
(1970) 02 OHC CK 0022
In the Orissa High Court
Case No : S.J.C. No. 1 of 1965

Muralimohan Prabhudayal

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 03-02-1970

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 24(1)

Citation : (1970) 26 STC 22

Hon'ble Judges : G.K. Misra, C.J.; S. Acharya, J

Bench : Division Bench

Advocate : P. Kar, for the Appellant; The Standing Counsel (Sales Tax), for the Respondent

Judgement

G.K. Misra, C.J.—The two questions referred to this court for answer u/s 24(1) of the Orissa Sales Tax Act are as follows :

(1) Whether the taxing officers are precluded from making a fair and reasonable guess about the rate of profit if the same is found to be low on a consideration of the local conditions though the accounts as maintained are found to be correct.

(2) Whether in the facts and circumstances of the case the estimation of profit rate as made is justified or is arbitrary based on surmises and conjectures.

2. The facts leading to this reference are clearly stated in the reference order. The quarter in respect of which the assessment has been made relates to the quarter ending with 31st December, 1958. The dealer is a wholesaler in grocery articles. He returned a profit at a rate of 4 per cent. in his account books. The assessing officer is of opinion that the normal profit in the locality in such business would be between 8 per cent. to 12 per cent. He accordingly estimated the rate of profit at 8 per cent. and enhanced the returned figures. The first appellate authority estimated the rate of profit at 6 1/4 per cent. The Tribunal upheld the order of the Assistant Commissioner. The Tribunal held that big dealers could usually maintain their accounts perfectly and yet manipulate the

same showing lesser returns which could be done by showing a low rate of profit. He was of opinion that an estimation can be made by the taxing officer of the reasonable rate of profit taking into consideration the local condition of the wholesale dealers in grocery articles. It was accepted in the reference order that the source of knowledge of the general local condition of the business of the wholesale grocery dealers was not made known to the appellant. Thus the estimate was made without furnishing the materials on the basis of which the taxing authorities differed from the rate furnished in the returns of the dealer.

3. From various cases dealt with by us it seems clear that the Tribunal has no clear conception of law even though high authorities were cited before him. The law on the point is no longer in doubt and may be stated in clear terms. Rules of evidence are not strictly applicable to assessment proceedings under the Sales Tax and the Income Tax Acts. Evidence which is not admissible under the Evidence Act may be entertained in respect of assessment proceedings. But if such evidence purported to constitute the basis of assessment, then the assessee or the dealer must be given a reasonable opportunity to rebut such evidence. Without reasonable opportunity being given to the assessee to rebut the materials intended to be used against the assessee, those materials cannot be used. They would be inadmissible. There cannot be an assessment purely on guess which is not subjected to explanation given by the assessee. The principle was very clearly laid down in *Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax, West Bengal* AIR 1955 S.C. 65, in an Income Tax case and the identical principles were followed in a sales tax case in *Raghubar Mandal Harihar Mandril v. The State of Bihar* [1957] 8 S.T.C. 770 (pat) .

4. As a necessary corollary of the aforesaid principle the assessing authority cannot declare the account books to have not been properly maintained on the basis of information not supplied to the assessee. In this case the Tribunal came to the conclusion that account books were correctly maintained. He, however, did not act upon the account books on the basis of an information obtained by the taxing officer that the rate of profit prevalent in the locality pertaining to such type of business was much higher. As this information was not supplied to the assessee for rebuttal, it was inadmissible in evidence. If this evidence is excluded, then there is no other material on the basis of which the account books could have been rejected. If from extraneous evidence allowed to be rebutted by the assessee it could be established by the assessing authorities that the account books were wrong, then the account books could be rejected even though arithmetically they were accurately maintained.

5. As has been discussed already, the dealer is to be given ample opportunity to rebut the materials found against him. A question has been raised as to the ambit and amplitude of this opportunity. In *Raghubar Mandal's* case [1957] 8 S.T.C. 770 the Supreme Court approved *GUNDA SUBBAYYA Vs. COMMISSIONER OF Income Tax, MADRAS.*, , and (1944) 12 ITR 393 . In the Madras case, their Lordships of the Full Bench enunciated that the principle of natural justice had

application to an assessment proceeding under a taxing statute where particular materials were proposed to be used against the assessee. In the language of their Lordships, the assessing authority should draw the assessee's attention and give him an opportunity to show that the officer's information is wrong. In the Lahore case, four propositions were laid down. They are:

(i) The taxing officer is not bound to rely on evidence produced by the assessee which he considers to be false.

(ii) If he proposes to make an estimate in disregard of the evidence, oral or documentary, led by the assessee, he should in fairness disclose to the assessee the materials on which he is going to found that estimate.

(iii) He is not, however, debarred from relying on private sources of information, which sources he may not disclose to the assessee at all.

