

**(1973) 05 OHC CK 0010**

**In the Orissa High Court**

**Case No : Special Jurisdiction Case No. 325 of 1969**

Goswami Press

APPELLANT

Vs

State of Orissa

RESPONDENT

**Date of Decision : 03-05-1973**

**Acts Referred:**

Orissa Sales Tax Act, 1947 — Section 24(3), 5(2)(A)(a)(ii)

**Citation :** (1973) 39 CLT 780 : (1973) 32 STC 479

**Hon'ble Judges :** R.N. Misra, J;B.K. Ray, J

**Bench :** Division Bench

**Advocate :** A.B. Misra, for the Appellant; Standing Counsel (S.T.), for the Respondent

## **Judgement**

R.N. Misra, J.—By order dated 9th November, 1970, made u/s 24(3) of the Orissa Sales Tax Act, 1947 (hereinafter called the Act), this court called upon the Sales Tax Tribunal to refer the following two questions for determination of this court :

(1) Whether in the facts and circumstances of the case, there has been any contravention of the proviso to Section 5(2)(A)(a)(ii) of the Orissa Sales Tax Act and whether the petitioner is liable to pay again tax on the value of the paper sold ?

(2) Whether the tax demanded does not amount to double taxation hit by Section 8 of the Orissa Sales Tax Act?

2. As directed the Tribunal forwarded a statement of facts dated 8th February, 1971. When the case came up for hearing before us on 14th August, 1972, the statement of facts was found to be inadequate and appeared to be too bald and cryptic. Accordingly, we called for a supplementary statement which has in the meantime been received. In fact, as indicated by us in our order dated 14th August, 1972, the Tribunal has now returned a consolidated statement of facts.

3. The assessee is a registered dealer under the Act. In the course of business it undertakes printing of materials on orders from customers. Sometimes

customers furnish paper necessary for the printing and on occasions paper is supplied from the stock of the assessee. The assessee maintains an order-book as per pro forma enclosed to the statement of facts wherein the orders are serially noted and number and particulars of the transactions are noted in the respective columns of the book. From the entries in this register, it can easily be found out as to in which case paper has been supplied by the customer and where paper has been supplied by the dealer. In such cases where paper is supplied by the customer, the bill is in respect of printing charge only and where paper is supplied by the dealer, two bills are prepared-one for the sale of paper where tax under the Act is charged and the other for labour and other charges. These two bills are prepared on the same occasion with reference to the same order at the time when the printed materials are delivered to the customer and the money is realised. A sample copy of the bill has also been forwarded along with the statement of facts for reference by us.

4. For the year 1965-66, the assessee returned a gross turnover of Rs. 3,91,263.75 and taxable turnover of Rs. 1,17,202.24. In the taxable turnover was included the sale price of paper to the tune of Rs. 34,061.12. The assessing officer excluded from the gross turnover returned by the assessee the printing charges which represented payment for labour only and by that process arrived at a gross turnover of Rs. 1,23,205.59. The assessing officer proceeded to determine the taxable turnover thereafter. During the year, the dealer had purchased paper worth Rs. 36,016.08 free of tax on the strength of its registration certificate by furnishing the requisite declaration that the paper purchased was meant to be resold within Orissa. The assessing officer found that out of this purchase of paper, the assessee had sold paper to the tune of Rs. 34,061.12 to the customers. He obviously was of the view that there was indeed no sale of paper as such. The assessee after procuring orders for printing had utilised paper to the tune of Rs. 34,061.12 in executing the orders for printing. After deducting 10 per cent estimated profit, he came to hold that for violation of the proviso to Section 5(2)(A)(a)(ii) of the Act, a sum of Rs. 30,655.02 was to be added to the taxable turnover. Accordingly, he directed that amount to be so added. Consequently, the taxable turnover was enhanced to Rs. 1,47,857.26, which was in excess of the gross turnover determined to the tune of about Rs. 25,000.

5. The assessee appealed to the first appellate authority contending that there was no material for holding that there was violation of the undertaking in the declaration furnished by the assessee at the time of purchase, namely, that paper purchased without payment of tax on the basis of the declaration was to be resold in Orissa. According to the assessee, the order-book was regularly maintained and it clearly indicated as to in which case paper was being supplied by the customer and also in which case the assessee was using its own paper. The sale memos also show that paper as such had been sold and after title in the paper had passed on to the customer, the same had been retained by the assessee for utilisation in execution of the printing order. The first appellate

authority, however, did not give any relief. On an appeal to the Tribunal, the assessment was affirmed.

