

(1971) 11 MP CK 0012

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 149 of 1970

Commissioner of Sales Tax

APPELLANT

Vs

Imphalsha Manufacturing Co.

RESPONDENT

Date of Decision : 11-11-1971

Acts Referred:

Madhya Pradesh General Sales Tax Act, 1958 — Section 44

Citation : (1973) J LJ 1048 : (1973) 18 MPLJ 1055 : (1974) 33 STC 263

Hon'ble Judges : S.P. Bahrgava, J; R.J. Bhawe, J

Bench : Division Bench

Advocate : M.V. Tamaskar, for the Appellant; None, for the Respondent

Judgement

S.P. Bhargava, J.

This reference u/s 44 of the M.P. General Sales Tax Act (hereinafter called the Act) has been made at the instance of the Commissioner of Sales Tax, Madhya Pradesh. The question referred for our opinion by the Board of Revenue is as follows:

Whether in making the best judgment assessment, a subsequent opportunity to show cause against the proposed best judgment estimate is to be given to the assessee over and above the one to be given to him to show cause against the proposal to assess him to the best of judgment.

The facts giving rise to this reference may be briefly stated as follows: The non-applicant is a registered dealer engaged in the business of manufacture and sale of water for injections and some other medicines. The non-applicant started its business in 1964 and in its return for the period 25th November, 1964, to 31st March, 1965, it declared its turnover under the Act to be Rs. 57,275.39. Its turnover was determined by the assessing authority to be of Rs. 1,00,000 and the tax assessed was Rs. 4,446.62 and a penalty of Rs. 15 was imposed u/s 17(3) of the Act for filing the return late. The assessee contended that there was no justification for resorting to the best judgment assessment u/s 18 of the Act

and in any case the assessment of tax made was very high. This contention was rejected by the first appellate authority on the ground that the assessee did not maintain day to day quantitative manufacturing account. However, the Tribunal on appeal found that the assessee had maintained a quantitative manufacturing account, but it was held that the best judgment assessment was justified as, there was discrepancy in the figures as per accounts and those shown in the return. In the return the sales were shown to be worth Rs. 57,275.39 and the accounts show the sales to be worth Rs. 64,513.85. It was further held that the assessee had failed to explain this discrepancy before the lower authorities as also before the Tribunal even though an opportunity had been given to the assessee to explain the discrepancy. The Tribunal, however, remanded the case for making fresh estimation on the view that the assessing authority had not given any reason for the actual estimate. In remanding the case the Tribunal observed that in making the best judgment there were two steps, namely, (i) the decision to resort to best judgment assessment, and (ii) the making of actual estimates. It was further observed that it is also settled law that at both the stages the assessee should be given an opportunity to show cause against the proposed action. The Tribunal found that before making the estimates no basis was formulated and that the assessee had not been given any opportunity to plead in respect of the basis. The Tribunal also observed that this was the first order of assessment of the business of the assessee and that being so, the enhancement of nearly 50 per cent in the gross turnover and an enhancement to the extent of nearly Rs. 72,000 in the taxable turnover should have been supported by adequate reasons which was not done in the present case. The Commissioner of Sales Tax felt aggrieved by that part of the order of the Tribunal in which it is said that in making the best judgment assessment an opportunity should be given at both the stages, i. e., before resorting to the best judgment assessment and then for making the estimate.

The contention advanced on behalf of the Commissioner of Sales Tax is that 18 which deals with the best judgment assessment does not provide for two opportunities as stated by the Tribunal. It is stressed that once it is decided to resort to best judgment assessment, further opportunity to plead against the proposed assessment is not necessary and the assessing authority is entitled to make the best judgment assessment on the basis of material already on record. In the same connection, it has been urged that if no material has been gathered behind the back of the assessee, the assessing authority is not required to show the basis of its estimate to the assessee for adopting it. It is urged that all that is necessary for the assessing authority while making the best judgment assessment is to follow the procedure prescribed in Rule 33 which is as follows:

In making an assessment to the best of his judgment under sub (4), (6) or (7) of 18, the assessing authority shall, as far as practicable, have due regard to the extent of the business carried on by the dealer, the surrounding circumstances and all other matters which may be of assistance in arriving at a fair and proper estimate of the taxable turnover of the dealer.

It would be helpful to discuss some decided cases before we come to the question which is required to be answered by us. The expression "to the best of his judgment" occurs in 23(4) of the Income Tax Act, 1922. This expression came up for judicial scrutiny before the Privy Council in Commissioner of Income Tax, Central and United Provinces v. Laxminarain Badridas [1937] 5 ITR 170(P.C.). Their Lordships observed:

He (the assessing authority) must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by, (1) [1937] 5 ITR 170(P.C.). and assessments of, the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary.

The view expressed by the Privy Council in the context of the Income Tax Act has been followed when a similar question arose under the Sales Tax Act. The Supreme Court stated the principle thus in State of Kerala Vs. C. Velukutty, :

Under Section 12(2)(b) of the Act, power is conferred on the assessing authority in the circumstances mentioned thereunder to assess the dealer to the best of his judgment. The limits of the power are implicit in the expression "best of his judgment". Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon the arbitrary caprice of a judge, but on settled and invariable principles of justice. Though there is an element of guess-work in a "best judgment assessment", it shall not be a wild one, but shall have a reasonable nexus to the available material and the circumstances of each case. Though sub (2) of 12 of the Act provides for a summary method because of the default of the assessee, it does not enable the assessing authority to function capriciously without regard for the available material.

