
(1972) 03 P&H CK 0016

In the Punjab And Haryana At Chandigarh

Case No : General Sales Tax Reference No. 19 of 1965

Pahar Chand and Sons

APPELLANT

Vs

The State of Punjab

RESPONDENT

Date of Decision : 17-03-1972

Acts Referred:

Punjab General Sales Tax Act, 1948 — Section 11, 2, 22, 23, 5

Citation : (1973) 30 STC 211

Hon'ble Judges : S.S. Sandhawalia, J; D.K. Mahajan, J

Bench : Division Bench

Advocate : D.N. Awasthy and A.C. Jain, for the Appellant; R.K. Chhibber, for Advocate-General, for the Respondent

Judgement

D.K. Mahajan, J.—At the instance of the assessee this court directed the Sales Tax Tribunal u/s 22(3) of the Punjab" General Sales Tax Act to state the following question of law for the opinion of this court:

Whether, in the circumstances of the case and on the evidence, the finding that the disputed sales were not deductible from the petitioner's taxable turnover, is legally unjustified ?

2. When the reference was made we directed the Tribunal by our order dated 12th January, 1970, passed u/s 23(4) of the Act to make a proper statement of the case. This has been done.

3. The assessment year in question is 1952-53. The assessee is the firm Messrs. Pahar Chand and Sons, a registered dealer under the Act. The firm is dealing in vegetable ghee and cloth. It submitted all the four quarterly returns for the assessment year in question and disclosed its gross turnover at Rs. 4,65,865-3-0. It claimed deductions in respect of sales made to registered dealers amounting to Rs. 3,72,903-11-6 u/s 5(2)(a)(ii) and Rs. 22,464-4-0 u/s 5(2)(a)(v) of the Act. An amount of Rs. 2,203 was voluntarily deposited as sales tax. The assessing authority issued a notice in form S.T. XIV to the dealer on 4th

December, 1954. On behalf of the assessee, Shri Pahar Chand's statement was recorded by the assessing authority on 28th November, 1955, which revealed that inter-State sales amounting to Rs. 22,464-4-0 had been made by the applicant-firm to the following dealers:

1. M/s. Amir Chand Faquir Chand, Rs. 5,088 Aut, Himachal Pradesh. 2. M/s. Ram Singh Jaswant Singh, Rs. 8,751-4-0 Phagwara. 3. M/s. Gural Singh Jaswant Singh, Rs. 8,625 Phagwara.

4. On enquiries conducted by the assessing authority it was held that the deductions amounting to Rs. 22,464-4-0 on account of these sales being inter-State sales could not be allowed u/s 5(2)(a)(v) of the Act. The reason was that these sales were made to the purchasing dealers at Amritsar and the property in goods had passed at Amritsar and there was nothing to prevent them from reselling the goods at Amritsar.

5. The claim of the dealer for deductions in respect of sales made to registered dealers amounting to Rs. 3,72,903-11-6 u/s 5(2)(a)(ii) of the Act was gone into by the assessing authority. It came to the conclusion that the sales made to M/s. Des Raj Om Dutt, Gurdaspur, amounting to Rs. 41,487-8-0 had not been proved. In respect of sales amounting to Rs. 35,019-7-0 to M/s. Gurdial Singh Sohan Singh, a registered dealer, on the basis of private enquiries, it was found that these sales had been made to a dealer who had closed its business after obtaining the registration certificate. A notice to this dealer was issued on 21st January, 1956, to show cause why the deductions claimed u/s 5(2)(a)(ii) of the Act be not disallowed. The dealer was allowed to give evidence. But his claim that he be told on what material the notice dated 21st January, 1956, had been issued was rejected. After considering the evidence led by the dealer and the material collected behind the back of the dealer it was held that the sales in question were not genuine. The Assessing Authority, Amritsar, therefore, rejected the account books of the assessee and estimated the gross turnover at Rs. 5,00,000 and allowing claim for deduction amounting to Rs. 3,37,884-4-6 u/s 5(2)(a)(ii) and Rs. 5,066-2-0 u/s 5(2)(b) of the Act-assessed the applicant-firm to tax at Rs. 4,907-13-0. Thus, an additional demand of Rs. 2,704-12-3 was created against the assessee vide its order dated 27th February, 1956.

