
(2008) 07 OHC CK 0083
In the Orissa High Court

Shiv Prasad Sahu

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 29-07-2008

Acts Referred:

ORISSA SALES TAX ACT, 1947 — Section 12(4), 2(j)

Citation : (2008) 106 CLT 672 : (2008) 2 OLR 626 : (2009) 19 VST 417

Hon'ble Judges : B.N. Mahapatra, J

Bench : Single Bench

Judgement

B.N. Mahapatra, J.—In this tax revision petition though the petitioner has raised several questions, at the time of hearing learned Counsel for the petitioner confined his arguments to only three questions, which are modified below:

(i) Whether on the facts and in the circumstances of the case the Tribunal is correct in sustaining the addition of 10% of the purchased quantity of mohua flower disclosed by the petitioner and supported by the certificate issued by the Superintendent of Excise towards drriage and wastage to determine the purchase turnover of mohua flower which is liable to tax on turnover of purchase for the purpose of levy of tax?

(ii) Whether on the facts and in the circumstances of the case in absence of any adverse material on record the turnover of the dealer can be enhanced on mere suspicion and conjecture?

(iii) Whether on the facts and in the circumstances of the case the Tribunal has committed error of law in deciding an issue which was neither taken in the grounds of appeal nor raised by the petitioner or the opposite party before the Tribunal at the time of hearing of the appeal?

2. The background facts under which this tax revision petition has been filed are as follows:

The petitioner in the present case is a registered dealer under the Orissa Sales

Tax Act, 1947 (hereinafter referred to as "the Act"). During the relevant year he was a liquor vendor carrying on business in selling of country liquor. For the purpose of his business he purchased mohua flower out of which country liquor has been extracted. In response to a notice issued u/s 12(4) of the Act for the year 1992-93 the petitioner appeared before the Sales Tax Officer, Kesinga (hereinafter referred to as the "Assessing Officer") and contended that during the year he purchased mohua flower weighing 4380.60 quintals. In support of his contention he produced the certificate issued by the Superintendent of Excise, who had certified that the petitioner purchased mohua flower to the extent of 4380.60 quintals. During the relevant time mohua flower was subject to tax on turnover of purchase. The Assessing Officer while completing the assessment added 10% of the quantity of mohua flower shown by the petitioner towards the driage and wastage and estimated the total quantity of purchase of mohua flower at 4818 quintals. He also estimated the purchase price of mohua flower at Rs. 150/- as against Rs. 140/- per quintal shown by the petitioner on the ground that the purchase price shown by the petitioner was not supported by any evidence. Accordingly, the Assessing Officer determined the purchase turnover of mohua flower at Rs. 7,22,799/- and levied 8% tax on such turnover while completing the assessment u/s 12(4) of the Act.

3. Being aggrieved by the order of assessment passed u/s 12(4) of the Act, the petitioner filed an appeal before the Assistant Commissioner of Sales Tax, Bolangir Range, Bolangir (hereinafter called as the "First Appellate authority"). The First Appellate authority while disposing of the appeal, deleted addition of 10% of the purchase turnover made by the Assessing Officer on the ground that the said purchase turnover of mohua flower was supported by a certificate of the Superintendent of Excise. He also determined the purchase price of mohua flower at Rs. 145/- per quintal as against Rs. 140/- shown by the petitioner and Rs. 150/- estimated by the Assessing Officer on the ground that the petitioner did not maintain purchase voucher in support of purchase of mohua flower.

4. Against the said First Appellate order Revenue filed second appeal with specific ground that the reduction of sale price from Rs. 150/- to Rs. 145/- per quintal was not sustainable, particularly when the First Appellate authority in its order observed that the dealer had not maintained the printed purchase voucher so that the name of purchaser could be verified. The learned Tribunal vide its order dated 9.8.2004 allowed the appeal filed by the Revenue with the following observations at paragraph-4 of its order:

On a careful consideration of the material in the assessment and appeal orders, grounds of appeal and cross objection and after going through the hearing both sides I observed as follows:

Addition of 10% over the quantity consumed for production of country liquor to estimate the total procurement of the mohua flower is considered justified.

