
(2007) 11 OHC CK 0033
In the Orissa High Court

D. Ch. Guruvalu Son and Co.

APPELLANT

Vs

Sales Tax Officer

RESPONDENT

Date of Decision : 28-11-2007

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 12(8)

Citation : (2008) 105 CLT 21 : (2008) 1 OLR 18 : (2008) 14 VST 509

Hon'ble Judges : A.K. Ganguly, C.J;B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.N. Mahapatra, J.—In this Writ Petition, the Petitioner challenges the initiation of re-assessment proceeding u/s 12(8) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as "the Act") for the years 1995-96 and 1996-97 by the Sales Tax Officer, Koraput-II Circle, Rayagada (hereinafter called as "S.T.O.") on the following two grounds.

- i) The A.G. Audit Report on the basis of which proceeding under the Act has been initiated is not in conformity and in contempt of the order of the Hon'ble High Court of Orissa in the cases of P.R. Tata & Co. v. Sales Officer (1971) 27 STC 176 (ori) State of Orissa v. Iqbal Bros. (1990) 79 STC 337 (ori) and
- ii) Non-communication of reason for reopening of the assessment in writing to the Petitioner is arbitrary and vitiates the proceeding initiated u/s 12(8) of the Act.

2. In this case, a Division Bench of this Court on 20.9.2001 while Issuing notice on the question of admission indicated that there were conflicting opinions of this Court on the point at issue and, passed the following order:

...There appears to be some conflicting opinion in the Judgments of this Court in P.R. Tata & Co. v. The Sales Tax Officer, Koraput-I Circle, and Anr. (1971) XXVII -176, State of Orissa v. Iqbal Bros. (1990) 79 S.T.C.337 (ori) and Iqbal Brothers

v. State of Orissa S.J.C. No. 49 of 1986, disposed of on 17.11.1994) which need to be resolved by the Full Bench.

The Hon"ble Full Bench after hearing the parties by its Order Dated 15.2.2007 remanded the matter back to the Division Bench by observing as follows:

5. On going through the aforesaid three Judgments, we find that the decisions in P.R. Tata (supra) and State of Orissa v. Iqbal Brothers (supra) were rendered on different facts and circumstances. In P.R. Tata, the lease was taken by the assessee from the State Govt. and in State of Orissa v. Iqbal Brothers (supra), the royalty was paid to the State Govt. for procurement of Mohua flowers. However, in Iqbal Brothers v. State of Orissa (supra), there was no agreement between the State Govt. and the assessee and it was local tribals from whom the assessee purchased the Mohua flowers and there was no privity of contract between the State Govt. and the assessee. So, the three cases referred to are Judgments passed on different factual backgrounds as indicated above. Therefore, there is no conflict between the decisions in P.R. Tata & Co. v. Sales Tax Officer and State of Orissa v. Iqbal Brothers and Iqbal Brothers v. State of Orissa (supra). Since there is no conflict, there is no question of resolving the same. Accordingly, we remit the matter back to the appropriate Division Bench to dispose of the Writ Petition.

Pursuant to the order of the Full Bench/the matter appeared in the list on 13.11.2007. We heard the Learned Counsel for the parties at length.

3. The case of the Petitioner is that it is a partnership firm and during the relevant period it was carrying on business of rice milling, processing of tamarind seeds to tamarind dal etc. as a registered dealer under the Act. It entered into different agreements on different occasions with the Government of Orissa for procurement of tamarind on payment of royalty from the leased out areas. Under the said lease agreements, the Petitioner was entitled to procure tamarind which existed at the time of entering into the agreement with the Government of Orissa or that may come to exist in future during the period of lease. Copies of the said agreement entered into between the Petitioner and the Government of Orissa are under Annexures-2A and 3A to the Writ Petition. The royalty amount so paid by the Petitioner to the Government of Orissa for procurement of tamarind during the aforesaid three years has been disclosed by the Petitioner in its return as turnover of purchase for the purpose of payment of sales tax under the Act and the same was accepted by the Opp. Party for the three assessment years while passing the aforesaid orders u/s 12(4) of the Act. Subsequently, the S.T.O. has reopened the case and issued notice to the Petitioner u/s 12(8) of the Act on the basis of the A.G.'s Audit Report to include the expenses incurred by the Petitioner towards collection, transportation charges etc. in the purchase price for the purpose of levy of tax under the Act.

