

(2015) 08 OHC CK 0044

In the Orissa High Court

Case No : STREV Nos. 89, 90, 91 and 92 of 2011

State of Odisha

APPELLANT

Vs

Suvadra Enterprises

RESPONDENT

Date of Decision : 03-08-2015

Acts Referred:

Citation : (2015) 85 VST 286

Hon'ble Judges : I. Mahanty, J;Durga Prasanna Choudhury, J

Bench : Division Bench

Advocate : M.S. Raman, Addl. Standing Counsel (Commercial Taxes), for the Appellant

Judgement

Dr. Durga Prasanna Choudhury, J—The petitioner has filed these revisions under section 24(1) of the Odisha Sales Tax Act, 1947 (hereinafter for short "the Act") challenging the order dated 20.4.2009 passed Orissa Sales Tax Tribunal (DIVISION BENCH-II), Cuttack in S.A. Nos. 71 to 74 of 2002-2003 preferred by the opposite party for the assessment period from 1995-96 to 1998-99. Since four revisions are filed out of single order, they are being disposed of by this common order.

FACTS:

2. The unsworn details of the case of the petitioner are as follows:--

"The opposite party who is a registered dealer under the Act deals in Milton, Hawkins, Aristocrate, Eagles, Curlon, Sumeet Grinder, air cooler, Electrical Appliances, Plastic furnitures etc. on retail and semi-wholesale basis was assessed for the years 1995-96, 1997-98 and 1998-99, under section 12(4) of the Act and for the year 1996-97 under section 12(8) of the Act. Subsequently, in 2000, Assistant Officer of A.G. Audit party made audit of the turn over of the opposite party for these period. During audit, they found that the opposite party has suppressed the sales and accordingly, found taxable purchase to the tune of Rs. 56,37,965.00 on the strength of Form XXXIV and Rs. 56,859.00 on the

strength of way bills, in total, amounting to Rs. 56,94,824.00 for those years. But the audit found that the taxable turn over against those years have been suppressed by the opposite party and claimed much more value of goods in comparison to less purchase of first point tax paid goods as well as non-disclosure of taxable purchase of annual stock account of opening and closing balance of stock. Thus he found that Rs. 16,34,522.00 was escaped from assessment during those years resulting in Rs. 6,11,131.00 short levy of tax including surcharge. The Auditor also found for the years 1993-94 and 1994-95 there was similar suppression of tax of Rs. 1,48,141.00 including surcharge. After receiving the audit report, the learned Assessing Authority-Sales Tax Officer, Bhadrak Circle, Bhadrak found a prima facie case under section 12(8) of the Act and issued notice. In turn, the opposite party submitted show-cause. Learned Assessing Authority vide order dated 17.8.2001 (Annexure-7) indicated that Rs. 1,53,170.00 is payable by the opposite party because there is turn over escaped from the assessment under section 12(4) of the Act."

3. Against the above order, the opposite party preferred First Appeal before the learned Asst. Commissioner of Sales Tax, Balasore Range, Balasore in F.A. Case No. AA 85 to 88/BD 2001-02 who vide order dated 21.3.2002 (Annexure-8) observed that the assessment of the year 1995-96 to 1998-99 has already been completed under section 12(4) of the Act. According to him, there was suppression of the sale of taxable goods of Rs. 19,45,020.14 paise, Rs. 6,60,600.96 paise, Rs. 11,20,283.15 paise and Rs. 8,65,360.31 paise in the years 1995-96, 1996-97, 1997-98 and 1998-99 respectively. Although the argument was advanced by the opposite party before the First Appellate Authority that the adding of 10% profit and wrong estimate of the sale by the learned Assessing Authority is bad in law, dispelling the argument of the opposite party learned First Appellate Authority confirmed the order of the learned Assessing Authority by observing that the assessment was made on the basis of the stock position reported by the appellant to the Income Tax Department, the inventory of the physical stock was made on 30.6.2001.