6. The firm was aggrieved by the order of the assessing authority. It preferred an appeal to the Deputy Excise and Taxation Commissioner, Julmndur. As the only controversy in this reference is with regard to the sales made to M/s. Gurdial Singh Sohan Singh, a registered dealer, it is not necessary to refer to other matters that were agitated in appeal or in further revisions. The appeal was partly allowed by the Deputy Excise and Taxation Commissioner. The appellate authority affirmed the decision of the assessing authority on all matters excepting the enhancement of the gross turnover from Rs. 4,65,865-3-0 to Rs. 5,00,000. The relevant part of the order of the appellate authority in this behalf is set out below :

The assessing authority has further increased the gross turnover from Rs. 4,65,865-3-0 to Rs. 5,00,000 without pointing out any defects in the accounts which is unjustified. This enhancement in the gross turnover seems to have been made for the reasons that the dealer had failed to prove his sales to registered dealers and exports outside the State for which the deductions have already been disallowed. For the same mistake the appellant cannot be penalised twice. I, therefore, hold that the enhancement of the gross turnover is not justified.

7. So far as the matter in controversy in the present reference is concerned, it will be proper at this stage to revert back to the decision of the assessing authority. On this matter the assessing authority observed :

Departmental enquiries conducted in early 1954 revealed that the concern never transacted any business and closed down almost immediately after taking out the registration certificate. During the course of enquiries it also transpired that the proprietor of the concern Shri Sohan Singh was a poor man who was handicapped in his business by lack of capital and a prolonged illness from T. B. In the end Shri Sohan Singh fell a victim to the disease. Statements of persons of the locality, i.e., Dal Mandi, in which area the shop of the alleged purchaser was supposed to exist were recorded. They testified to the effect that M/s. Gurdial Singh Sohan Singh obtained a registration certificate from the sales tax department because they had an intention to carry on business as ghee merchants. However, the persons examined categorically deposed during the course of enquiries that the concern closed down and conducted no business whatsoever. On account of the above information a notice was served on the assessee on 21st January, 1956, to show cause why his claim for deduction u/s 5(2)(a)(ii) in respect of sales to M/s. Gurdial Singh Sohan Singh not be rejected summarily. The assessee filed an application on 31st January, 1956, requesting that the data collected by the department should be shown to the assessee and also requested for an opportunity to prove the sales by calling evidence. All the enquiries by the department being strictly confidential documents, the assessee's request about making the data open to him was rejected. He was, however, afforded an opportunity to produce such evidence as he desired.

8. The assessee then examined Atma Ram and Pahar Chand, one of the proprietors, on 4th February, 1956. The assessing authority then proceeded to discuss their evidence, and after rejecting it, held:

I have already mentioned above the liabilities which Rule 26, operative up to August, 1952 [the date of amendment in Section 5(2)(a)(ii)] levies on a seller. Obviously, this rule cannot be construed to mean that the factum of a signature should overrule all other circumstances, e.g., the closure of the shop, the non-existence of the transaction itself and like. In August, 1952, Section 5(2)(a)(ii) was amended and a proviso to the section categorically laid down that the seller shall obtain a declaration from the dealer himself. It is to be pointedly noted that the word "agent" is conspicuous by its absence in the said proviso. I have come across the signatures of Shri Joginder Singh whose connection with the alleged

purchaser is not sought to be established at all. Thus, at least these signatures have to be treated as if non-existent and the transactions have to be viewed as if there exist no signatures of the purchasing dealer. I cannot understand why the dealer has not chosen to summon Shri Joginder Singh asking him to prove his signatures.

