(2014) 11 OHC CK 0076

In the Orissa High Court

Case No : Writ Petition (Civil) No. 11723 of 2011

Srinivas Traders	APPELLANT
Vs	
State of Odisha	RESPONDENT

Date of Decision : 26-11-2014

Acts Referred:

Citation : (2015) 120 CLT 1099 : (2015) 2 ILR 35 : (2015) 1 OLR 654 : (2015) 81 VST 80

Hon'ble Judges : I. Mahanty, J;B.N. Mahapatra, J

Bench : Division Bench

Judgement

B.N. Mahapatra, J.—This writ petition has been filed with a prayer to quash the order dated 11.08.2010 (Annexure-1) passed by opposite party No. 2-Orissa Sales Tax Tribunal, Cuttack (for short, the Tribunal) in S.A. No. 1539/2004-05 pertaining to the year 2002-03 on the ground that the said order suffers the vice of perversity as the grounds not taken either by the petitioner or by opposite party No. 1-Commissioner of Commercial Taxes, Odisha, Cuttack have been considered and the order passed by opposite party No. 3-Sales Tax Officer, Rourkela-I Circle, Rourkela (for short, ''STO-Rourkela'') has been confirmed illegally.

2. Mr. D. Pati, learned counsel for the petitioner submitted that the petitioner is a proprietorship concern and is carrying on business in manufacturing and sale of corrugated cardboard boxes. The manufacturing unit of the petitioner is situated at CTS-34 Market, Basanti Colony, Rourkela, Dist: Sundargarh. The additional place of business is running at Rayagada in the name and style of "S.R.M. Industry". Opposite Party No. 3-STO-Rourkela examined the books of accounts and passed the order of assessment on 06.02.2004 (Annexure-2) for the year 2002-03 raising a tax demand of Rs. 1,78,396/-. The said extra demand of tax has been raised on the ground that the petitioner has not maintained stock account although it is a manufacturing unit and that it has obtained registration number in respect of additional place of business and has submitted returns to

opposite party No. 5-Sales Tax Officer, Koraput-II Circle, Rayagada (for short, ''STO-Koraput'') without obtaining permission from opposite party No. 1 for filing the consolidated return. Ultimately, the Assessing Officer resorted to best judgment assessment by making addition of Rs. 6,34,889.61 on account of sale of waste paper (scrap material) and making further addition on account of turnover of additional place of business. Accordingly, opposite party No. 3 determined the Gross Turnover and Taxable Turnover. Opposite Party No. 4, the 1st Appellate Authority taking into consideration various material facts and evidence available on record held that same turnover cannot be taxed twice and accordingly allowed adjustment of tax amounting to Rs. 1,04,733/- deposited by the petitioner at Rayagada and waived the levy of interest of Rs. 153/- made under Section 12(4-a) of the Orissa Sales Tax Act (for short, ''OST Act''). Opposite party No. 4 also restricted the addition of 2% of the gross sale value towards sale of scrap instead of 10% of the gross sale value as done by the Assessing Officer and accordingly passed the 1st Appellate order under Annexure-3.

Being aggrieved by the 1st Appellate order, the petitioner filed the 2nd Appeal before the opposite party No. 2-Tribunal. Before the learned Tribunal, the petitioner raised dispute about the enhancement of turnover by 2% of the gross sale of the finished product towards sale of paper scrap and determination of sale price thereof. Opposite party No. 2, after receipt of the appeal memo filed by the petitioner, issued notice to opposite party No. 1 for filing of memorandum of cross objection in terms of Rule 57 of Orissa Sales Tax rules. Opposite Party No. 1 has not filed any memorandum of cross objection. It has also not filed any appeal challenging the order dated 03.05.2004 passed by opposite party No. 4, the 1st Appellate Authority. Opposite party No. 2 issued notice of hearing to opposite party No. 1 in terms of Rule 58 of OST Rules. The appeal was heard on 04.08.2009.

3. Mr. Pati vehemently argued that in absence of any appeal or cross objection filed by opposite party No. 1, it was obligatory on the part of opposite party No. 2-learned Tribunal to adjudicate the sole issue raised by the petitioner, i.e., regarding enhancement of turnover, but opposite party No. 2 in a peculiar manner unknown to law and in excess of power conferred upon it passed the impugned order dated 11.08.2010 holding that two points arising out of assessment have not been dealt with properly by opposite party No. 4 and passed the order ignoring the principles of natural justice. Such action of opposite party No. 2 is illegal and arbitrary. Mr. Pati further submitted that though the appeal was heard on 04.08.2009 by opposite party No. 2, the impugned order was passed on 11.08.2010 i.e. after lapse of one year and two months. Concluding his argument, Mr. Pati submitted that the impugned order passed by the learned Tribunal may be set aside.