Relying on the Judgments of this Court rendered in P.R. Tata's case (supra) and in the case of State of Orissa v. Iqbal Bros, (supra), the Petitioner contended that

expenses incurred by it towards collection and transportation charges cannot form part of the purchase price which is only confined to royalty paid to the Government. Therefore, reopening of assessment u/s 12(8) of the Act is not sustainable. The Petitioner further contended that notice issued u/s 12(8) of the Act is also otherwise not sustainable as the S.T.O. has not indicated the reason for reopening of the assessment to the Petitioner in writing.

4. The Learned Counsel appearing for the Opposite Party vehemently urged that the Petitioner used to purchase tamarind (minor forest product) from the different forest areas by taking exclusive lease from the Divisional Forest Officer during the three assessment years with the condition that the Petitioner will open procurement centres and storage godowns with the approval of the Forest Department and it will purchase tamarind from the primary collectors, mostly tribals, of the concerned area on paying them minimum procurement price fixed by the District Price Fixation Committee and would submit fortnightly return before the Range Officer regarding procurement and disposal of the stock. He further submitted that since the Petitioner had to pay procurement price to the primary collectors and royalty to the State Government as a pre-condition for procurement of tamarind from the leased out area, the Opposite Party is fully justified in issuing the notice u/s 12(8) of the Act to include the procurement and transportation charges of tamarind in purchase price to levy tax thereon. In support of his contention, Learned Counsel cited a Judgment of this Court in S.J.C. No. 49 of 1986 *Iqbal Brothers v. State of Orissa* disposed of on 17.11.1994.

5. In P.R. Tata's case (*Supra*), the issue for consideration before this Court was whether or not the collection, transportation and crushing charges incurred by the Petitioner-firm, who was carrying business in Myrobalan (Harida) by taking lease from the Forest Department, Government of Orissa, were to be included in the "purchase turnover" and were exigible to tax. It was held that under the terms of agreement, forest produce was sold by the Forest Department and purchased by the Petitioner for a consideration money as per the schedule and the purchaser himself was to pluck Harida, collect, transport and crush them. None of these things was done by the seller. The seller also did not incur any expenses towards anything done at the time or before delivery of Harida. Therefore, "purchase price" would not include collection, transport and crushing charges incurred by the Petitioner. In the case of *State of Orissa v. Iqbal Brothers* (*supra*), the question before this Court was whether the dealer was to pay tax on the purchase turnover of Mohua flower on the basis of royalty amount paid by the dealer to the Forest Department for removal of Mohua flower collected from the persons on payment of remuneration or the prevailing market rate at which Mohua flower was sold at the time of purchase by the dealer would be "purchase turnover" of the dealer for the purpose of paying tax under the Act. This Court confirmed the order of the Sales Tax Tribunal relying upon the P.R. Tata's case (*supra*) holding that the dealer was to pay tax on the purchase turnover of Mohua flower on the basis of royalty amount paid by the dealer to the Forest

Department to remove Mohua flower collected from the persons" on payment of remuneration. In *Iqbal Brothers v. State of Orissa* (S.J.C. No. 49 of 1986), disposed of on 17.11.1994, the questions posed for opinion before a Bench of this Court were as follows:

i) Under the facts and circumstances of the case, whether the royalty paid to the Forest Department on the collection of Mohua Flower from Government forest lands shall be the purchase-turnover in the hands of the dealer-Appellant?

ii) Under the facts and circumstances of the case, whether the tribunal is justified to hold that all the charges such as transport charges, commission paid to Agents and handling charges etc. incurred by the dealer-Appellant after collecting Mohua flower from Government Forest lands are to be included in the purchase turnover of the Appellant and are exigible to sales tax in view of definition Under Sections 2(ee) and 2(j) of the Orissa Sales Tax Act.

Considering the facts of the said case, this Court held as follows:

...When a dealer takes lease from the Forest Department and gets the right to collect the forest produce then certainly the consideration money paid by such dealer to the Forest Department representing the royalty becomes the purchase price and as such would be the purchase turnover in the hands of the dealer and any expenses thereafter incurred by the said dealer for plucking, collecting, transporting etc. cannot form a part of the purchase price or purchase turnover. This has been so held in *P.R. Tata's case* (supra). But where the dealer does not purchase the Mohua flower from the Forest Department and in fact somebody else gets the right to collect and the dealer even if factually might pay the royalty which was otherwise payable by the other person the royalty paid by the dealer on behalf or the persons having right to collect Mohua flower cannot be said to be the purchase price for the dealer or the purchase turnover of the dealer.