So much as criticism of the dealer's version and the statement of the evidence got recorded by him. However, there is one factor which I cannot ignore while examining this claim and that is one relating to the closure of M/s. Gurdial Singh Sohan Singh. It is not readily explained why a concern which has closed down and whose proprietor is not available to the department should be openly making purchases from the assessee. Yet another factor which lends very serious doubt to the authenticity of the transactions is the economic hardship of the alleged purchasers. All enquiries by the department and my personal investigation from various sources lead me to believe that Shri Sohan Singh was virtually a pauper who took to the ghee trade as a last resort to earn something. As a result of his reputation and other factors it is unimaginable that he should be in a position to make four figure purchases in single lots and for ready cash too.

Under these circumstances, I hold that the alleged sales to Messrs. Gurdial Singh Sohan Singh never took place and that the signatures on the counterfoils produced before me are wholly fictitious.

As observed in the earlier part of this order, sale vouchers are the original book of entry in respect of all transactions relating to sales by the assessee. As a result of the foregoing conclusions quite a few of the sale vouchers stand discredited. This leads to the logical conclusion that the credit to the goods account which has gone towards the calculation of the gross turnover is fictitious and the cash-receipt in the cash-book in respect of the above transactions are also wrong. Under the circumstances, I entirely reject the version supplied by the dealer's account books.

9. It will appear from the reading of the order of the assessing authority and the appellate authority that whereas the assessing authority rejected the books of the assessee, the appellate authority accepted them observing that the books had been rejected "without pointing out any defects" and, therefore, the rejection of those books was unjustified. The assessee then preferred a revision to the Excise and Taxation Commissioner, Punjab, and this revision was rejected by the said Commissioner on 27th October, 1961, with the observation :

The second point was that the sales to M/s. Gurdial Singh Sohan Singh were disallowed. The reasons for it are that no party of the name of Gurdial Singh Sohan Singh existed or was functioning in 1952-53. The brother of Sohan Singh deceased, appeared and stated that his brother Sohan Singh and his firm never worked in 1952-53, though he did work for a short time in 1951. Now, sales worth Rs. 35,000 have been shown to this firm on a cash basis. No supporting evidence of hundi, cheque, transport or loading receipts are available.

Declarations are supposed to have been signed by one Joginder Singh whose connection with the firm of M/s. Gurdial Singh Sohan Singh has not at all been established. He was neither a munim nor a representative of the firm nor was Shri Joginder Singh sought to be produced. In the face of the statement of Joginder Singh, known to the petitioner, that his brother never did any business in the year in question, it was incumbent on the petitioner to have summoned Joginder Singh and confronted him with his signatures. The very fact that the petitioners did not do so would indicate an adverse inference against them, namely, that these sales never took place and the petitioner just wrote the registered number of M/s. Gurdial Singh Sohan Singh knowing that the man was suffering from T. B. and not functioning and his registration number could be safely used. It is surprising that whereas Joginder Singh, who is alive, was not sought to be produced, his signatures were sought to be proved by the petitioner or his ex-employee. The assessing authority has given good reasons why he could not accept their evidence. No doubt, it is none of the job of the petitioner to indicate where the purchaser took the goods, but in the context of this case, the point to be determined is whether or not a sale took place at all. Because the petitioner knew that Joginder Singh would contradict it and Joginder Singh's connection with M/s. Gurdial Singh Sohan Singh is not there at all, the petitioner tried to support these apparently unreliable and concocted declarations by other men. These sales were rightly rejected.

10. The assessee then preferred a further revision petition to the Financial Commissioner. The Financial Commissioner by his order dated 22nd March, 1962, rejected the petition and observed:

Mr. Bhagirath Dass has argued while the deductions claimed on account of sales to the firm Gurdial Singh Sohan Singh have been disallowed in the present case, these have been allowed by the departmental officers in other cases concerning this very firm of Gurdial Singh Sohan Singh, e.g., in Appeal No. 390 of 1957-58, Messrs. Amar Nath Khurana and Sons, Amritsar v. The State, before the Deputy Excise and Taxation Commissioner, Jullundur. Therefore, the learned Advocate has urged that there should be no cause for differential treatment concerning the same firm.