(iv) In case he proposes to use against the assessee the result of any private enquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilised to such extent as to put the assessee in possession of full particulars of the case he is expected to meet and should further give him ample opportunity to meet it, if possible.

It is the amplitude and ambit of this fourth proposition which needs examination. There cannot be any controversy that the assessee can adduce independent evidence of his own to disprove the particulars proposed to be used against him. The question is: whether he can have the right of cross-examination in certain circumstances. Take an illustration. A third party's accounts are proposed to be used against the assessee and if such accounts are relied on, the assessee's accounts are to be discarded. It is contended by the learned standing counsel that supply of a copy of the accounts of the third party would be sufficient material particulars and the assessee cannot be permitted to test the correctness of those accounts by cross-examination, if necessary. We are unable to accept this contention which is abhorrent to the elementary concept of natural justice that no material should be accepted without being tested. If the assessee gets an opportunity by cross-examination, he can establish that the accounts of the third party are wrong and manipulated to suit the interest of the third party, or that they were intended to be adversely used against the assessee with whom the third party had inimical relationship. It is difficult to accept the contention in such a case, that the ample and reasonable opportunity to be given to the assessee would not include within its sweep the right of cross-examination.

A number of decisions have been cited before us. It is unnecessary to examine all of them. Jayantilal Thakordas v. State of Gujara [1969] 23 S.T.C. 11 is a Bench decision of the Gujarat High Court which takes a view in support of the revenue. For reasons discussed we are unable to accept this decision as laying down good law. If critically examined, it runs counter to the pronouncement of the Supreme Court in Raghubar Mandal's case [1957] 8 S.T.C. 770, though it has been referred to in that decision. It differed from Appukutty v. State of Kerala

[1963] 14 S.T.C. 489, a Single Judge decision of the Kerala High Court, which according to us lays down the correct principle. In paragraph 8, his Lordship observed :

In the first place, the assessing authority in my view had absolutely no justification for relying upon the books of account of a third party, much less the secret account books, as against persons like the petitioner, without affording an effective opportunity to cross-examine those persons who are supposed to have maintained the secret accounts and from whom they have been discovered. The fact that some third party maintaining even according to the department, some secret accounts has made certain entries in his accounts which may connect a person like the petitioner, by itself will not give jurisdiction to the assessing authority to utilize that information, unless that person has been given ample opportunity, in the presence of the person who has kept the secret accounts to effectively cross-examine him and elicit the necessary facts as to how exactly the relevant entries came to be made connecting the petitioner with such books of account.

The Gujarat decision wrongly assumed that the aforesaid Kerala decision was oblivious of the legal position that the Evidence Act had no application to assessment proceedings. The legal position has been clearly explained in *T. Devasahaya Nadar Vs. Commissioner of Income Tax, Madras.*, . A Bench of the Madras High Court observed thus :

We are of opinion that it cannot be said as a general proposition of law that any evidence upon which the department might rely should have been subjected to cross-examination. The procedure for assessment is indicated in Section 23(3) of the Act. The Income Tax Officer is not a court. Having regard to the nature of the proceedings, he occupies the position of a quasi-judicial tribunal. He is not bound by the rules of evidence in the Indian Evidence Act. The limit of the enquiry and the kind of materials or evidence which he can act upon cannot be specified and the statute has not attempted it. Wide though his powers be, he must act in consonance with rules of natural justice. One such rule is that he shall not use any material against the assessee without giving him an opportunity to meet it. The source of information for the material against the assessee need not be divulged. In fairness to the assessee he should be told what is against him, so that he may, if he can, displace it. It is no denial of natural justice if the Income Tax Officer refuses to produce an informant for being cross-examined by the assessee. If any witness is examined in the presence of the assessee, he must of course have a right of cross-examination....The range of natural justice is wide and whether or not there has been violation of natural justice would depend on the facts and circumstances of the case.

6. Thus, the position can be summed up by saying that, as a general rule, it cannot be said that in no circumstances a dealer or assessee has a right of cross-examination. He would have such a right of cross-examination if the facts and circumstances so justify.

7. On the aforesaid analysis, we would answer the questions referred thus:-

(i) The taxing officers are not precluded from making a fair and reasonable guess about the rate of profit if the same is found to be low, on a consideration of the local conditions, though the accounts are found to be correct, provided that the further condition that the information on the basis of which a fair and reasonable guess is made is supplied to the dealer and a reasonable opportunity is given to him to rebut the same, is fulfilled.

(ii) In the facts and circumstances of this case, the estimation of profit rate as made was not justified and is arbitrary as it was based on surmises and conjectures, and as no reasonable opportunity was given to the dealer to know and to rebut the same.

8. In the result, the reference is accepted ; but in the circum-stances there will be no order as to costs. The petitioner is, however, entitled to the refund of the reference fee.

S. Acharya, J.

I agree.