
(1988) 03 OHC CK 0014

In the Orissa High Court

Case No : S.J.C. No"s. 60, 61 and 62 of 1979

Bhubaneswar Wholesale Co-Operative Stores Ltd.

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 08-03-1988

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 24(2)(b), 9B

Citation : (1988) 66 CLT 124 : (1988) 70 STC 279

Hon'ble Judges : H.L. Agrawal, C.J.;K.P. Mohapatra, J

Bench : Division Bench

Advocate : R.B. Ray, for the Appellant; The Standing Counsel (C.T.), for the Respondent

Judgement

H.L. Agrawal, C.J.—These three cases arise out of the references called for by this Court u/s 24(2)(b) of the Orissa Sales Tax Act, 1947 (for short "the Act") from the Sales Tax Tribunal, Orissa, at the instance of the dealer.

2. The petitioners and the questions of law are common in all the cases which relate to the assessment years 1973-74, 1974-75 and 1975-76. The statement of case has been called for on the following question of law in the first case (S.J.C. No. 60 of 1979):

Whether, on the facts and in the circumstances of the case, the petitioner can be said to have collected Rs. 81,166.95 by way of sales tax and if so whether the addition of the same to the taxable turnover is legal ?

3. In the other two cases, the questions of law have been framed in identical form but only the amounts vary. While in S. J. C. No. 61 of 1979 relating to the assessment year 1974-75 the amount collected is Rs. 1,27,897.72, in S. J. C. No. 62 of 1979 relating to the assessment year 1975-76 the amount is Rs. 2,09,028.96.

4. The facts:

The petitioner is a co-operative society and deals in grocery and other articles. The assessing officer enhanced the taxable turnover by Rs. 81,156.95 for the assessment year 1973-74, Rs. 1,27,897.72 for 1974-75 and Rs. 2,09,028.96 for 1975-76, on the ground that the petitioner was not entitled to claim deduction of the above amounts representing the amounts of sales tax realised from its purchasers. The petitioner succeeded before the Appellate Assistant Commissioner in appeal but on appeal by the Revenue, the orders of the assessing officer were restored by the Tribunal.

5. Undisputedly, in the sale memos, the petitioner had not shown the price of the goods and the amount of sales tax realised on the sales, separately. The stand of the assessee has been that sales tax was included in the sale price which was, however, bifurcated and shown separately in the books of accounts and accordingly that should not have been excluded from the gross turnover. The Tribunal was of the view that if any amount was realised by the dealer towards the tax, then that was to be excluded from the gross turnover for the purpose of determining the taxable turnover, but in the absence of that having been shown in the sale memos, the taxing authorities rejected the claim.

6. The controversy necessitates reference to some of the provisions of the Act.

7. The expression "gross turnover" has been defined in Section 2(dd) to mean- the total of "turnover of sales, and turnover of purchases".

8. Similarly, "sale price" has been defined in Section 2(h) to mean-

the amount payable to a dealer as consideration for the sale or supply of any goods, less any sum allowed as cash discount according to ordinary trade practice, but including any sum charged for anything done by the dealer in respect of the goods at the time of, or before delivery thereof.

9. Section 9-B which was inserted in the Act by Act 24 of 1950 with effect from 21st December, 1950 also amended from time to time, deals with the provision of "collection of tax by dealers". Sub-section (1) read as follows:

(a) No person other than a registered dealer shall realise any amount by way of tax under the provisions of this Act.

(b) No person shall deduct any amount by way of tax on the purchase turnover from the purchase price payable to his vendor.

10. Rule 26-A of the Orissa Sales Tax Rules provides for maintenance of account of moneys realised or stipulated for realisation by way of tax and is quoted hereunder:

26-A. Maintenance of account of moneys realised or stipulated for realisation by way of tax.-(1) In the account books maintained for the business a separate page shall be set apart and all moneys realised and/or stipulated for realisation by way of tax on each day shall be shown therein as also the payment out of the

above into the Government Treasury.

* * * (3) Every dealer liable to maintain accounts under the proviso to Sub-section (2) of Section 9-B shall maintain a true and correct account of all moneys realised or stipulated for realisation showing the serial number, date, number of the cash or credit memo, sale price and sales tax realised

or stipulated for realisation, if any.

