

(1974) 02 OHC CK 0014
In the Orissa High Court
Case No : S.J.C. No's. 63 to 65 of 1973

Shree Narsingh Trading Co.

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 27-02-1974

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 12(2), 24(1)

Citation : (1974) 34 STC 314

Hon'ble Judges : R.N. Misra, J;B.K. Ray, J

Bench : Division Bench

Advocate : S.C. Mohapatra and R.K. Chapolia, for the Appellant; Standing Counsel (S.T.), for the Respondent

Judgement

R.N. Misra, J.—The Member, Sales Tax Tribunal, has referred the following question u/s 24(1) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as the Act), for determination of this Court:

Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in confirming the enhancement by about 20 times the suppressions found ?

The facts relevant for the purpose of answering the question are shortly stated below: The assessee is a registered dealer of Bargarh in the district of Sambalpur. He came to be assessed under the Act for the year 1966-67 and for the quarters ending June and September, 1967. As a common question has arisen in all the three periods, these three references have been made. The Sales Tax Officer while making the assessments for all these three periods found suppressions in the accounts and, therefore, required the assessee to explain these suppressions and having not been satisfied with the explanations completed a best judgment assessment in respect of each of the periods by enhancing the turnover by about 26 per cent of the returned figures. The enhancements were sustained in first appeals as also in second appeals.

2. The finding that the assessee had suppressed transactions from his accounts is not in dispute. In fact, the question which has been referred to this Court has been framed on the footing that as suppressions were found, accounts became liable to be rejected and best judgment assessment could be completed, but the attack is against the quantum of enhancement, which is described to be 20 per cent the suppressions found. Mr. Mohapatra for the assessee, however, contends that within the ambit of the question--particularly as the question has been framed with reference to the facts and circumstances of the case--whether there can be a best judgment assessment u/s 12(2) of the Act is contained and has to be examined. It is settled law that the reference jurisdiction of this Court is advisory and has to be confined to questions of law arising out of the appellate order and referred to it for determination: (see *Income Tax Commissioner v. S. S. Navigation Co. Ltd.* [1961] 42 ITR 589 (S.C.) : AIR 1961 S.C. 1688). The learned Counsel for both the sides have, however, argued at some length on the question regarding completing an assessment u/s 12(2) of the Act by adopting the best judgment method. We have, therefore, agreed to discuss about that position in law.

3. Section 12 of the Act provides the scheme of assessment of tax. The first four sub-sections which would be material for the purpose are as follows:

(1) If the Commissioner is satisfied, without requiring the presence of a 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.

(2)(a) If the Commissioner is not satisfied without requiring the presence of a registered dealer who furnished the returns 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.

(b) On the day specified in the notice or as soon afterwards as may be, the Commissioner after hearing such evidence as the dealer may produce, and such other evidence as the Commissioner may require on specified points, shall assess the amount of tax due from the dealer.

(3) If a registered dealer, having furnished returns in respect of a period, fails to comply with all the terms of a notice issued under Sub-section (2), the Commissioner shall assess, to the best of his judgment, the amount of tax due from the dealer.

(4) If a registered dealer does not furnish returns in respect of any period by the prescribed date, the Commissioner shall, after giving the dealer a reasonable opportunity of being heard, assess, to the best of his judgment, the amount of tax, if any, due from the dealer.

By a later amendment, Sub-section (4-a) was introduced into the Act making provision for raising of interest on the ultimately assessed amount of tax where the taxing authority was satisfied that the dealer had knowingly produced incorrect accounts, documents or registers so as to reduce his liability to pay tax. Sub-sections (1) to (4) of Section 12 of the Act are more or less on the footing of Section 23 of the Income Tax Act, 1922. Sub-section (1) of Section 12 of the Act is the same as Sub-section (1) of Section 23 of the Income Tax Act. Sub-section (2)(a) of Section 12 of the Act is almost similar to Sub-section (2) of Section 23 of the Income Tax Act while Sub-section (2)(b) of Section 12 of the Act is almost on similar lines as Sub-section (3) of Section 23 of the Income Tax Act. Similar provisions as contained in Sub-sections (3) and (4) of Section 12 of the Act are found in Sub-section (4) of Section 23 of the Income Tax Act.

Sub-section (1) of Section 12 of the Act requires the assessing authority to make the assessment without the presence of a registered dealer or production by him of any evidence where he is satisfied that the return is correct and complete. Sub-section (2) of that section authorises the assessing authority to require the assessee to personally appear to answer questions or give explanations or to produce evidence in support of the return. During the assessment proceeding, even after the assessing authority has issued a notice under Sub-section (2)(a) of Section 12, a further notice may be given requiring production of further evidence either generally or on specified points whereafter only the assessing authority is to make the assessment. Sub-section (3) contemplates of a situation where the assessee after having furnished a return fails to comply with the notice under Sub-section (2). In such a case, assessment has to be to the best of the assessing authority's judgment. Sub-section (4) contemplates of cases where no return is filed. After giving an opportunity to the assessee, the assessing authority is also to complete the assessment according to the best of his judgment.