6. Now, the question which falls for determination by this Court is whether the purchase price as defined u/s 2(ee) of the Act will include both the amount of royalty paid to the State Government and the amount paid to the primary collectors (tribals) for collecting tamarind. To determine the issue it is necessary to decide who is the seller in the present transaction and what is the valuable consideration paid by the purchaser-Petitioner to the seller for purchase of tamarind during the relevant period of lease. It is so necessary because of the fact that tamarind during the relevant period was declared as goods liable to purchase tax u/s 3-B of the Act and, accordingly, the Petitioner is liable to pay tax on its turnover of purchase of tamarind. For this purpose, it is relevant to quote the definition of the terms "purchase turnover" and "purchase price" as defined under the Act. The term "Turnover of Purchase" has been defined u/s 2(j) of the Act which is as follows:

Section 2(j): "Turnover of Purchase" means the aggregate of the amounts of purchase price paid and payable by a dealer in respect of the purchase or supply of goods or classes of goods declared u/s 3-B.

The term "Purchase Price" has been defined in Section 2(ee) of the Act which is as follows:

Section 2(ee): "Purchase price" means the amount payable by a person as valuable consideration for the purchase or supply of any goods less any sum allowed by the seller as cash discount according to ordinary trade practice, but it shall include any sum charged towards anything done by the seller in respect of the goods at the time of or before delivery of such goods other than the cost of freight or delivery or the cost of installation when such cost is separately charged.

Thus, the term "turnover of purchase" means the aggregate of the amount of purchase price paid and payable by a dealer in respect of the purchase or supply of good or classes of goods declared u/s 3-B of the Act and the term "purchase price" means the amount payable by a person as valuable consideration for the purchase or supply of any goods less any sum allowed by the seller as cash discount according to ordinary trade practice, but it shall include any sum charged towards anything done by the seller in respect of the goods at the time or before delivery of such goods.

In this context, it is also relevant to go through the agreement form of the forest contract enclosed to the Writ Petition under Annexures-2A and 3A. It reveals that the said contract has been entered into between the Governor of Orissa on one hand and the Petitioner on the other hand. Relevant portions of the said agreement are quoted hereunder:

Forest Contract Agreement Form

An agreement for the sale and purchase of forest produce made this 1 st day of,October, 1995 between the Governor of Orissa (which term shall include his successor in office) of the one part and Dokichika Guruvulu Son 7 Co. Partner Sri I. Krishna Rao, S/o Late I. Appna, resident of Jimidipeta hereinafter called the forest contractor (which term shall include his heirs executors, "representative and permitted assigns) of the other part. Whereby it is agreed as follows:

- 1) The forest produce sold and purchased under this agreement, hereinafter referred to as the said forest produce, is specified in Schedule-I below and is situated in the area indicated in Schedule-V, hereafter referred to as the contract area.
- 2) The quantity of forest produce sold and purchased under this agreement is all the said forest produce which may now exist or may come into existence in the contract area which the forest contractor may remove from the said area, in accordance with the terms of this agreement, during the period from the 1st day of October 1995 to the 30th day of September, 2000 both days inclusive and it is hereby agreed that the said forest produce may be extracted by the forest contractor only during the aforesaid period.
- 3) The details of the consideration payable by the contractor under this agreement are specified in Schedule-II below. All payments on account of dues

from forest contractors shall be made into a Government Treasury of Sub-Treasury and the Treasury Chalan should be sent at once after each payment to the Range Officer concerned.

4) The routes by which the said forest produce may be removed from the contract area and the depots at which it shall be presented for examination are specified in Schedule-III below....

Sd/- Illegible Divisional Forest Officer Rayagada Division.