(ii) The rate of mohua flower per quintal should be Rs. 150/- per quintal.

The present tax revision case arises out of this order of the learned Tribunal.

5. Mr. Raman, learned Counsel appearing on behalf of the petitioner submitted that the quantity of mohua flower shown by the petitioner was supported by a certificate issued by the Superintendent of excise and, therefore, there is no reason to make addition of 10% on the purchase turnover towards driage and wastage while the mohua flower was exigible to tax on turnover of purchase. He also contended that the learned Assessing Officer has not brought any material on record to enhance the purchase turnover of mohua flower and its price shown by the petitioner. His further contention is that in absence of any ground taken by the Revenue against the finding of First Appellate authority that the turnover of the purchase of mohua flower disclosed by the petitioner and supported by a certificate of Superintendent of Excise, cannot be enhanced, the learned Tribunal committed error in reversing the said finding.

Mr. Kar, learned Counsel appearing on behalf of the Revenue has not seriously objected to the above submissions of Mr. Raman except that the learned Tribunal has ample power to decide an issue involved in the assessment.

6. For determining the controversy, it is relevant to quote the definition of the terms "turnover of purchase" and "purchase price" as defined under the Act. The term "Turnover of Purchase" has been defined u/s 2(j) of the Act is as follows:

Section 2(j) : "Turnover of Purchase" means the aggregate of the amounts of purchase prices paid and payable by a dealer in respect of the purchase or supply of goods or classes of goods declared u/s 3-B.

The term "Purchase Price" has been defined in Section 2(ee) of the Act's as follows:

Section 2(ee) : "Purchase Price" means the amount payable by a person as valuable consideration for the purchase or supply of any goods less any sum allowed by the seller as cash discount according to ordinary trade practice, but it shall include any sum charged towards anything done by the seller in respect of the goods at the time of or before delivery of such goods other than the cost of freight or delivery or the cost of installation when such cost is separately charged.

Thus, the term "turnover of purchase" means the aggregate of the amount of purchase price paid and payable by a dealer in respect of the purchase or supply of goods or classes of goods declared u/s 3-B of the Act and the term "purchase price" means the amount payable by a person as valuable consideration for the purchase or supply of any goods less any sum allowed by the seller as cash discount according to ordinary trade practice, but it shall include any sum charged towards anything done by the seller in respect of the goods at the time or before delivery of such goods.

7. In the present case the consideration paid by the petitioner for purchase of mohua flower constitute the purchase price as defined u/s 2(ee) of the Act alone since nothing has been done by the seller in respect of the goods at the time or

before delivery of such goods to the petitioner. Driage and wastage is an event subsequent to completion of purchase. This subsequent event has nothing to do for the purpose of determining the purchase price of mohua flower since in case of a commodity liable to tax on turnover of purchase, the incidence of tax arises only when the purchase is effected.

In that view of the matter, we are of the considered view that the Tribunal is not justified to sustain the addition of 10% towards driage and wastage to the quantity of mohua flower disclosed by the petitioner and supported by the certificate of Superintendent of Excise for the purpose of levy tax on the turnover of purchase of mohua flower which is liable to tax on turnover of purchase under the OST Act.

8. The second issue herein as to whether in absence of any adverse material on record the turnover of the dealer can be enhanced. As disclosed earlier, the petitioner has disclosed his purchase turnover of mohua flower at 4380.60 quintals. The same has been supported by a certificate issued by the Superintendent of Excise. Contrary to the same, no material has been brought on record that during the relevant period the petitioner purchased mohua flower more than what is disclosed by him and supported by a certificate issued by the Superintendent of Excise.

While deleting the addition on purchase quantity of mohua flower, the First Appellate authority at Paragraph-5 of its order held as follows:

...At this stage, the learned Tax practitioner stated that when the purchase quantity of mohua flower had been certified by the Superintendent of Excise to the extent of Q. 4380.60 and when the assessing officer had no proof as regards suppression of purchase made by the dealer-appellant, the learned Sales Tax Officer is not at all justified to add 10% towards driage and wastage and to arrive at purchase quantity of mohua flower. I find some justification in the arguments of the learned Tax Practitioner. Purchase quantity of mohua flower is estimated at Q. 4380.60 as certified by the Superintendent of Excise, Kalahandi in Memo No. 1803, dated 26.08.1993....