4. Mr. R.P. Kar, learned Standing Counsel for opposite parties supported the impugned order of the Tribunal passed under Annexure-1.

5. On the rival contentions of the parties, the only question that falls for consideration by this Court is whether in absence of any appeal or cross objection filed by the Revenue, the learned Sales Tax Tribunal is justified to restore assessment order disallowing the relief granted by the 1st Appellate Authority to the dealer-petitioner while adjudicating the appeal filed at the instance of the dealer-petitioner?

6. Undisputed facts are that the petitioner was assessed to extra tax demand of Rs. 1,78,396/- by opposite party No. 3-STO for the year 2002-03 vide Annexure-2. The 1st Appellate Authority allowed the appeal filed by the petitioner in part by reducing the assessment basically on two grounds, i.e., the same turnover cannot be taxed twice and therefore, the petitioner is entitled to adjustment of tax of Rs. 1,04,733/- already paid in respect of turnover of the additional place of business situated at Rayagada and secondly limited the addition to 2% of the gross value of the finished product as against 10% adopted by the Assessing Officer towards sale price of scrap. The Revenue did not file any appeal before opposite party No. 2-Tribunal challenging the order of the 1st Appellate Authority. It is the petitioner, who being not fully satisfied with the order passed by the 1st Appellate Authority has filed 2nd Appeal before the Tribunal on the limited ground that enhancement of turnover by 2% of gross value of the finished product towards sale of scrap paper and determination of price thereof are not correct. It is also pertinent to mention here that the Revenue after receipt of the appeal memo filed by the petitioner has not filed any cross objection. Therefore, the only issue that was left for adjudication by opposite party No. 2-Tribunal is whether opposite party No. 4 has rightly determined 2% of the sale value of the finished product as sale value of scrap paper.

7. At this juncture, it would be profitable to refer to the decisions of the Hon''ble Supreme Court and this Court.

8. The Hon''ble Supreme Court in the case of State of Kerala Vs. Vijaya Stores, , held as under:

"...The normal rule that a party not appealing from a decision must be deemed to be satisfied with the decision, must be taken to have acquiesced therein and be bound by it and, therefore, cannot seek relief against a rival party in an appeal preferred by the latter, has not been deviated from in sub-section (4)(a)(t) above. In other words, in the absence of an appeal or cross-objections by the Department against the Appellate Assistant Commissioner''s order the Appellate Tribunal will have no jurisdiction or power to enhance the assessment...."

9. The Hon''ble Supreme Court in the case of Reckitt and Colman of India Ltd. Vs. Collector of Central Excise, , held that it is beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had never canvassed and which the appellants had never been required to meet.

10. This Court in the case of State of Orissa Vs. Voona Suru Patra and Sons, ,

held as under:

"It is well settled now that in second appeal by the assessee an advantage obtained by him from the first appellate authority in the absence of appeal or cross-objection by the revenue is not open to attack."

11. This Court in the case of Shyamsunder Sahoo v. State of Orissa, (1994) 92 STC 28, held as under:

"5. The power of the Tribunal to enhance the assessment is relatable to an appeal or cross-objection filed by the Revenue. The normal rule that a party not appealing from a decision must be deemed to be satisfied with the decision, has to be taken to have acquiesced therein and must be bound by it, and, therefore, cannot seek relief against a rival party in an appeal preferred by the latter, has not been deviated from in Section 23(3)(c). The Tribunal has no jurisdiction or power to enhance the assessment in the absence of an appeal or cross-objection by the Revenue."

12. In Shiv Prasad Sahu Vs. State of Orissa, , this Court has held as under:

"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 the grounds of appeal argued before it.

13. In view of the above, we are of the considered opinion that in absence of any appeal or cross appeal by the Revenue, the Tribunal ought not to travel beyond the dispute raised by the petitioner in its appeal. Therefore, the Tribunal should not have disallowed the relief granted to the petitioner by the 1st Appellate Authority by restoring the assessment order when the Revenue has no grievance against grant of such relief to the petitioner by the Ist appellate Authority.

14. For the reasons stated above, the impugned order dated 11.08.2010 passed by opposite party No. 2-Tribunal in SA No. 1539/2004-05 is not sustainable in law and is liable to be quashed and accordingly, we quash the same. Opposite party No. 2-Tribunal is directed to re-hear SA No. 1539/2004-05 on the issue(s) raised by the petitioner and pass order in accordance with law within a period of eight weeks from today.

15. In the result, the writ petition is allowed.