Further, the learned Advocate has submitted that the Excise and Taxation Commissioner's order mentions that the brother of the deceased Sohan Singh had appeared, but the petitioners were not given a chance of examining him ; so the department have come to an adverse conclusion against the petitioners in contravention of the dictates of natural justice.

The learned Advocate also mentioned that the assessment had been done beyond proper limitation, but later on he did not press this point.

On the other side, the learned Advocate for the State has argued that there is a definite conclusion of the departmental officers, after local enquiries, that the firm Gurdial Singh Sohan Singh had stopped functioning before the year of

assessment in this case; so, that should be regarded as a point of fact not calling for any interference in revision. Also, that the petitioners themselves never produced Joginder Singh, the brother of the deceased Sohan Singh although they were given a proper opportunity of doing so.

I have examined the record in this case carefully. The main question in the present case is as to whether the firm of Messrs. Gurdial Singh Sohan Singh was, in fact, functioning in the year of assessment, i.e., 1952-53, or not. On this point, I find that the assessing authority has given quite detailed reasons for not accepting the petitioner's contention that this firm of Messrs. Gurdial Singh Sohan Singh was actually functioning in the year of assessment. Local enquiries were conducted by the departmental officers and it was found that there was no Gurdial Singh anywhere and that Sohan Singh was only a very poor man who had been suffering badly from T. B. Other local evidence was taken into account also, and the conclusion arrived at by the assessing authority was that the alleged sales to Messrs. Gurdial Singh Sohan Singh never took place and the signatures on the counterfoils produced were wholly fictitious. The signatures were of one Joginder Singh, but he was never produced in evidence, although the petitioners were given due opportunity to do so. The Excise and Taxation Commissioner had mentioned in his order now sought to be revised that Sohan Singh's brother, i.e., Joginder Singh, had stated that Sohan Singh and his firm never worked in 1952-53 or 1953-54. However, from the record, I cannot locate any direct statement to this effect by Joginder Singh, although at page 45 of the file, part C, the notice issued to the petitioners mentions that the department had understood this from Joginder Singh during the enquiries in the case. But as has been mentioned above, Joginder Singh, whose signatures were claimed to be genuine by the petitioners, was never produced in evidence himself by the petitioners, although he had the opportunity to do so. The assessing authority's order shows that he went into details regarding the reliability or otherwise of the evidence about the genuine character of the firm Gurdial Singh Sohan Singh and for the reasons given in his order dated 27th February, 1956, the assessing authority arrived at the conclusion that the alleged sales in question had never been made to Messrs. Gurdial Singh Sohan Singh. This really is a finding of fact, and I see no reason for differing with it. It seems correct that in the other case mentioned by the learned Advocate for the petitioners before me, sales to this firm of Messrs. Gurdial Singh Sohan Singh have been allowed by the department: but we have to see whether the material evidence in the present case under consideration justifies it or not. If there has been a mistake in any other case, there is obviously no reason why it should be repeated in the present case also. And the learned Advocate for the petitioners has argued this case before me only regarding the deductions claimed on account of the alleged sales to Messrs. Singh Sohan Singh.

11. Thereafter, the assessee made an application u/s 22(1) for referring the following questions of law for the opinion of this court :

(1) Whether in the facts and circumstances of this case, the refusal of the deduction claimed for sales to M/s. Gurdial Singh Sohan Singh and M/s. Chaman Lal and Sons, was justified in law ?

(2) Whether there is any legal material on the file justifying the refusal of deduction claimed by the petitioners u/s 5(2)(a)(ii) of the Punjab General Sales Tax Act regarding items of sales made by the petitioners to M/s. Gurdial Singh Sohan Singh and M/s. Chaman Lal and Sons ? and

(3) Whether in the facts and circumstances of the case, the finding that these sales were not deductible is not vitiated by mixing up of inadmissible evidence and irrelevant considerations ?

