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(1973) 04 OHC CK 0023

In the Orissa High Court

Case No : Special Jurisdiction Case No. 65 of 1971

State of Orissa — APPELLANT

Vs

Durgadutta Moda — RESPONDENT

Date of Decision : 10-04-1973

Acts Referred:
Orissa Sales Tax Act, 1947 — Section 11(1), 12(8), 24(1)

Citation : (1973) 39 CLT 864 : (1973) 32 STC 98

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

Bench : Division Bench

Advocate : R. Mohanty, for the Respondent

Judgement

R.N. Misra, J.—This is a reference made u/s 24(1) of the Orissa Sales Tax Act (hereinafter referred to as the Act) by the Member, Sales Tax Tribunal, on the following two questions of law for determination of this court:

(i) Whether on the facts and in the circumstances of the case, the Member is right in holding that a duty is cast on the revenue to fix the actual amount of escapement in a reassessment proceeding ?

(ii) Whether on the facts and in the circumstances of the case, the Member is right in holding that assessment u/s 12(8) of the Orissa Sales Tax Act should be confined to the turnover escaped or under-assessed ?

2. The assessee, a registered dealer under the Act, deals in aluminium goods. He had been assessed to sales tax under the Act for the year 1962-63. On a discovery of certain dealings of the assessee with other dealers, which had not come to light during the assessment proceedings, action was taken u/s 12(8) of the Act. In the accounts of the third party, the following transactions of the assessee were found:

Date Amount 13-4-62 Rs. 504.27 P. " " 426.46 " 9-5-62 " 1,361.94 " 10-5-62 " 142.16 " 12-5-62 " 508.40 " " " 176.10 " 22-5-62 " 815.27 " _____

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3,934.60 _____ On verification of the assessee''s accounts, the Sales Tax Officer did not find corresponding entries. The Sales Tax Officer accepted the entries in the third party''s accounts to be correct and came to the conclusion that there were suppressions in the assessee''s books of account. Though the total suppressions came to Rs. 3.934.60, the Sales Tax Officer made an estimate of the suppressed turnover of sales at Rs. 12,000 and demanded additional tax along with penalty of Rs. 100 from the assessee.

The appeal filed by the assessee failed. In second appeal by the assessee, the Tribunal came to hold :

Certain pleas were taken by the Advocate for the appellant which were advanced in the forums below also, but they have been rightly rejected as unsustainable. The only point now for me to consider is, is Rs. 12,000 enhancement justified. This is a 12(8) proceeding with an imposition of penalty of Rs. 100. It was the duty of the department to fix the actual amount of escapement. They have not done so. The total escapement is Rs. 3,934.60. There is another sum of Rs. 2,603.95 but that is not an escapement. Thus in round figures the escapement is Rs. 4,000. Accordingly, I reduce the enhancement to Rs. 4,000 only.

3. Learned standing counsel contends that the approach of the Tribunal to the matter has been vitiated and the Tribunal is wrong in its view that in an assessment u/s 12(8) of the Act what can actually be added is the escaped turnover. Mr. Mohanty appearing for the assessee supports the view of the Tribunal and contends that there was no scope for making a best Judgment assessment in a proceeding u/s 12(8) of the Act and what the assessing officer was entitled to add was the exact escapement only.

4. The two questions which have been referred to us seem to be not very appropriate. What exactly arose from the Tribunal''s order in second appeal and is canvassed by learned standing counsel is that in an assessment u/s 12(8) of the Act, the assessing officer is entitled to make a best Judgment assessment and he need not confine his assessment to the exact escaped turnover. A distinction has got to be maintained between escapement and under-assessment. In the case of under-assessment there is no scope for estimate, because the turnover would remain the same, while a lower rate has been applied on the earlier occasion, the appropriate rate has only to be applied. The case of escapement, however, has a completely different basis. We would accordingly recast the questions keeping in view the actual dispute to the following effect:

(i) Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that it was the duty of the department to fix the actual amount of escapement; and

(ii) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessment in question had to be confined to the escaped turnover.