* * *

11. Sub-section (2) of Section 9-B which is equally important reads as follows :

9-B. Collection of tax by dealers.-(1) * * *

(2) Notwithstanding anything contained in Section 15, any registered dealer who realises or stipulates to realise any amount by way of tax on the sale of any goods from the purchaser shall issue a cash or credit memo, as the case may be, signed by the dealer or his servant, manager or agent, to the purchaser showing separately the price of the goods sold and the amount realised or stipulated for realisation by way of tax and shall keep a counterfoil duly signed and shall further maintain a true and correct account of all moneys realised or stipulated for realisation by him by way of tax in the prescribed manner.

Provided....

12. Thus this provision enjoins upon a registered dealer to issue cash or credit memos, showing separately the price of the goods sold and the amount realised, if any, as tax from the purchasers.

13. Sub-section (3) empowers the Commissioner to impose penalty in the prescribed manner on a person who contravenes the provisions of Sub-section (1). In the year 1983 only by Act 23 of 1983 Sub-section (3) was substituted and as the sub-section stands now Sub-section (3)(b) empowers the Commissioner to impose penalty in the prescribed manner on a person who contravenes the provisions of Sub-section (1)(b) or Sub-section (2) noticed above besides the punishment contemplated u/s 25 of the Act.

14. We have seen that on account of this provision contained in Section 9-B(2), the Revenue authorities have disallowed the claim for deduction by the petitioner from its taxable turnover the amount representing the recovery of sales tax from the purchaser although the petitioner purported to support the said claim of recovery of the amount not as a part of the sale price but towards sales tax by its books of accounts in accordance with Rule 26-A. The fact that the petitioner had realised the amount of tax from the customer is perhaps a non-issue.

15. The question that remains for consideration is whether on account of the failure of the petitioner to indicate separately the "price" and the "tax" in the sale memos, would deprive it of the claim of deduction.

16. At this stage, I may refer to Section 5(2)(A) of the Act also which describes

"the taxable turnover" which means "that part of a dealer's gross turnover during any period which remains after deducting therefrom :-

(a) ...

(b) any amount by way of tax realised by the dealer.

17. From the above provision and the scheme of the Act, two things are clear, namely, that (1) under the Orissa Act, a registered dealer is entitled to pass on the burden of sales tax to the purchasers and collect the tax from them and (2) that he is entitled to deduct it from his gross turnover also. This exactly is what the present petitioner is claiming. But that has been denied as already said above only on the ground of its failure to show sales tax separately in the cash memo and accordingly this Court has called for a statement of case.

18. A somewhat similar question had fallen for consideration before this Court in the case of *Gopabandhu Type Foundry v. State of Orissa* (1970) 36 CLT 1156. The facts of this case are very much similar to those in the case in hand. There also, the amount of sales tax realised from the purchasers were not shown in the memos, but were indicated separately in the accounts which could be determined. In these circumstances, it was held:

...In this particular case, the tax realised has been indicated separately in the accounts and the amounts can be easily determined for the purpose of deduction. In the absence of any provision either in the statute or in the rules restricting the rights of the dealer to make such deduction unless the realisation of tax is separately shown in the cash or credit memos, the dealer's right cannot be affected. It is somewhat remarkable that the taxing authorities jumped to a rash conclusion that deduction is not permissible unless the realisation of tax is shown separately in the cash or credit memos. The provision is merely for easy collection of the tax realised. Non-adherence to the prescription in respect of the cash or credit memos does not entail any penal or other consequence. In the absence of such provision, a taxing statute must be construed in favour of the subject, i.e., the dealer or the assessee.

19. I must however observe that Shri R.B. Ray, learned Advocate appearing for the petitioner, could hardly assist us save and except placing the above decision. The learned Standing Counsel could not point out any apparent doubt in the view already taken by this Court and made a halfhearted submission that it was not correctly decided.

20. We have, however, given our anxious consideration to the situation considering its importance and consequences and I would like to discuss in some detail for agreeing with the earlier view of this Court.

21. Section 5(2)(A)(b), already extracted above, entitles a registered dealer to deduct from his gross turnover the amount of tax realised by him without any further qualification that the tax must have been realised in accordance with the procedure mentioned in Section 9-B(2) of the Act. In my view, while it would be

advisable that a registered dealer should indicate the sale price and the tax separately in the memos, but absence of that or the dealer's failure to show the two amounts separately and issuing a memo, showing a consolidated sum would not by itself deprive him of the right to claim deduction from his gross turnover particularly when Rule 26-A of the Rules prescribes maintenance of accounts showing separate details for the moneys "realised or stipulated for realisation by way of tax on each day" which the petitioner-dealer in this case has done.

