

(2005) 11 MP CK 0052
In the Madhya Pradesh High Court
Case No : Writ Petition No. 679 of 1995

Ramdas Jugani

APPELLANT

Vs

Commissioner of Income Tax and Another

RESPONDENT

Date of Decision : 29-11-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 133B, 142(1), 144, 145, 148

Citation : (2006) 203 CTR 282 : (2005) ILR (MP) 1164 : (2006) 282 ITR 356

Hon'ble Judges : Shantanu Kemkar, J

Bench : Single Bench

Advocate : Sumit Nema, for the Appellant; Rohit Arya with Sanjay Lal, for the Respondent

Judgement

Shantanu Kemkar J.

1. The petitioner claims to be carrying on the business of medicines at Hoshangabad in the name of M/s. Anand Medical Stores.
2. On the basis of a survey dated March 7, 1991, conducted u/s 133B of the Income Tax Act, 1961 ("the Act" for short), by the Assistant Director (Investigation), Bhopal, a notice u/s 142(1) read with Section 148 of the Act was issued to the petitioner on March 18, 1991, by the Income Tax Officer ("the ITO", for short). As the petitioner did not file the return as required under the said notice, the Income Tax Officer completed the ex parte assessment vide orders dated March 23, 1993, for the assessment years 1989-90 and 1990-91. The Income Tax Officer exercising the jurisdiction u/s 144 of the Act made best judgment assessment accepting the turnover of the petitioner reflected in the said survey report dated March 7, 1991, (annexure R-1), and assessed income of Rs. 33,700 for the year 1989-90 and worked out a total demand of Rs. 16,880 and assessed income of Rs. 40,000 for the year 1990-91 and worked out a demand of Rs. 13,688.

3. Feeling aggrieved by the said orders of assessment, the petitioner filed appeals before the Deputy Commissioner of Income Tax (Appeals), Bhopal, challenging the best judgment assessment made by the Income Tax Officer. The Deputy Commissioner of Income Tax (Appeals) by order dated October 28, 1993, dismissed the said Appeals Nos. I.T.A. No. 40 and 41/IT/ 1993-94 and upheld the assessment orders. Feeling aggrieved, the petitioner filed revisions u/s 264 of the Act before the Commissioner of Income Tax. The said revisions were dismissed by common order dated December 9, 1994. Hence, this petition.

4. Shri Sumit Nema, learned Counsel for the petitioner, contended that the Income Tax Officer, has not discussed as to on what basis he arrived at the total figure of sales and the net profit rate of 9 per cent.; thus in the absence of any material on record the order passed by the authorities deserves to be quashed. In support of his contentions, he relied on the judgments in the case of GANGA PRASAD SHARMA Vs. COMMISSIONER OF Income Tax, M.P. AND ANOTHER., ; Karnataka State Forest Industries Corporation Ltd. Vs. Commissioner of Income Tax, ; State of Orissa Vs. Maharaja Shri B.P. Singh Deo, ; P.J. Philip Vs. State of Kerala, .

5. Shri Rohit Arya, learned senior counsel appearing for the respondents, has contended that on the basis of survey conducted, the petitioner furnished information u/s 133B of the Act, basing upon which and the survey report a notice u/s 142(1) read with Section 148 of the Act was issued to the petitioner. The petitioner did not file any return. Again a notice u/s 142(1) of the Act was issued to him on January 16, 1992, but he did not appear. However, the petitioner was issued another notice to show cause as to why ex parte assessments be not made, even then the petitioner neither appeared nor filed any reply. Accordingly, the best judgment assessments were made. He contended that the turnover of the petitioner was determined on the basis of information collected u/s 133B of the Act on Form No. 45D which is signed by the petitioner himself. As per the said information submitted by the petitioner, which was on the basis of sales tax record his sale for the assessment year 1989-90 was Rs. 8,03,292 and for the year 1990-91 it was Rs. 9,07,665. The net profit rate was worked out to be 9 per cent, having regard to the nature of business which was carried on by the petitioner. He, thus contended that as the assessments are based upon the information of total sales supplied by the petitioner himself on Form No. 45D, the same has rightly been taken by the Income Tax Officer to be his total sales, and the computation of profit at 9 per cent, was justified as it was found generally reasonable in the medicine shop business. He contended that the prayer of the petitioner in revision petition annexure P-9 filed u/s 264 of the Act before the Commissioner of Income Tax being limited to the extent that computation of profit at 9 per cent., is excessive and arbitrary, the petitioner cannot challenge the total sales taken by the Income Tax Officer, confirmed in appeals and revisions. He also contended that the scope of interference in this petition under Article 226 is limited and unless there is arbitrary exercise of powers by the authorities, no interference is called for in the