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5. Question No. (i): Section 12(8) of the Act provides :

If for any reason the turnover of a dealer for any period to which the 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 thirty-six months from the expiry of the year to which that period relates call for a 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 not exceeding one and a half times of the said tax so assessed.

It is, therefore, clear that once the assessing officer comes to the conclusion that the turnover of a dealer has escaped assessment or has been under-assessed, he has to call for a return from the dealer u/s 11(1) of the Act and is required to proceed with the assessment in the manner laid down under Sub-section (5) of that section of the Act. Sub-section (5) of Section 12 authorises assessment to the best of Judgment. Therefore, u/s 12(8) there can be an assessment by best of assessing officer''s Judgment. Mr. Mohanty relied with great emphasis on a Full Bench decision of the Madras High Court in the case of P. S. Subramaniam Chettiar & Sons v. Joint Commercial Tax Officer III, Dindigul [1966] 18 S.T.C. 357. Referring to Section 16(1) of the Madras General Sales Tax Act, 1959, it was held that Sub-section (1) was concerned with two kinds of escapements: (1) turnover escaping assessment; and (2) turnover being assessed at a rate lower than the rate at which it is assessable. In the second category of cases, there was no question of assessment according to best Judgment, but in dealing with the first category, the question arose whether the assessing authority was confined to the turnover actually proved by evidence to have escaped assessment or could go beyond and determine the quantum of turnover by best Judgment. Referring to Section 16 of the Act, the court held that the Sub-section had not conferred the power of assessment by best Judgment and, therefore, in reassessing the escaped turnover, the assessing officer was not entitled to resort to the method of best Judgment assessment. We do not think, reliance can be placed on this decision to interpret the power of the assessing officer under Sub-section (8) of Section 12 of the Orissa Act. In the Orissa Act provision has been made conferring power under Sub-section (5) of Section 12 on the assessing officer. Therefore, by express legislation the assessing officer has been authorised to complete reassessment on the basis of escapement of turnover by following the method of assessment according to best Judgment. Two decisions of the Allahabad High Court in Bhagat Ram Jai Narain v. Commissioner, Sales Tax, Uttar Pradesh, Lucknow [1969] 24 S.T.C. 287 and Kashi Jewellers v. Commissioner of Sales Tax, U.P., Lucknow [1969] 24 S.T.C. 291, another decision

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of the Madhya Pradesh High Court in H. M. Esufali H. M. Abdulali v. Commissioner of Sales Tax, M.P., Indore [1969] 24 S.T.C. 1 and a decision of the Patna High Court in Mittal & Company v. State of Bihar [1969] 24 S.T.C. 418, which have taken the view that the Sales Tax Officer in reassessing the turnover is entitled to make a best Judgment assessment, in our view, lay down the correct law. Once the accounts are discarded the foundation of the original assessment made on the footing of the accounts collapses and the turnover made on that basis loses its validity. The assessing officer becomes entitled to cover the entire range of the turnover and may make a best Judgment assessment. It is true, the extent of the escapement has got to be kept in view and, therefore, it requires to be indicated or ascertained. Our answer to the first question, therefore, shall be that on the facts and in the circumstances of the case, the Tribunal was not right in holding that it was the duty of the department to fix the actual amount of escapement.

6. Question No. (ii): As already indicated, the quantum of suppression found was to the extent of Rs. 3,934.60. The assessing officer had in his order of reassessment stated :

...The dealer to avoid tax has suppressed the transactions. Hence, no reliance can be put on the accounts produced by the dealer and as such, the same are rejected and assessment is made to the best of Judgment. Considering the amount of suppression and the volume of trade, I honestly estimate the suppressed turnover of sales during the year at Rs. 12,000....

The first appellate authority in dealing with the matter came to say :

...I am fully convinced that the appellant has suppressed his purchases; thereby he has suppressed his sales also. In the circumstances there must be some enhancement to cover up the omissions. The assessing officer has made an enhancement of Rs. 12,000 per quarter after covering up all such omissions. It appears that he is very reasonable in making such an enhancement. He has taken the pros and cons into account, the extent of omissions detected and the deliberate suppressions made....

