
(1972) 10 OHC CK 0019
In the Orissa High Court
Case No : S.J.C. No. 1 of 1969

State of Orissa

APPELLANT

Vs

Nanda Sahu and Padan Sahu

RESPONDENT

Date of Decision : 12-10-1972

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 12(2), 12(8), 24(1)

Citation : (1972) 38 CLT 1267 : (1973) 32 STC 223

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

Bench : Division Bench

Advocate : N.N. Bhattacharya, for the Respondent

Judgement

R.N. Misra, J.—This is a reference made u/s 24(1) of the Orissa Sales Tax Act of two questions of law said to be arising from the appellate order of the Sales Tax Tribunal u/s 23 of the Orissa Sales Tax Act (hereinafter referred to as the Act). The questions referred are :

(1) Whether in the facts and circumstances of the case, the Tribunal was right in holding that if particulars of suppression of transaction by an assessee are available at the time of original assessment u/s 12(2), but are for any reason not utilised in that assessment such assessment cannot be reopened u/s 12(8) subsequently on the basis of that earlier report.

(2) Whether in the facts and circumstances of the case, the Tribunal was right in annulling the assessments and imposition of penalty u/s 12(8) of the Orissa Sales Tax Act, 1947.

The facts which gave rise to the questions indicated above are these: The assessee is a registered dealer under the Orissa Sales Tax Act. He was assessed u/s 12(2) of the Act in respect of the quarters ending June, 1963, to March, 1964, by the Sales Tax Officer, Cuttack III Circle, on 31st January, 1965. The assessee's accounts were discarded and the taxable turnover was enhanced. In respect of these very four quarters notice u/s 12(8) of the Act was given and

assessments were completed on the basis that on 31st July, 1963, an officer of the Intelligence Wing of the department had detected certain suppressions. The suppressions related to iron goods worth Rs. 471.75 said to have been purchased under a voucher dated 31st May, 1963, from Calcutta in the name of one Padan Sharma, a fictitious person. The purchase was not accounted for. The assessing officer also found discrepancy in betel-nut account. Accordingly, assessment u/s 12(8) of the Act was completed on 23rd August, 1965, enhancing the gross and taxable turnovers and levying penalty as provided under the law. The appeals before the Assistant Commissioner were dismissed. The Tribunal accepted the assessee's contention in regard to discrepancy in betel-nut account. It, however, found that there had been suppression in regard to the iron goods, Notwithstanding the aforesaid finding, the Tribunal stated :

It is next pointed out that the fraud report of the Intelligence Wing submitted on 31st July, 1963, was made long before the original assessment u/s 12(2) of the Orissa Sales Tax Act was made on 21st January, 1965 and, therefore, the assessing officer should have taken the report into consideration before completing the assessment and enhancing the turnover by Rs. 11,000 for the quarters ending June, 1963, to March, 1964. Although a period of 11/2 years lapsed between the detection by the Intelligence Wing and the completion of the assessment by the Sales Tax Officer, Cuttack III Circle, it is not understood why the fraud report ,of the Intelligence Wing was not made available to the assessing officer. It appears that the Intelligence Wing was acting independently as assessing officer and making his own enquiry but he is not passing any information to the assessing officer in proper time. The procedure adopted by the department leads to unnecessary harassment to the assessee because very shortly after the assessment was completed and best judgment assessment was made the assessee had to face the reopening of the assessment u/s 12(8) for the facts which could have been brought to his notice before the assessment is completed. I, therefore, do not consider that the issue of notice u/s 12(8) on 19th July, 1965, calling upon the assessee to show cause against the proposed reopening of the assessment is justified and whatever turnover escaped assessment should have been brought to the notice of the dealer before the original assessment was completed. Hence I hold that the enhancement of the turnover u/s 12(8) of the Orissa Sales Tax Act and imposition of penalty is unwarranted.

After the aforesaid appellate order, the Tribunal was moved to make the reference u/s 24(1) of the Act. Four applications were made, but the one relating to the quarter ending 30th June, 1963, was found to be in time. Accordingly, the Tribunal made the reference of the two questions already indicated in regard to that quarter.

2. The two questions are indeed one. We would accordingly reframe the question as follows :

Whether in the facts and circumstances of the case, the Tribunal was justified in

holding that if particulars of suppression of transactions by the assessee though available at the time of assessment made u/s 12(2) of the Act were not utilised in making the said assessment, proceedings u/s 12(8) of the Act could be taken subsequently on the basis of the very said particulars of suppression ?

Section 12 of the Act deals with the procedure for making the assessment. Sub-section (1) authorises the taxing officer to complete the assessment on the basis of the return if he is satisfied that the return made is correct and complete. If the assessing officer is not so satisfied, under Sub-section (2) (a) he is to require the registered dealer to produce evidence that the return furnished is correct and complete. The registered dealer thereupon is to comply with the requirements of the notice on the dates specified. Sub-section (3) deals with the contingency where the registered dealer who has furnished a return fails to comply with the notice under Sub-section (2). Upon such failure of the dealer the taxing officer is to make the assessment according to best of his judgment. Sub-section (4) deals with the situation where a registered dealer fails to furnish the return in accordance with the provisions of the Act. In such a case, the taxing officer has to give the dealer a reasonable opportunity of being heard and thereupon he is to complete the assessment to the best of his judgment. Sub-section (4-a) which is an innovation in the statute from 1968 authorises realisation of interest where the assessing officer finds that the dealer knowingly produced incorrect accounts, documents or registers with a view to affecting the quantum of tax payable by him. Sub-section (5) deals with assessment of an unregistered dealer and provides also for imposition of penalty for non-registration. Sub-section (6) deals with a dealer required to furnish annual return u/s 11 of the Act. Sub-section (7) authorises prosecution for offences under the Act and the provisos thereunder deal with composition and limitation for making of original assessment and assessment subsequent to remand. Sub-section (8) deals with escaped assessment of turnover.