writ jurisdiction. In support of his contention, he relied on the judgments passed in the case of Commissioner of Sales Tax Vs. Kutubali Noorjibhai and Co., State of Orissa v. Fancy Motors Accessories Agency [1988] 69 STC 34 (Ori) State of Orissa v. Tormal Rameswardas [1988] 68 STC 204 (Ori) Bhagwandas Khandelwal Vs. The Commissioner of Sales Tax and Others, ; The Commissioner of Sales Tax, Madhya Pradesh Vs. H.M. Esufali, H.M. Abdulali, Siyaganj, Main Road, Indore, ; Commissioner of Sales Tax Vs. Rajaram Sitaram Soni,

6. In the case of GANGA PRASAD SHARMA Vs. COMMISSIONER OF Income Tax, M.P. AND ANOTHER., return was filed by the assessee on estimate basis by computing the profit at a flat rate of 10 per cent, on gross receipts. The Assessing Officer computed the net profit at 15 per cent. The Commissioner affirmed the said order of the Assessing Officer by observing that in view of the business, the estimate of net profit of 15 per cent, appears reasonable. The Division Bench of this Court found that neither the Income Tax Officer nor the Commissioner has referred to any material for applying the flat rate of 15 per cent, while estimating the net profits and therefore the estimate of net profit of 15 per cent, assessed by the authorities was quashed. In the case of State of Orissa Vs. Maharaja Shri B.P. Singh Deo, the Supreme Court observed that the power to levy assessment order on the basis of best judgment is not an arbitrary power. In other words that assessment must be based on some relevant material. It is not a power that can be exercised under the sweet will and pleasure of the concerned authorities. In the case of Karnataka State Forest Industries Corporation Ltd. Vs. Commissioner of Income Tax, , the Karnataka High Court has held that when the assessing authority does not accept the assessee's method of accounting for the assessment year, then he could exercise power u/s 145 to make such computation in such method as he determines for deducing the correct profits and gains. In the case of P.J. Philip Vs. State of Kerala, , the Kerala High Court has held that the best judgment assessment must be fair, reasonable and based on material. In the case of CST v. Kutubali Noorji bhai and Co. [1975] 36 STC 523 the Bombay High Court held that best judgment assessment made by the taxing authority must inevitably involve some guess-work, but its sole base cannot be imagination. The estimate made by the taxing authority in making a best judgment assessment should not be vindictive or capricious, but it should be a bona fide estimate and arrived at on a rational basis. There has to be a reasonable nexus between the basis adopted in estimating the turnover and the estimate made. If the basis adopted is a relevant basis, even though the court may think that it is not the most appropriate base, the estimate made by the assessing authority cannot be disturbed. In State of Orissa v. Fancy Motors Accessories Agency [1988] 69 STC 34 the High Court of Orissa held that since the jurisdiction of the Tribunal was quite different from that of the High Court under a reference, the High Court would not interfere, where the Tribunal had enhanced the gross turnover by a particular sum which appeared to it to be reasonable and best in its judgment. The Tribunal as the final court of fact had full authority in law to intervene and