We have already extracted what the Tribunal said about it. It is useful to indicate here that the first appellate authority did not apply its mind to the matter at all. The assessing officer had not enhanced a turnover by estimate up to Rs. 12,000 per quarter. He had initially completed the assessment for the whole year and the reassessment was also for the whole year. Rs. 12,000 was estimated as the suppressed turnover for the entire year.

7. Once it is accepted that there can be an assessment according to best of Judgment, that is, the assessing officer would be entitled to estimate the escaped turnover, can the estimate in this case be upheld ?

The principle of best Judgment assessment has been dealt with at length by their Lordships of the Supreme Court in Raghubar Mandal Harihar Mandal Vs. The

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State of Bihar, Their Lordships quoted with approval the dicta laid down by their Lordships of the Judicial Committee in Commissioner of Income Tax, Central and United Provinces v. Badridas Ramrai Shop, Akola [1937] 5 ITR 170 (P.C.), by their own court in Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax, West Bengal [1954] 26 I.T.R 775 (S.C.), by the Lahore High Court in (1937) 5 ITR 464 and in (1944) 12 ITR 393 . The following passage from the Judgment of Lord Russell of Killowen in Commissioner of Income Tax, Central and Untied Provinces v. Badridas Ramrai Shop, Akola [1937] 5 ITR 170 was quoted with express approval:

...The officer is to make an assessment to the best of his Judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously, because he must exercise Judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee''s circumstances and his own knowledge of previous returns by and assessments of the assessee and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guesswork.

Their Lordships again emphasized by saying :

...To use the words of Lord Russell of Killowen again, ''he must make what he honestly believes to be a fair estimate of the proper figure of assessment'' and for this purpose he must take into consideration such materials as the assessing officer has before him, including the assessee''s circumstances, knowledge of previous returns and all other matters which the assessing officer thinks will assist him in arriving at a fair and proper estimate....

In this case the assessing officer did not indicate any foundation for his estimate apart from saying that he took into consideration the amount of suppression and the volume of trade. Learned standing counsel contends that these are objective considerations and we would not be justified in holding that reference to these was not a sufficient foundation for the estimated figure. We indeed find it difficult to agree with such contention. It was open to the assessing officer to refer to the nature of the trade, the conduct of the assessee like bis having been subjected to various proceedings u/s 12(8) of the Act for other periods, any special feature in the business which makes suppressions more convenient, reference to any particular trade practice prevailing in the locality or in the assessee''s own business and factors like these to justify his estimate, A mere declaration in the order of assessment that the estimate is honest does not add support in law to the estimate.

Mr. Mohanty relied upon a decision of this court in the case of Bherodhan Jethmal (Private) Ltd. v. State of Orissa [1970] 26 S.T.C. 536. We must say that no support is available to the assessee from this decision. As the facts show, this

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court came to hold that the duplicate book which was the genuine account was before the assessing authority and as such over and above what appeared from the genuine account, there should be no further addition. There is no material in the present case on the basis whereof such a finding can be given.

8. It would be reasonable for us to hold that the assessing officer or the first appellate authority had not provided any acceptable foundation for the estimate made and sustained and the Tribunal was, therefore, justified in holding that what could be added in the minimum is the escaped turnover itself. As we have already said, on a finding that there has been escapement of the turnover on account of the assessee''s suppression of turnover, it is open to the assessing officer to estimate and complete the assessment according to his best Judgment. But to support such estimate materials must be found and indicated. It must be clearly kept in view that on account of escapement, reassessment is not intended to be penal, that is, arbitrariness cannot come into quantification of the escaped turnover and, in fact, for such conduct of the assessee penalty is separately provided. In view of what we have said above, it would follow that the conclusion of the Tribunal that on the facts and in the circumstances of the case more than the actual escaped turnover could not be added, cannot be found to be a (sic) valid conclusion. The answer to the second question, therefore, shall be that in the facts and circumstances of the case, the Tribunal was justified in holding that the assessment in question had to be confined to the escaped turnover.

9. Since both the assessee and the revenue have succeeded in part, we direct both parties to bear their own costs of this reference.

B.K. Ray, J.

10. I agree.

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