12. This application was rejected by the Financial Commissioner. Then the matter was brought to this court u/s 22(2) of the Act and this court, acting u/s 22(3), allowed the application and directed the question of law already stated in the opening part of this order to be referred for the opinion of this court.

13. The dispute in the present reference relates to the sales made to Messrs. Gurdial Singh Sohan Singh, a registered dealer, amounting to Rs. 35,019-7-0.

14. Mr. D.N. Awasthy, learned counsel for the assessee, has raised the contention that the finding of the assessing authority which has been upheld right upto the Financial Commissioner that the sales to M/s. Gurdial Singh Sohan Singh are not genuine is not legally justified. The burden of his argument is that material collected by the assessing authority behind the back of the assessee has been used to arrive at the finding that the sales to M/s. Gurdial Singh Sohan Singh are not genuine. The assessee wanted to know the material in order to show that it was not enough to warrant the conclusion that the sales were not genuine.

15. The learned counsel for the department, on the other hand, has vehemently contended that the finding arrived at by the departmental authorities that the sales to Messrs. Gurdial Singh Sohan Singh were not genuine, is a finding of fact. Therefore, it is urged that in view of this finding, it cannot be said that any illegality has been committed by the assessing authority in holding that the sales to the said firm were not genuine. It is conceded that certain material used in order to arrive at this finding was collected behind the back of the assessee and was not shown to him on demand. It is further stressed by the learned counsel that it was the duty of the assessee to prove that the sales to the said registered dealer were genuine. The department did give ample opportunity to the assessee in this behalf.

16. Thus, the respective contentions urged at the Bar have to be examined in order to answer the question referred to us.

17. Before I proceed to deal with the contention of the learned counsel, it would be proper to set out a few relevant provisions of the Act, Section 5(2)(a)(ii) at the relevant time stood as under;

Sales to a registered dealer of goods declared by him in a prescribed form as being intended for resale in the State of Punjab or sale in the course of inter-State trade or commerce (or sale in the course of export of goods out of the territory of India) or of goods specified in his certificate of registration for use by him in the manufacture in the State of Punjab of any goods for sale and on sales to a registered dealer of containers or other materials for the packing of such goods :

Provided that in case of such sales, a. declaration duly filled up and signed by the registered dealer to whom the goods are sold and containing prescribed particulars on a prescribed form is furnished by the dealer who sells the goods:

Provided further that when such goods are used by the dealer to whom these are sold for purposes other than those for which these were sold to him, he shall be liable to pay tax on the purchase thereof at the rate of tax leviable on the sale of such goods, notwithstanding that such purchase is not covered by Clause (ff) of Section 2.

18. Rule 26 of the Punjab General Sales Tax Rules, 1949, so far as it is relevant is in the following terms :

26. (1) Any dealer who wishes to deduct from his gross turnover the amount in respect of a sale on the ground that he is entitled to make such deduction under the provisions of Sub-clause (ii) of Clause (a) of Sub-section (2) of Section 5 shall, along with his return in form S.T. VIII in respect of such a sale furnish "C" and "D" parts of declaration in form S.T. XXII duly filled up and signed by purchasing dealer or by his agent.

(2) Any dealer registered under the Act shall apply to the appropriate assessing authority for the grant of declaration in form S.T. XXII stating clearly his reasonable demand for a period of not more than six months disclosing the stock and details of declaration forms already in hand and also the date on which and the number in which he was last issued the declaration forms.

(3) If the assessing authority referred to in Sub-rule (2) is satisfied that the requisition of the dealer is genuine and reasonable he may issue him as many declaration forms as he may deem fit on prior payment of two rupees per book of 50 declaration forms either in cash or on deposit by the dealer in the Government treasury.

(4) A single declaration in form S. T. XXII shall cover one or more than one transaction of sale, provided that in the latter case the total value of sales to one registered dealer in one quarter does not exceed ten thousand rupees.