make its own assessment of the facts in exercise of its best judgment in the matter. Particularly when the explanation offered by the dealer was accepted, it was open to the Tribunal, to confine the addition with reference to a particular period only, taking into consideration the nexus between the materials available on record, when there was no legal compulsion that the additions must be made for the entire year. In *State of Orissa v. Tormal Rameswardas* [1988] 68 STC 204 (Ori) it is held that once the existence of the report on the seized documents was not disputed, the burden was on the dealer to prove to the satisfaction of the Assessing Officer that no such transactions took place as alleged. In the absence of allegation of arbitrariness or capriciousness in the estimation of turnover, the basis on which it was made could be challenged in the circumstances. In *Bhagwandas Khandelwal v. CST* [1971] 27 STC 388 the Division Bench of this Court has held that a best judgment assessment is to be based on some material which could reasonably lead to the conclusion arrived at. In *The Commissioner of Sales Tax, Madhya Pradesh Vs. H.M. Esufali, H.M. Abdulali, Siyaganj, Main Road, Indore*, the Supreme Court observed that it is inevitable that there is some guess-work while making the best judgment assessment. The assessing authority while assigning the best judgment should arrive at his conclusion without any bias and on rational basis. The authority should not be vindictive or capricious. If the estimate is bona fide estimate and is based on a rational base, the fact that there is no good proof in support of that estimate is immaterial. Prima facie, the assessing authority is the best judge of the situation. It is his best judgment and not any one else's. The High Court cannot substitute its best judgment for that of the assessing authority. In the case of *Commissioner of Sales Tax Vs. Rajaram Sitaram Soni*, the High Court followed the judgment passed in the case of *The Commissioner of Sales Tax, Madhya Pradesh Vs. H.M. Esufali, H.M. Abdulali, Siyaganj, Main Road, Indore*.

7. Having considered the rival contentions of the parties, and the case law referred to above, the petitioner's challenge to the total estimated sales taken by the Assessing Officer is not sustainable. The said estimated sales taken by the Assessing Officer was based on the information furnished by the petitioner himself on Form No. 45D u/s 133B of the Act. It can also not be challenged in this petition as I find that it was not challenged by the petitioner in revision (annexure P-9) filed before the Commissioner of Income Tax. The next contention of the petitioner that the rate of tax has been fixed arbitrarily at 9 per cent, per annum has got force. The petitioner submitted copy of trading and profit and loss account for both the assessment years before the first appellate authority (Deputy Commissioner of Income Tax (Appeals)). It was stated that the said trading and profit and loss account were prepared by the petitioner on the basis of the books of account maintained by him and were checked and inspected by the authorities, during the survey conducted u/s 133B of the Act. It was also contended before the appellate authority that on the basis of the accounts maintained by him, his income did not exceed taxable quantum for both the years. However, no attention was given to the petitioner's contentions by the

Deputy Commissioner of Income Tax (Appeals) though the Deputy Commissioner of Income Tax (Appeals) on the basis of the said trading and profit and loss account accepted the sales shown by the petitioner. However, he maintained the rate of 9 per cent, by observing that it is reasonable for the medicine shop business. In my considered view, this reasoning appear to be arbitrary and unreasonable in view of the Division Bench judgment of this Court in the case of GANGA PRASAD SHARMA Vs. COMMISSIONER OF Income Tax, M.P. AND ANOTHER., . The appellate authority ought to have assigned some reason as to why the accounts submitted by the petitioner cannot be considered for arriving at the figure of rate of tax. The judgment referred to above by learned Counsel for the parties makes it clear that the power to pass assessment order on the basis of best judgment is not an arbitrary power. It must be based on some relevant material. It must be fair and reasonable. The assessment of rate by merely observing that generally computation of profit of 9 per cent, is reasonable in medicine shop business is arbitrary and is not sustainable. The appellate authority had not disclosed as to why it has not taken in to consideration the trading and profit and loss account submitted by the petitioner and on what basis the computation is made. On the other hand as reflected from the order, the basis of computation of profit at 9 per cent, is general and casual. The revisional authority also rejected the petitioner's prayer to reduce the net profit rate without assigning any reasons as to how the rate of 9 per cent, is just and reasonable.

8. In view of the aforesaid, the orders passed by the appellate authority and the revisional authority are held to be arbitrary to the extent they upheld the rate of 9 per cent, and are, therefore, quashed. The matter is remitted to the appellate authority to reconsidered as to the rate which can be applied while estimating net profits.

9. Accordingly, the petition is allowed. No orders as to costs.