

(1961) 03 OHC CK 0001

In the Orissa High Court

Case No : Special Jurisdiction Case No. 73 of 1959

Jami Biswanath Prusthy

APPELLANT

Vs

Commissioner of Sales Tax

RESPONDENT

Date of Decision : 28-03-1961

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1961) 12 STC 606

Hon'ble Judges : R.K. Das, J;G.C. Das, J

Bench : Division Bench

Advocate : A. Das, for the Appellant; G.K. Misra, for the Respondent

Judgement

G.C. Das, J.—The following questions of law have been referred to this Court by the Member, Sales Tax Tribunal, Orissa, under Sub-section (1) of Section 24 of the Orissa Sales Tax Act (Orissa Act 14 of 1947) (hereinafter referred to as "the Act"):

(1) Is not the assessment arbitrary and illegal when the assessing officer after rejecting the return and the accounts bases his estimate on no evidence whatsoever except on an observation that the amount returned by the assessee is very big ?

(2) Whether best judgment assessment can be made u/s 12(2)(b) of the Act ?

(3) In case a defect is found out in accounting on a particular day in a quarter, can the accounts of other quarters for which no defect is at all found out be rejected even though the unit of assessment is a quarter for the purpose of assessment under the Sales Tax Act?

2. The facts are that the dealer-assessee is a registered dealer under the Orissa Sales Tax Act bearing No. G.A. 1234. He was assessed u/s 12(2) of the Act for the quartets ending 30th June, 1954, to 31st December, 1954. He submitted his returns and produced his account books in support of the figures returned by

him. On 22nd August, 1954, one of the inspecting officers of the Sales Tax Department found one Kota Narayana of Ichhapur at the bus stand of Berhampur with some goods ready to go by bus to Ichhapur. Kota Narayana gave a statement in writing in Telugu to the inspecting officer mentioning therein that the goods were purchased by him. One of the items of purchase was a bag of Bengal gram kept in two bags which Kota Narayana admitted to have purchased from the dealer-assessee Jami Biswanath Prusthy on the previous day, that is, on 21st August, 1954. He also admitted that the assessee did not give him any cash memo. The same inspecting officer then contacted the dealer-assessee on the very next day and found that the sale of a bag of Bengal gram to Kota Narayana on 21 August, 1954, had not been entered in the sale register. One of the partners of the assessee who was present then gave out that no such sale was effected to Kota Narayana. When the assessments for the said three quarters came up before the assessing officer, the assessee was confronted with the statement of Kota Narayana, and thereafter he produced a duplicate copy of a cash memo which mentioned sale of a bag of Bengal gram and a dozen of Lux toilet soap, but it did not mention the name of the purchaser. Bengal gram, it may be remembered, is not a taxable commodity. The assessing officer, however, did not accept this cash memo, since Kota Narayana did not assert before the inspecting officer on 22nd August, 1954, that he had also purchased a dozen of Lux toilet soap as mentioned in the duplicate copy of the cash memo. Thus, on the finding of these items of suppression in the account books of the assessee, the assessing officer rejected the books of accounts as unreliable and did not accept the turnovers as returned by the assessee for all the three quarters. Thereafter he estimated the suppression of sales for all the three quarters at Rs. 75,000, that is, Rs. 25,000 per quarter and added them back to the turnovers returned. This, he did after considering the business extent of the dealer-assessee. On appeal, before the Assistant Collector of Sales Tax, Kota Narayana was also examined, but he supported the statement of the dealer-assessee that his purchase of a bag of Bengal gram at Rs. 47 from the dealer-assessee is covered under the duplicate cash memo. A perusal of this statement along with the statement given by him in Telugu before the inspecting officer clearly shows that while sticking to his case that no cash memo was granted for the sale of a bag of Bengal gram, the witness brought in an absurd story that he was not there at the time of actual sale he having sent two Telugu women labourers to purchase the commodity from the dealer-assessee. This story suggests that, the purchase could not have been made, on 21st August, 1954, and must have been on 22nd August, 1954. Accordingly, it belies the date of purchase mentioned in the duplicate copy of the cash memo. Similarly in an attempt to reconcile the fact of sale of a dozen of Lux toilet soap mentioned in the duplicate cash memo, and the absence of his assertion on 22nd August, 1954, before the inspecting officer that he had also purchased a do/en of Lux toilet soap, the witness gave out an unreliable and prevaricating story that he had to purchase them for another and delivered them to him on receipt of the price at the bus-stand. Earlier in that very statement he said that he had purchased them for private use. Accordingly,