7. From a plain reading of the agreement form of forest contract as entered into between the Governor of Orissa and Petitioner it is amply clear that the seller in this case is the Government of Orissa and the buyer is the Petitioner under the contract. Under the contract the Petitioner is liable to pay the consideration as specified in the Schedule-II to the Government of Orissa. On payment of the consideration amount to the Government of Orissa, the Petitioner acquires exclusive right to procure tamarind from the leased out area during the lease period. After acquiring the right to procure tamarind from the leased out area on payment of the consideration money to the Government of Orissa, nothing is done by the seller, i.e., the Government of Orissa for procurement of tamarind by the Petitioner. It becomes the sole responsibility of the Petitioner to procure tamarind from the leased out area at its own cost. Hence, the consideration, i.e., royalty paid by the Petitioner to the Government of Orissa is the purchase price in terms of Section 2(ee) of the Act and the Petitioner's case is squarely covered by the ratio of the decisions rendered in P.R. Tata's case (supra) and State of Orissa v. Iqbal Brothers (supra).

On the other hand, in the agreement form of forest contract under which the Petitioner acquires right to procure tamarind from the leased out area nothing is mentioned to the effect that the Petitioner would purchase tamarind from the primary collectors (tribals) of the area on paying them the consideration money as contended by the Opposite Party. The Opposite Party at the time of hearing also could not satisfy this Court in support of his assertion that the Petitioner purchased tamarind from the primary collectors for any consideration. The facts of the case in Iqbal Brothers v. State of Orissa (supra) are completely different from the facts of the case at hand and that is the distinctive feature.

In view of the above, the Petitioner had rightly treated the royalty paid to the Government for procurement of tamarind from the leased out area as "purchase turnover" of the tamarind for the purpose of payment of tax under the Act.

8. The other ground of challenge to the validity of the notice issued u/s 12(8) of the Act is that on demand the Opposite Party did not intimate the Petitioner the reason for reopening of the assessment u/s 12(8) of the Act in writing. Law is well settled that the assessing officer must have to record reasons in some form before initiation of proceeding u/s 12(8) of the Act. He must at least indicate what is the basis for prima facie conclusion that there has been escapement of assessment or under assessment. In absence of such a finding, the initiation of

proceeding u/s 12(8) is not sustainable in the eye of law. See Suburban Industries Kalinga Private Limited and Anr. v. Sales Tax Officer, Bhubaneswar [1993] 90 STC 280 (ori), State of Orissa v. Ugratara Bhojanalaya [1993] 91 STC 76 (ori), and Indure Limited v. Commissioner of Sales Tax and Ors. [2006] 148 STC. Law is also settled that if the dealer responds and participates in the proceeding, it is open to him to seek for the reasons which necessitated the reopening of the proceeding. At that stage, the assessing officer cannot take the plea that the reasons are not to be indicated. If he is in possession of the materials which he proposes to use against the dealer in the proceeding for re-assessment, he must before using the materials bring them to the notice of the dealer and give them adequate opportunity to explain and answer the case on the basis of those material. (See Suburban Industries Kalinga Private Limited and Anr. [supra] and Sales Tax Officer, Ganjam and Ors. v. Uttareswari Rice Mills reported in [1972] 30 STC 567 (ori))

9. Keeping in view the ratio of the decisions rendered in the above cases, the second ground of challenge is now considered. In paragraph-10 of the Writ Petition it has been averred that in response to the notice issued u/s 12(8) of the Act, the Petitioner appeared before the assessing officer and when asked for the reason for reopening of the assessment in writing, it was pointed out by the S.T.O. that the A.G. Audit party has objected the assessment on the ground that in paying royalty the Petitioner has not included the procurement expenses, transportation and handling charges for collection of tamarind and further the Sales Tax Officer-Opposite Party indicated that the purchase turnover disclosed on the basis of royalty paid to the Divisional Forest Officer in lieu of exclusive right for procurement of forest produce may not be acceptable in view of the latest Judgment of the Hon'ble High Court in Iqbal Brothers" case (supra) rendered on 17.11.1994 in SJC No. 49 of 1986. This shows that the reason for reopening of the assessment has been indicated to the Petitioner by the S.T.O. and only on that basis it has filed the present Writ Petition. It makes no difference even if the reason is not indicated in writing, but communicated to the dealer on its appearance before the assessing officer. Hence, the Petitioner's challenge to the notice issued u/s 12(8) of the Act on the ground of non-communication of the reason for re-opening in writing fails.

But, the Writ Petition is allowed on the grounds discussed in paragraphs-8 and 9 and the notice purported to have been issued u/s 12(8) of the Act vide Annexure-1 is quashed. There shall be no order as to costs.

A.K. Ganguly, C.J.

10. I agree.