22. It is no doubt true that the sale price is the valuable consideration for passing of the title in the goods from the seller to the purchaser, but to determine the turnover, a clear distinction has to be made between cases where a dealer is not authorised by law to collect the tax and adds it to the sale value in the bill of sales and collects it from the customer as sale price and cases where the dealer is so authorised. In the former case, it would form part of the purchase price. But where the dealer is entitled to pass on the burden to the purchaser to collect it and pay it to the Government, the amount so collected would retain its character as "tax" and would not form part of the "purchase price" : see [1954] 5 STC 88 (Mad) (Deputy Commissioner of Commercial Taxes, Coimbatore Division v. M. Krishnaswami Mudaliar & Sons).

23. The same view was reiterated by the Madras High Court in Sundaram Motors Pvt. Ltd. v. Joint Commercial Tax Officer, Mount Road II Division, Madras [1965] 16 STC 644(MAD).

24. I may refer to yet another decision of the Madras High Court in Lipton (India) Ltd. v. State of Tamil Nadu [1973] 32 STC 194(MAD) where it was held :

Though the bills referred to an inclusive amount, it was on the basis of a clear understanding between the assessee and its purchasers that that amount would represent the sale price proper and the sales tax thereon, the break-up of which had already been set out in the price list supplied to the purchasers. The assessee therefore clearly intended to pass on the sales tax to its purchasers, though in the bills, the sales tax payable had not been shown separately. The assessee should, therefore, be taken to have substantially complied with the conditions set out in the executive instructions of the Board of Revenue (S. 0. 13), which provided that if sales tax collected was separately shown, the dealer would be entitled to the exclusion of that amount from the taxable turnover.

25. Now I may refer to some decisions of other High Courts. A similar view was taken by the Kerala and the Patna High Courts in (1) Deputy Commissioner of Agricultural Income Tax and Sales Tax Vs. S. Veeriah Reddiar, and (2) Tata Iron and Steel Co. Ltd. Vs. State of Bihar, . In the second case it was observed :

The amount collected by the registered dealer from the customers as sales tax and paid over to the Government cannot be treated as part of the sale price u/s 2(h) and so does not constitute part of the taxable turnover of the registered dealer.

26. Then again the Patna High Court in Radha Krishna Surajmal Vs. Commissioner of Commercial Taxes, made the following observation :

Therefore, for claiming the deduction in terms of Sub-sections (1)(b) and (2)(a) (ii) of Section 7 of the Act, all that is necessary is that there must be evidence, not necessarily only the sale memos, to indicate that apart from the sale value of the goods sold, an amount had been collected by way of sales tax as such. If such evidence is available with the dealer and it is found by the department to be a piece of acceptable evidence, the claim must be allowed.

27. The Mysore High Court has taken similar view in Spencer & Co. Ltd. v. State of Mysore [1970] 26 STC 283(Mys) to the following effect :

A dealer can be said to have collected the amounts by way of tax under the Act where, from the facts and circumstances, it can be inferred that the seller intended to pass on the tax and the buyer had agreed to pay the sales tax in addition to the price and that in the accounts of the dealer he has shown such amounts separately.

28. On a circumspection of the above authorities of different High Courts, the crux of the matter that appears is that where a dealer is authorised by law to pass on any tax payable by him on the transactions of sale to his purchasers, such tax does not form part of the sale price. But where there is no such statutory provision authorising him in that behalf, the tax does form part of the consideration when he includes it in the price and realises the same from his purchaser. The existence of the statutory provision giving authority to a dealer to collect the tax payable on the transaction from the purchaser is, therefore, the settler of the controversy. The decisions of various High Courts taking divergent views are based on the provisions made in the respective State laws. I find full support for talcing this view from the decision in Anand Swarup Mahesh Kumar Vs. Commissioner of Sales Tax, .

29. Examining the facts of the case in hand and the provision of the scheme of the Orissa Sales Tax Act and the Rules, where the liability of sales tax can be transferred from the selling dealer to the purchasers and the same having been shown separately in the books of accounts of the petitioner which has not been otherwise rejected by the assessing officer, it must be held that the petitioner is entitled to claim the deduction of the said amount representing the sales tax recovered from his purchasers from his taxable turnover. A dealer cannot be denied the statutory right of deduction.

30. The answer to the question, therefore, must be given in favour of the petitioner and against the Revenue. The petitioner would also get costs. Hearing fee is assessed at Rs. 250 only.

K.P. Mohapatra, J.

31. I agree.