4. Mr. Mohapatra contends that the assessing authority is not entitled to adopt the best of judgment method except in cases covered by sub-sections (3) and (4). In the instant case, those sub-sections have no application because the assessee had made a return and complied with the terms of the notices issued under Sub-section (2) of Section 12. Since the power to make assessment according to the best of judgment is conferred only in cases covered by Sub-sections (3) and (4) and not by Sub-section (2), in the present case, where the assessments have been completed under Sub-section (2) of Section 12, the assessing authority was not entitled to reject the books and proceed to complete the assessments according to the best of his judgment.

Reliance is placed upon a decision of the Patna High Court in Raghu Nath Mahadeo Vs. The Commissioner of Income Tax, , which was under the Income Tax Act and some other cases under the Sales Tax Act. We do not find it necessary to examine all the cases cited by Mr. Mohapatra for the assessee, as, in our view, when the notice or notices issued under Sub-section (2) of Section

12 are not complied with to the satisfaction of the assessing authority a situation arises to which Sub-section (3) would apply. It is not the physical presence of the assessee or the physical production of the books of account in answer to notices under Sub-section (2) of Section 12 that would amount to compliance with the terms of the notice/notices as provided in Sub-section (3) of Section 12. It is for the assessing authority to decide whether there has been compliance with all the terms of his notice/notices and where he finds that there has been no proper compliance, he is to proceed to complete the assessment on the footing that the assessee has failed to comply with all the terms of his notice/notices. The assessee could not have been made the final arbiter in the matter under the scheme of the Act. The Division Bench decision of the Patna High Court in *Kaniram Janki Das v. State of Bihar* [1952] 3 S.T.C. 230 directly supports this view of ours. This Court has also taken similar view in *Silla Krishna Murty v. Commissioner of Sales Tax* [1961] 12 S.T.C. 684 and *Jami Biswanath Prusthy v. Commissioner of Sales Tax* [1961] 12 S.T.C. 606. Though not specifically indicated, even acceptance of this principle can be culled out from the decision of the Supreme Court in *Raghubar Mandal Harihar Mandal Vs. The State of Bihar*, . There an assessment u/s 19(2)(b) of the Bihar Sales Tax Act in a similar situation had been sustained.

5. We would accordingly accept the stand of the learned standing counsel that, in the present case, the assessee's explanations having not been accepted, the assessing authority was entitled to complete the assessments to the best of his judgment.

6. The real question for consideration now is as to the quantum of enhancement. Dealing with this aspect the Tribunal stated:

It is further argued that the enhancement of G.T.O. by 25 per cent has been excessive and the enhancement should have been confined to the actual of the suppression detected. This point was raised before the Assistant Commissioner and he refused to give relief in observing that the suppressions detected are illustrative and not exhaustive. If it were to be a case of a dealer having produced all his account books and the suppressions detected were to be exhaustive, certainly there would be no case to enhance the G.T.O. beyond the suppressed turnover detected. But the instant case is not so. The regular account books produced by the dealer did not disclose any evidence of the suppressed transactions and there is possibility of the dealer maintaining duplicate accounts. Exhibit III and slip No. 4 when totalled disclose total suppression of Rs. 30,211.84 which, in the circumstances, cannot be considered exhaustive. There is reason to say that the appellant is maintaining account books showing credit transactions, where he must be noting the names of the purchasers. Such accounts have not been produced. Therefore, it will not be correct to limit the enhancement only to the suppression detected. In best judgment assessment the assessing officer is entitled to make an honest estimate of the probable suppression during the relevant accounting period. The suppressions detected

were during short period from 13th March, 1967, to 20th August, 1967, as evidenced from exhibit III, and in view of the amount of suppression detected, the enhancement of the returned turnover in the instant case cannot be styled as excessive.

The Supreme Court in *Commissioner of Sales Tax v. H. M. Esufali H. M. Abdulali* 90 ITR 271 (S.C.) dealt with a case of best judgment assessment and clearly indicated that the best judgment is of the assessing authority and not of the court to which a reference is made under the Act. In every best judgment assessment there must be some guess-work. Judicial opinion is settled that every assessing officer is obliged to make an honest attempt to rule out arbitrariness and make an assessment which would fairly represent the actual turnover of the assessee. As long as the assessing authority acts honestly and a good basis is provided for the estimate, the assessment is not open to interference. Mr. Mohapatra for the assessee did not reiterate the assessee's contention raised before the Tribunal that the enhancements had to be confined to the suppressions detected. On looking into the records and hearing the learned Counsel for the parties, we are satisfied that an honest attempt had been made by the assessing authority to determine the actual turnover of the assessee--both disclosed and accounted for, and undisclosed and suppressed. In Esufali's case 90 ITR 271 (S.C.), the enhancement sustained was much more than 20 times. After all, on the facts of a given case, the vulnerability of the estimate has to be considered. Here the Tribunal has pointed out two aspects: (a) the suppressions are in respect of a small period out of the total period under consideration, and (b) it cannot be said that even during that period all the suppressions were detected.

7. Our answer to the question referred, therefore, shall be:

On the facts and in the circumstances of the case, the Tribunal was correct in law in confirming the enhancement.

Parties shall bear their own costs.

B.K. Ray, J.

I agree.