(5) The dealer to whom the declaration forms have been issued shall be responsible for their proper custody and use. If a declaration form, whether blank or completed, is lost either from the custody of any dealer or from the purchasing dealer in transit, he shall report the loss to the authority from whom he obtained it.

(6) On receipt of report referred to in Sub-rule (5) above the said authority shall call upon the dealer to furnish a reasonable security by way of an indemnity bond in respect of each lost form separately to safeguard against the misuse of the same.

(7) If the duly completed and signed declaration form is lost by the purchasing dealer in transit or from the custody of the selling dealer, the selling dealer shall obtain a duplicate form from the dealer, to whom he sold the goods. In the absence of such duplicate form, he will not be entitled to the deductions.

(8) Where any purchasing dealer issues to the selling dealer a duplicate form referred to in Sub-rule (7), he shall give the following certificate in red ink across the page of all the four parts of the duplicate form. The certificate shall be duly signed by the dealer issuing the duplicate form :-

"I hereby certify that this is the duplicate of the declaration form No.--- signed on-and issued to-who is a registered dealer holding registration No.-."

* * * (10) The dealer referred to in Sub-rule (3) shall maintain a register containing accounts of declaration forms in the following manner :-

Date on which the declaration forms were received-----.

Number of declaration forms received-----.

Serial No. Date on which Particulars Value of No. and date Name and address of used for pur- of the goods goods of railway and registration declaration chasing goods. purchased. purchased. or goods receipt certificate number form. along with the of the selling address of tran- dealer. sport company, if any. It will also be advisable to set out form S.T. XXII:

Form of Declaration (See Rules 26 and 27-A)

Book No. ...

Serial No. ...

Name of the purchasing dealer to whom issued along with his Registration Certificate No....

Date of validity of Registration Certificate...

Seal of Issuing Authority.

To

...(Name and complete address of the selling

...dealer along with his R.C. No.)

I,-----, holder of registration certificate No.-----, dated the-----, hereby declare that I have purchased from you the goods hereinafter mentioned for the purpose of:-

*(1) use in the manufacture in Punjab of any goods, other than goods declared tax-free u/s 6, for sale in Punjab ; or

(2) resale in the State of Punjab; or

(3) sale in the course of inter-State trade or commerce ; or

(4) sale in the course of export out of the territory of India;

and the goods so purchased have duly been entered in my books of accounts and that the goods purchased for the purpose mentioned at (1) above are duly specified in my aforesaid registration certificate.

Description of goods Quantity Price No. and date of cash memo or bill issued
by the selling regi- stered dealer.

Place----- Full signatures and complete address of the purchasing
dealer or his authorised agent.

*Strike out whichever is not applicable.

(To be retained by the purchasing dealer).

19. Before I proceed further I wish to highlight the fact that the sales made by the assessee were sales to a registered dealer and the provisions of Section 5(2) (a)(ii), Rule 26 and form S.T. XXII must have been complied with. There is no finding by any of the relevant authorities that these provisions were not complied with. In this connection, it will be of some significance that a provision has been made in Section 5(2)(a)(ii) penalising a purchasing registered dealer where he commits a default. It will also have to be noted that there is no finding that the goods sold to M/s. Gurdial Singh Sohan Singh remained with the assessee, or sold to someone else.

20. Now, I advert to the contention of Mr. D. N. Awasthy, learned counsel for the assessee. As already stated, the main burden of his argument is that the assessing authority took into account material not made known to the assessee and collected behind his back to arrive at the conclusion that the sales to M/s. Gurdial Singh Sohan Singh were not genuine. The implication of this would be that the goods were in fact sold but the sale was not to a registered dealer as claimed and, therefore, no deduction could be claimed u/s 5(2)(a)(ii) and the assessee would be liable to sales tax thereon u/s 5(1) of the Act. If this was not so and there was in fact no sale, there will be no question of deleting the value of these sales from the taxable turnover of the assessee.

