outset that the question which we have to answer has to be answered with reference to the provisions of the Bihar Sales Tax Act, 1944, and not the Bihar Sales Tax Act, 1947. The Act of 1947 contains different provisions, which provisions do not fall, for consideration in the present case."

11. Section 12 (7) specifically enacts that if for any reason the turnover of a dealer for any period to which the Act applies has escaped assessment or has been under-assessed, the Collector may at any time within thirty six months of the end of that period call for a return under Sub-section (1) of Section 11..... The period of thirty six months is fixed not by a proviso as in Section 10 (6) of the Bihar Sales Tax Act of 1944 but by an independent sub-section itself.

According to Section 12 (7), there can be no reassessment on the ground either of escapement or of under-assessment by the Collector after thirty six months after the end of that period. "Collector" in this section is the same as the word "Collector" used in Section 23 (3) and as there is a limitation provided under a specific section of the Act this must be taken to apply to the case of reassessment by virtue of the exercise of the power of re-assessment in revision also and Rule 54 of the Orissa Sales Tax Rules does not and cannot give any greater power to the Collector exercising revisional authority than what is granted under the Act itself.

The Collector cannot by virtue of that rule which says that the Collector may, of his own motion, at any time within one year from the date of passing of any order by the Assistant Sales Tax Officer or by the Sales Tax Officer or by the Assistant Collector as the case may be, revise any such order from which no appeal has been preferred..... re-assess the turnover which escaped assessment or which was under-assessed within one year of the date of passing of the appellate order after 36 months provided by Section 12 (7). The provision in this rule to that effect, is contrary to the express enactment u/s 12 (7).

12. That Section 12 (7) prohibits a re-assessment of escaped turnover or under-assessed turnover beyond thirty-six months of the end of the period is also clear by the legislature making an amendment by Act 1 of 1955. The amendment is already noted above and it expressly enacts as a proviso to the already existing proviso to Sub-section (6) that the period of

limitation fixed in the proviso immediately preceding shall not apply to assessment under Sub-section (7) of this section or to enhancement of assessment or order of fresh assessment made or passed u/s 23.

Though this new amendment is made as a proviso to Sub-section (6) of Section 12, yet it says that the period of limitation of thirty-six months shall

not apply to assessment under Sub-section (7) or order of fresh assessment made or passed u/s 23. This clearly shows that but for this amendment

Section 12 (7) prohibited any fresh assessment after thirty-six months from the end of the period. This amendment of Sub-section (6) of Section

12 by adding a proviso is, in my opinion, a clear legislative recognition that prior to the amendment no re-assessment can be made by the

Collector" after thirty six months.

13. In my opinion, therefore, the orders of re-assessment made by the Collector of Sales Tax are contrary to law which is apparent on the face of

the orders. The orders are therefore quashed. The petitions are allowed with costs. A consolidated hearing fee for all the three petitions is fixed at

Rs. 250/-.

S. Barman, J.

14. I agree.