The learned Tribunal without assigning any reason has sustained the addition of 10% towards driage and wastage as-made by the Assessing Officer for the purpose of levy of sales tax.

9. Similarly the Assessing Officer has estimated the purchase price of mohua flower at Rs. 150/- per quintal as against Rs. 140/- shown by the petitioner. Here also no material has been brought on record to suggest the fact that the price for one quintal mohua flower is Rs. 150/-. The Assessing Officer has estimated the price of mohua lower on mere suspicion and surmises. In this regard, reference may be made to Section 12(9) of the Act. If the Assessing Officer was of the opinion that the purchase price of mohua flower shown by the petitioner is less than the prevalent market price he should have followed the procedure prescribed u/s 12(9) of the Act.

For the purpose of ready reference, Section 12(9) of the Act is reproduced below:

If the Commissioner is satisfied that any dealer has, with a view to evading or avoiding payment of tax effected sales of any goods or class of goods to favoured buyers or shown in his accounts sales or purchases at prices, which are unreasonably low compared to the prevailing market price of such goods, he may at the time of assessment or, where the assessment has been completed, at any time within a period of five years from the expiry of the year to which the sales or, as the case may be, the accounts relate, estimate the price of such goods on the basis of market price thereof prevailing at the time when such sales were effected or, as the case may be, such accounts were shown, and assess or, as the case may be, reassess the dealer to the best of his judgment, after making such enquiry as he may consider necessary and after giving the dealer a reasonable opportunity of being heard.

10. In the present case the learned Assessing Officer has not conducted any enquiry as provided in Sub-section (9) of Section 12 of the Act before enhancing the purchase price shown by the dealer from 140/- to Rs. 150/- per quintal. Another important aspect is that only when the Assessing Officer shall be satisfied that the purchase/sale price shown by the appellant is unreasonably low compared to the prevailing market price of such goods, he is authorized to enhance the same by following the procedure laid down in Sub-section (9) of Section 12 of the Act. In the present case while the petitioner disclosed the purchased price at Rs. 140/- according to the learned Assessing Officer the same should be Rs. 150/- without bringing any supporting material on record. Thus, it cannot be said that the purchase shown by the petitioner is unreasonable. In that view of the matter, the Tribunal is not justified to sustain the action of the Assessing Officer in estimating the purchase price of mohua flower at Rs. 150/ per quintal on mere suspicion and conjecture.

In absence of any adverse material on record to disprove the turnover shown by the petitioner-dealer, the same cannot be enhanced on mere suspicion and conjecture. Even in a case where a best judgment assessment is called for, it is trite law that the estimate should be based on material.

In this context it Would be useful to refer some of the decisions of the Hon''ble Supreme Court and High Courts. The Hon''ble Supreme Court in *State of Kerala v. C. Velukutty* (1966) 17 STC 465 laid down the law thus:

...From the discovery of secret accounts in the head office, it does not necessarily follow that a corresponding set of secret accounts were maintained in the branch office, though it is probable that such accounts were maintained. But, as the accounts were secret, it is also not improbable that the branch office might not have kept parallel accounts, as duplication of false accounts would facilitate discovery of fraud and, it would have been thought advisable to maintain only one set of false accounts in the head office. Be that as it may, the maintenance of secret accounts in the branch office cannot be assumed in the

circumstances of the case. That apart, the maintenance of secret accounts in the branch office might lead to an inference that the accounts disclosed did not comprehend all the transactions of the branch office. But that does not establish or even probabalise the finding that 135 per cent or 200 per cent or 500 per cent of the disclosed turnover was suppressed. That could have been ascertained from other materials. The branch office had dealings with other customers. Their names were disclosed in the accounts. The accounts of those customers or their statements could have afforded a basis for the best judgment assessment. There must also have been other surrounding circumstances, such as those mentioned in the Privy Council's decision cited supra. But in this case there was no material before the assessing authority relevant to the assessment and the impugned assessments were arbitrarily made by applying a ratio between disclosed and concealed turnover in one shop to another shop of the assessee. It was only a capricious surmise unsupported by any relevant material.