21. Before I proceed to deal with the authorities which wholly support the contention of the learned counsel for the assessee, it would not be out of place to highlight the fact that no sales to a registered dealer can be made unless the prescribed form S.T. XXII is filled by the purchasing dealer. The purchasing dealer

has to obtain the forms from the department and maintain an account of those forms. The direct case in point is the decision of the Allahabad High Court in *Premier Motors (P.) Ltd. v. Commissioner, Sales Tax, Uttar Pradesh, Lucknow* [1970] 26 S.T.C. 402. In this case, the following question of law was referred for the opinion of the High Court :

Whether on the facts and circumstances of this case, as discussed in my order dated 23rd May, 1968, and in the order of the appellate court dated 23rd April, 1965, the applicant was entitled to get the witnesses relied upon by the assessing authority examined in his presence and further whether he was entitled to cross-examine them.

22. The learned Judges answered the question in the following terms :

It is futile to contend for the revenue that because the Sales Tax Officer is not a court and is not bound by the rules of evidence, therefore, the assessee is not entitled to have a witness examined in his presence where the statement of such a witness recorded at the back of the assessee is sought to be used against him and particularly where the statements of the witnesses concerned in this case are at variance with the documentary evidence in possession of the assessee.

23. The learned Judges for this opinion placed reliance on the following observations of the Supreme Court in *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, :

The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. In a welfare State like India which is regulated and controlled by the rule of law, it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision.

24. To the same effect are the observations in *Muralimohan Prabhudayal v. State of Orissa* [1970] 26 STC 22 a Division Bench decision of the Orissa High Court:

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 Mitts Ltd. v. Commissioner of Income Tax, West Bengal* [1954] 26 ITR 775 (S.C.) in an Income Tax case, and the identical principles were followed in a sales tax case in *Raghubar Mandal Harihar Mandal v. The State of Bihar* [1957] 8 STC 770 .

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.

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 Harihar Mandal Vs. The State of Bihar*, 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.

25. The view that has been taken in the aforesaid two decisions find ample support from the decision of the Supreme Court in *Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax* [1954] 26 ITR 775 (S.C.). In the report it is observed :

As regards the second contention, we are in entire agreement with the learned Solicitor-General when he says that the Income Tax Officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law, but there the agreement ends ; because it is equally clear that in making the assessment under Sub-section (3) of Section 23 of the Act, the Income Tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment u/s 23(3). The rule of law on this subject has, in our opinion, been fairly and rightly stated by the Lahore High Court in the case of (1944) 12 ITR 393 .

26. In this case, we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the company to rebut the material furnished to it by him.

27. In *Dhirajlal Girdharilal Vs. Commissioner of Income Tax, Bombay*, it was held while dealing with the order of the Income Tax Tribunal :

When a court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises.

28. To the same effect are the decisions of the Supreme Court in *Omar Salay Mohamed Sait Vs. Commissioner of Income Tax, Madras*, and *Lalchand Bhagat Ambica Ram Vs. Commissioner of Income Tax, Bihar and Orissa*, . Both these decisions are in cases under the Income Tax Act.

29. In *Raghubar Mandal Harihar Mandal Vs. The State of Bihar*, while dealing with Section 10(2)(b) of the Bihar Sales Tax Act, 1944, which provision is equivalent to Section 11(3) of the Punjab General Sales Tax Act, it was observed :

The Sales Tax Officer is not fettered by technical rules of evidence and pleadings"-and he is entitled to act on material which may not be accepted as evidence in a court of law ; but he is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment. 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, including the assessee's circumstances, knowledge of previous returns and all other matters which the assessing officer thinks will assist him in arriving at a fair and proper estimate.

30. In other words, the principles that have to be considered in Income Tax cases *pari materia* apply to sales tax cases and it was pertinently observed that the principles enunciated in *Dhakeswari Cotton Mills"* case [1954] 26 ITR 775 governed cases under the Sales Tax Act. It was also observed that the decisions in (1937) 5 ITR 464 *GUNDA SUBBAYYA Vs. COMMISSIONER OF Income Tax, MADRAS.*, (1944) 12 ITR 393 and *Malik Damsaz Khan v. Commissioner of Income Tax* [1947] 15 ITR 445 (P.C.) did not run counter to the decision of the Supreme Court in *Dhakeswari Cotton Mills"* case [1954] 26 ITR 775 (S.C.).