4. Against the order of the learned First Appellate Authority, Second Appeal was preferred by the opposite party before the Orissa Sales Tax Tribunal (DIVISION BENCH-II), Cuttack. The Tribunal vide order dated 28.2.2011 passed in S.A. Nos. 71 to 74 of 2002-2003 framed the point in issue as to "whether the order of the learned ACST confirming the orders of assessment of escaped sales tax passed by the STO against the appellant for the periods 1995-96, 1996-97, 1997-98 and 1998-99 is erroneous and is to be annulled ?" After discussing at length in the judgment, learned Tribunal held that the learned Assessing Authority should have formed the independent opinion so far as escaped sales tax is concerned. The Tribunal also observed that this Court in the case of *The Indure Limited Vs. Commissioner of Sales Tax and Others*, (2006) 102 CLT 309 : (2006) 2 OLR 154 : (2006) 148 STC 61 held that the transfer under section 12(8) of the Act for the assessment of the escaped sales tax without assigning any reason in such assessment, is unlawful. Learned Tribunal found that the conclusion reached by

the authorities below are not based on any material before them. Since there is no material showing suppression of tax turn over, the conclusion arrived at by the authorities below, is bad in law and accordingly the Tribunal set aside the orders of the First Appellate Authority as well as the Assessing Authority and allowed the appeal. Hence the revision.

5. The case of the opposite party is that the opposite party submitted self-assessed return under section 12(4) of the Act and the same has been already assessed by the concerned authority. Accordingly it has already paid the tax. It is the further case of the opposite party that without affording reasonable opportunity, there is re-assessment of its tax turn over, resulting in sheer harassment to it. Opposite Party denies about any suppression of tax turn over and claimed that the audit assessment is based on no evidence and the learned authorities below the learned Tribunal have not appreciated the true facts of the case. The Opposite Party hailed the judgment of the learned Tribunal and submitted to dismiss the revision.

6. Mr. Raman, learned Additional Standing Counsel (Commercial Taxes) strenuously argued that there was assessment of the opposite party establishment for those four years under section 12(4) of the Act. But during audit assessment, the suppression of sale by the opposite party came to light, for which rightly the audit has unearthed the suppression of tax turn over and requested the Assessing Authority to re-assess the establishment. Learned Assessing Authority after giving opportunity to the opposite party, heard the matter under section 12(4) of the Act and finally found that further tax is to be paid by it. Accordingly Mr. Raman, learned Additional Standing Counsel (Commercial Taxes) submitted that the learned Tribunal did not appreciate the facts in its proper perspective and reached a wrong conclusion ignoring the orders passed by the authorities below it. According to him, the reason given by the learned Tribunal, is arbitrary and not based on any fact. He further submitted that the Tribunal being the Second Appellate Authority, must abide by the facts found by the authority below. But instead, it went on observing opinion on facts without relying upon the record which shows that there is suppression of sale turn over by the opposite party. On the other hand, learned Tribunal has erred in law by observing that the enhancement of tax without material of sale suppression by the opposite party, was unlawful because there are lot of materials produced basing on which re-assessment was made and the opposite party was found to have suppressed the material. Therefore, Mr. Raman, learned Additional Standing Counsel (Commercial Taxes) submitted to set aside the orders of the learned Tribunal and to restore the order of the learned Assessing Authority.

7. Learned counsel for the Opposite Party submitted that the opposite party being the dealer, has submitted self-assessed Form showing the bills of purchase and sale. He further submitted that on the sales tax, the order of the Tribunal is correct and legal and prayed the same should be confirmed and the revision

should be dismissed.

DISCUSSIONS:

8. We have carefully considered the submission of the respective counsel and perused the records to apprise ourselves of the facts of the case. From the records, it is found that there was assessment for those four years by the learned Assessing Authority. It is further found that vide Annexure-4, opposite party has filed reply to the show-cause notice issued under section 12(8) of the Act and in that show-cause he has averred that it has averred that it is maintaining the stock to the tune of Rs. 35-40 lakh out of which luggages cover 60%, 20% is covered by the tax paid items and the rest are covered by other first point items which include glass and crockery. He fairly stated not to have suppressed any sale. The Assessing Authority vide Annexure-7 indicated that there was re-assessment on 17.8.2001 and it is found that tax of Rs. 1,53,170.00 is payable by the opposite party for the assessment year 1997-98. This order does not disclose the discussion on the plea taken by the opposite party. Vide order dated 21.3.2002 (Annexure-8), the First Appellate Authority simply observed that opportunity was given to the opposite party to adduce evidence and the order dated 17.8.2001 of the Assessing Authority basing on the report of the Income Tax Department as to stock position in the establishment of the opposite party is correct and is an independent enquiry. When the Assessing Authority depends on the report of the Income Tax Department to whom the opposite party has submitted return, it is difficult to assume that the Assessing Authority has independently made observation by holding enquiry. When the order dated 17.8.2001 (Annexure-7) passed by the Assessing Authority about re-assessment does not disclose about any material of the opposite party, how the First Appellate Authority observed that opportunity was given to the opposite party to adduce evidence. But no evidence was given. While considering the impugned order of the learned Tribunal, it appears that the learned Tribunal has gone in detail and it is clearly observed in para-6 that original record of escaped assessment was not available to the Tribunal to ascertain if the assessing authority has recorded reasons of his satisfaction for proceeding under section 12(8) of the Act and clearly it has stated that the Assessing Authority has passed mechanical order. When the record was not produced by the appellant before the Second Appellate Authority, it is difficult to opine that the Tribunal has given his finding by ignoring the material adduced before them. On the other hand, it is found from the order passed by the Tribunal, impugned herein, that the tax turn over of a dealer cannot be enhanced for levy of sales tax merely on suspicion. We also endorse this view and observe that mere suspicion, however major may be, cannot substitute legal proof. It is reiterated that there is nothing found from the orders of re-assessment or the First Appellate Authority that the stock entry or any other material was considered independently to find out the escaped tax liability of the opposite party.

9. At this stage, it is required to go through the provision under section 12(8) of

the Act as the re-assessment has been made under section 12(8) of the Act. Section 12(8) is reproduced herein below:

"12(8) : If for any reason the turnover of a dealer for any period to which this Act applies has escaped assessment or has been under assessed or where tax has been compounded when composition is not permissible under this Act and the Rules made thereunder the Commissioner may at any time within five years from the expiry of the year to which that period relates call for return under sub-section (1) of Section 11 and may proceed to assess the amount of tax due from the dealer in the manner laid down in sub-section (5) of this Section and may also direct, in cases where such escapement or under assessment or composition is due to the dealer having concealed particulars of his turnover or having without sufficient cause has furnished incorrect particulars thereof, that the dealer shall pay, by way of penalty, in addition to the tax assessed under this sub-section, a sum equal to one and a half times of the said tax so assessed."

10. From the aforesaid provision it is clear that if for any reason the turnover of a dealer for any period to which this Act applies has escaped assessment or has been under assessed or where tax has been compounded when composition is not permissible under this Act and the Rules made thereunder the Commissioner may at any time within five years from the expiry of the year to which that period relates call for return under sub-section (1) of Section 11 and may proceed to assess the amount of tax due from the dealer in the manner laid down in sub-section (5) of Section 12 of the Act. It is imperative to go through the sub-section (5) of Section 12 of the Act which is reproduced below:

"12 (5): If upon information which has come to his possession, the Commissioner is satisfied that any dealer has been liable to pay tax under this Act in respect of any period and has nevertheless, without sufficient cause, failed to get himself registered, the Commissioner may, at any time within five years from the expiry of the year to which that period relates, call for return under sub-section (1) of Section 11, and 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 in respect of such period and all subsequent periods and may also direct that the dealer shall, pay, by way of penalty, in addition to the amount so assessed, a sum equal to one and half times that amount:

Provided that no penalty shall be levied for the quarter during which the dealer first or again becomes liable to pay tax under this Act and for the period between the date of application for registration and the date of registration."