In *Khandelwalla v. State of Orissa* (1982) 5 S.T.L 86 the Hon^{ble} Apex Court held that an assessment made on mere assumption or guess work cannot certainly be upheld.

In *Hardayal Govind Prasad v. State of Orissa* (1985) 58 STC 77 where the Sales Tax Officer rejected the books of account of the assessee and enhanced the gross and the taxable turnovers without regard for the available materials on record and the assessment was confirmed by the first appellate authority and the Tribunal, this Court held that the enhancement of the gross and the taxable turnovers had no rational basis and had no nexus to the materials available on record and therefore the enhancement of the turnover after rejection of books of account was arbitrary.

The Allahabad High Court in *Mangal Sen Ram Sanohi v. Commissioner of Sales Tax, UP, Lucknow* (1995) 97 STC 15(sc) held that:

Even if the books of account are rejected the Tribunal or any other taxing authority cannot arrive at an arbitrary amount of the taxable turnover of the dealer. It has to come to a particular figure on the basis of material on record or on some reasonable principle, taking into account the purchases or sales made, which may be determined from the records either seized or found in the possession of the dealer. Arriving at a random figure without any basis is not justified in tax law.

The Allahabad High Court in *Commissioner of Sales Tax v. Pilot Shoe Factory* (1977) 39 STC 95(sc) held that on the facts and in the circumstances of the case, when the assessee's books of account were rejected, the turnover, as returned by the assessee, need not necessarily have been rejected, but could be accepted if it appeared to be reasonable and proper. Merely because the books of account of the assessee are rejected as unreliable, it cannot be said that the turnover shown by the assessee must necessarily be rejected and that such turnover should be estimated at a higher figure than that returned by the

assessee. In spite of such rejection of the assessee's books of account, whether the turnover returned by him should be accepted or whether a higher turnover should be estimated by the assessing authority, must depend upon the facts and circumstances of each case.

Therefore, we are of the view that in absence of any adverse material on record the turnover of the dealer cannot be enhanced on mere suspicion and conjecture.

11. To deal with the third question it is necessary to refer the grounds of appeal filed before the learned Tribunal by the Revenue. The ground of appeal which has been annexed to the petition as Annexure-4 does not reveal that any specific ground has been taken with regard to addition of 10% towards drriage and wastage made by the Assessing Officer and deleted by the First Appellate authority. By a cryptic order the Tribunal has restored the order of assessment. The order does not reveal whether any argument has been advanced by the Revenue against deletion of addition 10% of purchased quantity mohua flowers by the First Appellate authority. Needless to say that the Tribunal is under a duty to decide all the questions of facts and law raised in the appeal before it. However, Tribunal on its own cannot make out a new case particularly when no such point was taken in ground of appeal and argued before it. It is not possible for the Court, to decide an issue, not raised/agitated by the authority for the reason that other party did not have opportunity to meet it and such a course would violate the principles of natural justice. Vide New Delhi Municipal Committee Vs. State of Punjab, etc. etc., . Similarly, in V.K. Majotra Vs. Union of India (UOI) and Another, , the Apex Court held as under:

The Courts would be well advised to decide the petitions on the points raised in the petition and if in a rare case keeping in view the facts and circumstances of the case any additional points are to be raised then the concerned and affected parties should be put to notice on the additional points to satisfy the principles of natural justice. Parties cannot be taken by surprise.

As no such ground was taken by the Revenue before the Tribunal, the question of deciding the issues could not arise. Therefore, findings on the issue cannot be sustained in the eyes of law.

12. In view of the above, we answer all the questions in favour of the dealer and against the revenue.

B.S. Chauhan, C.J.

13. I agree.