31. The learned counsel for the department relied upon *Madugula Papayya and Ors. v. Province of Madras* [1956] 7 S.T.C. 180 *Adarsh Bhandar v. Sales Tax Officer, Aligarh* [1957] 8 S.T.C. 666 and *Rajab Ali Pirani v. State of Andhra Pradesh* [1967] 19 S.T.C. 312. These decisions so far as they run counter to the *Dhakeswari Cotton Mills"* case would be bad law. In any case the decision in *Madugula Papayya and Ors. v. Province of Madras* [1956] 7 S.T.C. 180 does not deal with the matter now in controversy, namely, whether material privately

collected by the assessing authority and used against the assessee without the assessee being afforded an opportunity to meet it and show that either that material is unreliable or is otherwise inadmissible can be used against the assessee. In this case, the only question was whether the best judgment assessment had been based on any material and the observations made by the learned Judges must be confined to the facts of the case. They have no bearing on the instant case. What has been said in regard to Madugula Papayya's case [1956] 7 S.T.C. 180 applies equally to the decision in Adarsh Bhandar v. Sales Tax Officer, Atigarh [1957] 8 S.T.C. 666 and also to the decision in Rajab Ali Pirani v. State of Andhra Pradesh [1967] 19 S.T.C. 312.

32. The legal position being what has been stated above, I feel no hesitation in coming to the conclusion that the order of the assessing authority in deleting the sales made to M/s. Gurdial Singh Sohan Singh as not permissible deductions u/s 5(2)(a)(ii) is illegal. The Financial Commissioner had to accept that in other cases sales to M/s. Gurdial Singh Sohan Singh were allowed as permissible deduction by the department and if this being so, the very fabric of the order of the assessing authority holding the sales in dispute to the said firm as nonest is shaken to its very roots. Not only that, the Financial Commissioner observed that Joginder Singh, brother of Sohan Singh, had been examined by the assessing authority. That being so, the assessing authority could not make a capital out of the fact that Joginder Singh was not examined by the assessee. If the assessing authority was relying on the testimony of Joginder Singh and it did rely on it as is apparent from the order of the Financial Commissioner, the assessee should have been afforded an opportunity to cross-examine Joginder Singh. It was not open to the assessing authority to get over this hurdle on the plea that Joginder Singh had not been produced by the assessee. The contentions of the departmental counsel, therefore, must be rejected. A finding of fact in order to be binding has to be a legal finding of fact. For instance, a finding of fact which is based on no evidence is no finding of fact. Similarly, a finding of fact based on irrelevant evidence and a finding of fact based on evidence partly relevant and partly irrelevant, would be no answer to the contention of the assessee that such a finding is vitiated and is no finding in the eyes of law.

33. After giving the matter my careful consideration, the only conclusion to which I can arrive at is that the assessing authority acted on material which was not legal to come to the conclusion that the sales in question were fictitious. As I have already mentioned, the finding is contradictory in the terms; if sales were fictitious, in other words no goods had been sold, there was no question of adding them to the taxable turnover of the assessee, but if the goods had been sold then the mere fact that M/s. Gurdial Singh Sohan Singh, a registered firm, had stopped its business would be no ground to penalise the assessee when the sales had been made in accordance with the rules. The assessee had complied with the provisions of law while selling the goods to that firm after receiving from it form S.T. XXII and, therefore, the liability, if any, had to fall on the purchasing dealer. If the dealer had closed its business, it was for the department to cancel

its registration certificate or not to issue form S.T. XXII.

34. For the reasons recorded above, the only answer to the question referred to us has to be in the affirmative, i.e., in favour of the assessee and against the department. In the circumstances of the case, however, there will be no order as to costs.

S.S. Sandhawalia, J.

35. I agree.