6. Dealing with the contention of the assessee, the Tribunal in second appeal stated:

...Therefore, it was contended on behalf of the appellant that instead of making two bills, one for sale of paper and thereafter for printing the materials on that paper, the assessee has only put the whole thing in one bill and that does not make any difference. In other words, the papers were first sold to the customers and thereafter whatever was ordered by the customers was printed on that paper. The learned State Representative relied on the case of *Sardar Printing Works v. Commissioner of Sales Tax* [1958] 9 S.T.C. 75 and contended that the orders placed by the customers for supply of such job-works are contracts for sale of goods and not contracts for work and labour. That is exactly a case that fits into facts in this case. There, his Lordship held that:

"Stationery sold by a printer to the customers are goods within the meaning of the Madhya Bharat Sales Tax Act of 1950 and when a printer brings into existence printed stationery to the order of the individual customers, he produces a commercial commodity which is capable of being sold and supplied.

7. The assessee's case has been that an order-book is maintained in the regular course of business. When a printing order is placed, an entry is made in that register. Therein it is indicated as to whether the customer placing the order supplied the paper on which printing has to be done or as to whether the assessee, that is, the printer has to purchase the paper. As we have already indicated, in the statement of facts sent to this court the Tribunal has stated with reference to the order-book thus :

...It maintains an order-book as per pro forma enclosed wherein the orders are serially noted and numbered and the particulars of the transactions are noted in the respective printed columns. From the entries in the register, transactions where the press supplies the paper and where the party supplies are clearly distinguishable....

A copy of the pro forma which accompanies the statement of facts is as follows :

Goswami Press Commercial Printing Department Order-book

Column:

- (1) Order No.
- (2) Date
- (3) Name and address of the party
- (4) Particulars of the job
- (5) Instructions re. size, ink, etc.

- (6) Date to be delivered
- (7) Proof to be corrected by
- (8) Paper to be supplied by
- (9) Cost of paper
- (10) Rate of printing
- (11) Bill No. and date
- (12) Amount
- (13) Advance if any
- (14) Remarks

As indicated in the statement of facts, entries are regularly made at the time of placing of orders in this register. If the entries are properly made in this register at the time when orders are placed, it becomes difficult to accept the contention of the department that a mere paper transaction is made to avoid payment of sales tax by showing a make-belief sale of paper. The fact that at the time when delivery of the printed material is made separate bills are prepared would lose importance in view of the entry in this register at the time when orders are secured. We are not in a position to hold that this register is not properly maintained. On the other hand, the statement of facts would show that there is regular entry in this register.

8. The proviso to Section 5(2)(A)(a)(ii) of the Act can be attracted only when it is found that the declaration has been violated. The department's stand in this case is that though the assessee undertook to sell paper as paper, it has converted the paper into printed material which is a different commercial commodity and by selling such commodity there has been violation of the declaration. We are of the view that the burden lies on the assessee to establish the claim u/s 5(2)(A)(a)(ii) of the Act. But when action has to be taken under the proviso thereto, burden lies on the department to hold that there has been a violation. We cannot assume, agreeing with the learned standing counsel, that the burden is also on the assessee to show that there has been no violation. The negative is not to be proved by the assessee. Since the addition to the taxable turnover can be made in terms of the proviso only on establishing the violation, the revenue has the liability to establish that fact. There is no evidence on record to show that such burden lying on the revenue has been discharged in this case. There may be some suspicion arising out of the manner in which the bills are made. Suspicion, however great, cannot discharge the burden that lies on the revenue in order that the proviso may be put into play. Again, the register referred to above to a considerable extent stifles the scope of suspicion. We do not find any material on record to show that there has been violation of the undertaking.

9. The learned standing counsel wanted to rely upon a statement furnished by the assessee during assessment proceeding of the turnover. There has been no reference to this document either in the appellate order of the Tribunal or in the statement of facts sent to this court. The document has not been put to the assessee. We agree, it is a document which came from the assessee on the record. But, if it was to be utilised against the assessee in all fairness the assessee's attention should have been brought to the document particularly because the assessee was contending to the contrary. From that document also we are not in a position to draw anything positive against the assessee. The assessee has contended that it has sold paper qua paper and there has been no violation of the declaration. On the record before us that appears to be the only conclusion possible to be drawn. Several cases have been cited to us including some of this court on the point. We do not, however, find any necessity to refer to those decisions because, in our view, this case can be disposed of on what we have said above. Our answer to the first question shall, therefore, be:

On the facts and in the circumstances of the case, the revenue has failed to establish any contravention of the proviso to Section 5(2)(A)(a)(ii) of the Act and, therefore, the petitioner is not liable to pay tax on the value of the paper sold.

On the aforesaid finding, the second question does not arise for determination. We decline to answer it.

10. The reference is thus disposed of against the department. We, however, make no order as to costs.

B.K. Ray, J.

11. I agree.