11. The above provision makes it mandatory for the Assessing Authority to hold enquiry for such period after giving the dealer the reasonable opportunity of being heard to pay the tax as per the principle of best judgment. Therefore, the prerequisite under section 12(8) is compliance of section 12(5) of the Act. In the instant case as discussed above, we have already observed that vide order dated 17.8.2001 (Annexure-7) the Assessing Authority has taken view from the report

dated 26.12.2000 (Annexure-1) that a prima facie case under section 12(8) culled out. This observation of the Assessing Authority smacks the provision of law inasmuch as without giving any short of opportunity, the Assessing Authority has accepted the Audit Assessment Report and found that there is a prima facie case under section 12(8) of the Act against the opposite party. Moreover, neither the written statement nor any short of oral statement of the opposite party find place in the re-assessment order passed by the learned Assessing Authority. The reasons given in the escaped assessment order, does not disclose how much tax turn over has been suppressed by the petitioner. Equally the First Appellate Authority has also not considered whether the reasonable opportunity has been given to opposite party on letter and spirit for which the order passed under section 12(8) of the Act is lawful and requires no intervention.

12. It is reported in Mahadaya Premchandra Vs. Commercial Tax Officer, Calcutta and Another, AIR 1958 SC 667 : (1959) 1 SCR 551 : (1958) 9 STC 428 their Lordships at page 435 observed:

"We are really surprised at the manner in which the first respondent dealt with the matter of this assessment. It is clear that he did not exercise his own judgment in the matter and faithfully followed the instructions conveyed to him by the Assistant Commissioner (C.S.) without giving the appellants an opportunity to meet the points urged against them. The whole procedure was contrary to the principles of natural justice. The procedure adopted was, to say the least, unfair and was calculated to undermine the confidence of the public in the impartial and fair administration of the sales-tax department concerned."

From the aforesaid proposition, it is clear that if the Assessing Authority who is vested with power to exercise but does not execute according to statute, the procedure followed by the concerned authority is contrary to principle of natural justice.

13. The aforesaid principle has also been followed in Orient Paper Mills Ltd. Vs. Union of India (UOI), AIR 1969 SC 48 : (1978) 2 ELT 345 : (1969) 1 SCR 245 where their Lordships observed:

"It is regrettable that when administrative officers are entrusted with quasi judicial functions, oftentimes they are unable to keep aside administrative considerations while discharging quasi judicial functions."

From the aforesaid observation of the Hon"ble Apex Court, we are of the view that in the instant case learned Assessing Authority even though has accepted the request of the Audit Officer, the re-assessment by the Assessing Officer as quasi judicial authority should be independent but not solely based on the report of the Audit Officer.

14. The aforesaid two decisions of the Hon"ble Apex Court have been followed by this Court in the decision Indure Limited (supra). it is reported in Indure Limited (supra) where this Court have been pleased to observe at para-39 in the

following manner:

"The importance of this doctrine lies in the fact that if a statutory functionary is vested with a power to act, it is that statutory authority alone who will form the necessary objective opinion for exercising its powers. In doing so, it may take into consideration whatever is relevant. As in the instant case, audit objection may be a relevant consideration. Taking that objection into consideration, the Sales Tax Officer has to form his objective opinion. But the Sales Tax Officer cannot totally abdicate or surrender his discretion to the objection of the audit party by mechanically reopening assessment under section 12(8) as has been done in this case."

With due respect to the said decision, it is found that the Sales Tax Officer has to form his objective opinion by taking the evidence of the opposite party into consideration. But in the instant case no enquiry, independent of the report filed against the opposite party by the Income Tax Department, has been considered. We are of the opinion that the ratio decidendi of this case, squarely applies to the facts and circumstances of the case. Relying on such settled law in the above decisions of Hon"ble Apex Court and this Court with the provisions of law as discussed above, we are further of opinion that the learned Tribunal has rightly observed that the conclusion arrived about escaped assessment, is based on suspicion and no opportunity has been given and adding to that, we are of the view that no reasonable opportunity has been given to the opposite party to pass order under section 12(8) of the Act. It is, therefore, held that the impugned order dated 28.2.2011 passed by the Tribunal is valid and there is no reason to interfere with it.

15. In view of the aforesaid analysis, while confirming the order of the learned Tribunal, impugned herein, for the interest of justice, we hereby direct the Assessing Authority to re-assess the suppression of turn over (if any) for those years after giving opportunity to the petitioner and opposite party of being heard in compliance with the provision under section 12(5) of the Act and dispose of the case on merit under section 12(8) of the Act within a period of two months from today.

Revision is disposed of accordingly.

I. Mahanty, J.

I agree.