In KOYAMMANKUTTY Vs. FOURTH ADDITIONAL Income Tax OFFICER, KOZHIKODE-1, AND ANOTHER., , it was held that where the Income Tax Officer, after rejecting the accounts of the assessee, proceeds to assess the income by adopting a flat rate as the average rate of profit, without intimating to the assessee the average rate of profit and without putting it to the assessee that he proposed to adopt that rate of profit for making the assessment, the order violated the principle of natural justice that an opportunity must be given to the assessee to state his case regarding the proposed action, and the assessment was arbitrary and cannot be upheld. In this case it was observed that apart from the statutory provisions, the court will always insist that rules of natural justice are followed.

In Swamy Bros. Vs. Commissioner Of Income Tax, Mysore and Amp; Travancore-

Cochin, , the position was that the Income Tax Officer had rejected the accounts of the assessee and made an assessment to the best of his judgment by adopting a percentage on the turnover of the assessee and taking into account material from comparable cases of other assessees. It was held that the material on which the officer intended to found his estimate must be disclosed to the assessee and the assessee must first be extended an opportunity to explain the position.

In *Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax, West Bengal* [1954] 26 ITR 775 (S.C), the facts were that the Tribunal did not disclose to the assessee what information had been supplied to it by the departmental representative. It had not given any opportunity to the company to rebut the material furnished to it by him and it declined to take all the materials that the assessee wanted to produce in support of its case. It was held that the assessee had not had a fair hearing. The estimate of the gross rate of profit on sales, both by the Income Tax Officer and the Tribunal, was held to be based on surmises, suspicions and conjectures, and their Lordships came to the conclusion that the assessment levied on the assessee could not be sustained.

In *K. Ballah and Anr. v. Commissioner of Income Tax, Mysore* [1965] 56 ITR 182, a Division Bench of the Mysore High Court held that if an assessing authority wants to make a best judgment assessment on the basis of a comparable case, that case has to be put to the assessee and the assessee must be given an opportunity to give his explanation as regards the same.

In *Omar Salay Mohamed Sait Vs. Commissioner of Income Tax, Madras*, , the Supreme Court laid down:

The Income Tax Appellate Tribunal is a fact-finding Tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it the court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so....

In the instant case, obviously the best judgment assessment appears to have been made u/s 18(4)(d), as, according to the assessing authority, the method employed by the assessee in maintaining his account was such that in the opinion of the assessing authority assessment could not be properly made on the basis of those accounts though the assessee had maintained an account and it could not also be said that he had not adopted regularly any method of accounting. Rule 33, which has been reproduced above, provides that in making

an assessment to the best of judgment under Sub-section (4), (6) or (7) of 18, the assessing authority shall have regard to the various circumstances stated in the rule. However, we find nothing in 18 or Rule 33 which would compel the assessing authority to divide the process of assessment according to the best judgment into two parts or two stages. He need not first announce his decision to resort to the best judgment assessment and then commence the second step by subsequently making a proposed estimate of assessment. After rejecting the books of account on the grounds available to him u/s 18(4), all that would be required to be fairly done would be to point out the discrepancy on the basis of which the accounts could not be relied on to the assessee and to offer him an opportunity to explain the discrepancy if he could. The next point for consideration would be as to what was the estimate which could be made on the ground of the said discrepancy of the turnover which was liable to be taxed. Due to the discrepancy in the accounts, the assessing authority may have reached the conclusion that the discrepancy represented the figure of profits or that the discrepancy represented the amount of some sales which were not properly accounted for. The assessing authority was required to give an opportunity to explain as to which particular conclusion against him should or should not be drawn. In our opinion, the principle emphasized in the decisions discussed above is that when the assessing authority is required to assess any assessee to its best judgment on the basis of any information, comparable cases, flat average rate or any other material on record, it is only fair and proper that such information, cases, rate or material should be brought to the notice of the assessee to enable him to offer any explanation in his favour if he can. If any such information or material is collected behind the back of the assessee, it would be necessary and proper to apprise him of such information or material so that he may explain the said information or material in any manner. However, in our opinion, it is not necessary that the assessing authority must in all cases bring to the notice of the assessee the proposed estimate of assessment and then obtain an explanation from him on the basis of such an estimate. If the authorities had considered all available materials and applied their own mind and tried their best to come to a fair conclusion after bringing the material on record to the notice of the assessee, it cannot be held that in making the best judgment assessment it has not acted according to law only because a second opportunity after disclosing the estimate of the assessment has not been given.

We would, therefore, answer the question referred to us by saying that in making the best judgment assessment it is not always necessary to give a subsequent opportunity to the assessee to show cause against the proposed best judgment estimate over and above the one to be given to him to show cause against the proposal to assess him to the best judgment of the authorities concerned. However, if the best judgment assessment is to be made either on the basis of any fact on record or on the basis of any information given or obtained or on the basis of comparable cases or by working out an average rate, such facts or information must be brought to the notice of the assessee so that he gets an

opportunity to explain the circumstances. Such an opportunity need not be given in two stages, but it has to be given in accordance with the principles of natural justice so that the assessee is not affected adversely without being heard.

We leave the parties to bear their own costs of this reference.