Both under the Sales Tax Act as also the Income Tax Act "escaped assessment" has assumed a definite meaning. Escapement of assessment may arise in various circumstances. The dealer may neglect, to make a return or while making a return may suppress a part of the turnover. Even if the turnover has been returned, either by negligence or omission or even by wrong application of law, a part of the turnover may be left out from assessment. Be it on account of the assessee or the assessing officer, if that has ultimately resulted in escapement of a part of turnover from assessment the right to bring the escaped turnover into the net of taxation is vested by a provision like Section 12(8) of the Act in the assessing officer ordinarily subject to limitation as may be prescribed. In such circumstances, merely because a particular information regarding suppression was already available in the Intelligence Wing before the regular assessment u/s 12(2) of the Act was made and was admittedly not utilised, cannot stand in the way of initiating a proceeding u/s 12(8) of the Act. Even if the information was in the possession of the assessing officer himself, but had not been taken into account in them making of the assessment, the position would not have been

different. We have no doubts in our mind that the Tribunal clearly went wrong in using that as a ground for annulling the assessment. The question of law as framed above has to be answered in favour of the taxing department and against the assessee and our answer shall be that in the facts and circumstances of the case, the Tribunal was not right in holding that if particulars of suppression of transaction by the assessee though available at the time of assessment made u/s 12(2) of the Act were not utilised in making the said assessment, proceedings u/s 12(8) of the Act could be taken subsequently on the basis of the very said particulars of suppression.

3. Mr. Bhattacharya for the assessee contended that the transaction in question cannot be deemed to be the dealer's turnover and as such there can be no escapement. Strictly speaking, such a contention was never canvassed before the Tribunal and as such our advisory jurisdiction cannot comprehend such a matter for decision and, therefore, ordinarily we would do well by refraining to enter into the matter. Since the question was mooted and Mr. Bhattacharya advanced emphatically arguments on the question and referred a lot of decisions before us in support of his contention we think it proper to refer to his point in brief. From the record it appears that the dealer deals in grocery and stationery articles. According to Mr. Bhattacharya, therefore, the dealer does not deal in iron goods. Conceding that the transaction in question was a suppression, Mr. Bhattacharya contends that this cannot be included in his turnover because it is a casual dealing. In support of his contention he relied upon a decision of their Lordships of the Supreme Court in *State of Gujarat Vs. Raipur Manufacturing Company Ltd.*, *Southern India Tea Estates Company Limited Vs. The State of Kerala*, *Commissioner of Sales Tax v. Basta Colla Colliery Co. Ltd.* [1968] 21 S.T.C. 454 (ker) and *Appathurai Nadar v. Deputy Commercial Tax Officer* [1972] 29 S.T.C. 681 (pat). On an analysis of these cases, excepting the Patna decision in *Commissioner of Sales Tax Vs. Basta Colla Colliery Co. Ltd.*, we find that the transactions were actually not in the nature of any business dealing. In *Southern India Tea Estates Company Limited Vs. The State of Kerala*, the dealing was in the sale of shade trees and as the facts show a producer-dealer in tea was being assessed. The court found that there was no sale because the transaction was isolated occurring perhaps in a generation or two. In the Supreme Court decision *State of Gujarat Vs. Raipur Manufacturing Company Ltd.*, their Lordships found that old containers and other materials which were assets of the company were being disposed of since they were no more serviceable. In the Madras case (*Appathurai Nadar v. Deputy Commercial Tax Officer* [1972] 29 S.T.C. 681(mad)), the assessee had claimed that the slips which were found were in regard to loans advanced by him to outsiders and repayment received could not amount to turnover. These, therefore, are cases which are no authority for the present matter. The Patna decision (*Commissioner of Sales Tax v. Basta Colla Colliery Co. Ltd.* [1968] 21 S.T.C. 454 (mad)) was dealing with a dealer in coal, as the name of the assessee shows it was a colliery. It appears to have sold certain machineries. The facts indicated in the case do not show whether the sale of

machineries was of the colliery itself or the colliery had purchased the machineries for disposal as a transaction of business. In the absence of such material, we do not find any support for the contention of Mr. Bhattacharya from the said decision. If, however, it was really a transaction of business, that is, a colliery had purchased the machineries with the intention of reselling them, we see no justification for the conclusion that the sale price would not be turnover. The definition of "dealer" in the Orissa Sales Tax Act includes a "casual dealer" as defined in Section 2(bb). Mr. Bhattacharya contends that there must be plurality of transactions to make a person a casual dealer. We do not think there is force in the contention. Keeping in view the intention of the particular person in entering into business, the nature of the transaction and the surrounding circumstances, even a single transaction may make one a casual dealer. It is true in the definition "transactions of a business nature" have been used, but it is well-known that plural or singular would not be very material (see Section 13 of the Orissa General Clauses Act). Even if the contention of Mr. Bhattacharya was available to be gone into, we have no doubts in our mind that we should have negatived it. The reference is accordingly answered as already indicated. We think it appropriate to direct the parties to bear their own costs.

B.K. Ray, J.

4. I agree.