the Assistant Collector preferred the earlier statement made by this witness before the inspecting officer. Thus, he rejected the case of the assessee and confirmed the order of the assessing officer. The assessee thereafter filed a revision before the Collector of Sales Tax which came to be decided according to the new provisions by the Tribunal u/s 23(3) of the Act. The Tribunal accepted the concurrent findings of the assessing officer and the first appellate authority that the case of suppression of sale of a bag of Bengal gram at Rs. 47 was established. Consequently, the Tribunal held that the assessing officer was justified in rejecting the books of account, and the returned turnovers. In view of the fact that the accounts were maintained on annual basis and the three quarters under reference were within one financial year, it held that the estimate was neither arbitrary, nor capricious since the assessing officer took account of the volume of business of the assessee. The questions referred to this Court are pure questions of law.

3. In connection with questions Nos. (1) and (2), it was argued by learned counsel on behalf of the assessee that there was no evidence before the assessing authorities to make the best judgment assessment. For this purpose, he relied upon my judgment in the case of Fagumani Khuntia Vs. Commissioner of Income Tax, and another decision of this Court in the case of Jami Narasaya Prusty v. State of Orissa [1958] 9 S.T.C. 648 as also on a decision of the Supreme Court reported in Raghubar Mandal Harihar Mandal v. The State of Bihar [1957] 8 S.T.C. 770. In the case of Jami Narasaya Prusty(r), Rao, J., took the view that errors apparent on the face of the record are always treated as errors of jurisdiction for purposes of quashing and for issuing a writ of certiorari. He further held that the assessments for the three periods should be quashed inasmuch as they were based upon mere guess-work and there was no proper basis for making the best judgment assessment. As the error was apparent on the face of the order, it was not necessary for the assessee to go in appeal under the Sales Tax Act before invoking the jurisdiction of the High Court under Article 226. The question therefore is whether there was any material before the assessing authority to proceed with the assessment under Sub-section (3) of Section 12 of the Act. The materials, as has been found out by the assessing authority, are suppression of several items, the habit of the assessee and the volume of business. In the case of Fagumani Khuntia Vs. Commissioner of Income Tax, cited above, I held that where accounts have been produced and the case is not dealt with u/s 23(4) the "basis" and "manner" of computing the profits under proviso to Section 13 have to be legal and judicial. The Court will not interfere with the action of the Income Tax authorities under the proviso to Section 13, unless their action is arbitrary, capricious and unreasonable. I further held that there is no provision in the Income Tax Act which imposes a duty on the Income Tax Officer to disclose to the assessee the material on which he proposed to act while computing the assessment u/s 23(3) ; the principles of natural justice require that he should draw the assessee's attention to it and give him an opportunity to show that the officer's information is wrong and he

should also indicate in his order the material on which he has made his estimate. The question seems to have been set at rest by the decision of the Supreme Court in the case of *Raghubar Mandal Harihar Mandal v. State of Bihar* [1957] 8 S.T.C. 770. The Supreme Court in that case held that when the returns and the books of account are rejected, the assessing officer must make an estimate and to that extent he must make a guess, but the estimate must be related to some evidence or material and it must be something more than mere suspicion. He must make what he honestly believes to be a fair estimate of the proper figure of assessment and for this purpose he must take into consideration such materials as the assessing officer has before him and all other matters which the assessing officer thinks will assist him in arriving at a fair and proper estimate. That was a case under the Bihar Sales Tax Act, and there was no material on record to support the estimate made by the assessing authorities. Their Lordships of the Supreme Court accepted that there was discrepancy between the return filed and the accounts filed in support of it. They found that the assessing authorities having rejected the returns and the books of account, had proceeded to estimate the gross turnover. They also found that in so estimating the gross turnover they did not refer to any materials at all and referred to the order passed by the Sales Tax Officer in respect of the assessment for the quarter ending 30th June, 1946. I would like to quote the order of the Sales Tax Officer as quoted in that judgment :

I reject the dealer's accounts and estimate a gross turnover of Rs. 4,00,000 (four lakhs). I allow a deduction of 2 per cent, on the turnover and assess him on Rs. 3,92,000 to pay sales tax of Rs. 6,125.

Thus, in that case, there was absolutely no material for the assessment. As I had stated earlier in the present case the materials before the assessing authorities were the suppression of certain items from the books of account, habit of the assessee and the volume of the business that he had been carrying on. This is directly covered by the decision of the Supreme Court in the case of *Raghubar Mandal Harihar Mandal* [1957] 8 S.T.C. 770 quoted above. Thus, the circumstances, the suppression of transactions and the habit of the assessee are all materials for proceeding to make the best judgment assessment. Hence the first question must be answered in the negative.

4. With regard to the second question, "whether best judgment assessment can be made u/s 12(2)(b) of the Act", I have discussed the matter at great length in the case of *Silla Krishna Murty*, Since reported at [1961] 12 S.T.C. 584, which judgment I have just delivered. I had taken the view in that case that once the assessee does not comply with all the terms of a notice issued to him under Sub-section (2) of Section 12 of the Act, the assessing authorities are competent to proceed u/s 12(2)(b) of the Act. Hence we would answer the question in the affirmative.

5. With regard to question No. (3) it was argued that when Section 15 of the Act lays down that the assessee shall give a true account of the value of goods

bought and sold by him, he filed his return u/s 11. Rule 20 of the Orissa Sales Tax Rules provides for the filing of the return for each quarter of a year. Thus, it was argued that the unit of assessment is each quarter, the assessment of which must be completed separately and if any defect is found with regard to the accounting in respect of a particular quarter, the accounts for that quarter is liable to be rejected and not for the whole year. I am afraid, I cannot accept this argument. Doubtless, quarterly returns are to be submitted under the law. The assessee in this case submitted his quarterly returns but maintained the accounts for the financial year. Sub-section (1) of Section 11 enjoins upon the dealer to file returns for the quarter and under Sub-section (1) of Section 12 if the Commissioner is satisfied without requiring the presence of the registered dealer or the production by him of any evidence, that the returns furnished in respect of any period are correct and complete, he shall assess the amount of tax due from the dealer on the basis of such returns. Under Clause (a) of Sub-section (2) if the Commissioner is not satisfied without requiring the presence of a registered dealer who furnished the return or production of evidence that the returns furnished in respect of any period are correct and complete, he shall serve on such dealer a notice in the prescribed manner requiring him on a date and at a place to be specified therein, either to attend in person or to produce or to cause to be produced there any evidence on which such dealer may rely in support of such returns. Thereafter under Clause (b) he would proceed to hear the case and make the assessment. Clause (j) of Section 2 defines "year". "Year" means the financial year. The assessee submitted his accounts for the financial year. Rule 26-A of the Orissa Sales Tax Rules, 1947, prescribes the procedure for maintenance of account of moneys realised as sales tax. It reads as follows:

(1) In the account books maintained for the business a separate page shall be set apart and the collections on account of sales tax made every day shall be shown therein as also the payment out of the above into the Government Treasury.

(2) Every registered dealer shall maintain the books of account, registers and other documents including bills, credit, and cash memoranda, invoices and vouchers relating to the business of any year for at least 3 years thereafter.

Thus, the intention of the Legislature seems to be clear that the books of accounts are to be maintained on annual basis. Section 15 of the Act directs a dealer to maintain correct and complete accounts. Therein, of course it does not specify the period for which accounts are to be maintained. But the State Government have been empowered to make rules in that behalf and accordingly the above Rule 26-A was framed by the State Government. It is fairly clear that the intention is that the books of account are to be maintained on annual basis. That being so, there is no substance in the argument as advanced by Mr. Das.

In the result the question No. (1) is answered in the negative whereas questions Nos. (2) and (3) are answered in the affirmative. In view of our answers, the assessee must pay the cost of the Commissioner which is assessed at Rs. 100.

R.K. Das, J.

6. I agree.