
(1984) 01 OHC CK 0038

In the Orissa High Court

Case No : Special Jurisdiction Case No's. 78 and 79 of 1974

Utkal Automobiles Pvt. Ltd.

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 13-01-1984

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 23(3)(a), 24(1)

Citation : (1984) 57 CLT 174 : (1984) 56 STC 46

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

Bench : Division Bench

Advocate : B. Agarwalla and R.S. Agarwalla, for the Appellant; R.K. Patra, A.G.A., for the Respondent

Judgement

J.K. Mohanty, J.—These are references u/s 24(1) of the Orissa Sales Tax Act, 1947 (hereinafter called the "Act"), by the Sales Tax Tribunal, Orissa. The following questions have been referred for the opinion of this Court:

- (1) Whether on the facts and in the circumstances of the case the initiation of proceeding u/s 12(8) is bad in law ?
- (2) Whether on the facts and in the circumstances of the case the order of the Tribunal is based on an error apparent on the face of the records and hence liable to be set aside ?
- (3) Whether on the facts and in the circumstances of the case the Tribunal has rightly acted in accordance with the proviso to - Sub-section (3)(a) of Section 23 of the Orissa Sales Tax Act by condoning the delay in the matter of filing the second appeal ?
- (4) Whether on the facts and in the circumstances of the case the Tribunal acted without considering the material on record in disallowing the claim of deduction claimed by the petitioner and in allowing the claim of the State for enhancement ?

The facts giving rise to this case are as follows :

The petitioner carries on business in automobiles and is a registered dealer having its place of business at Cuttack. It has also its head office at Jamshedpur. For the quarters ending 31st March, 1967, and 30th June, 1967, the dealer-petitioner claimed deduction of Rs. 5,03,018.11 and Rs. 33,52,700.01 being the sale price of the vehicles sold outside the State. By order dated 14th July, 1959, the assessing officer passed orders u/s 12(4) of the Act and allowed the deductions claimed and completed the assessment. The Sales Tax Officer who succeeded him after verifying the records was of the opinion that the deductions allowed were not legal. He issued notice u/s 12(8) of the Act and reopened the assessment. The petitioner instead of appealing against the order of the assessing officer moved this Court to quash the proceeding, but was unsuccessful in its attempt. Thereafter it moved the Supreme Court, but was also unsuccessful. Thereafter as the petitioner did not appear before the assessing officer, the assessing officer completed the assessment and enhanced the gross turnover and the taxable turnover. Against the aforesaid order the petitioner preferred first appeal.- The appellate authority after examining the documents and accounts allowed some of the deductions claimed by the petitioner. The State Government being aggrieved by the order filed second appeal before the Sales Tax Tribunal. The Tribunal by order dated 10th May, 1963, remanded the case to the Sales Tax Officer for rehearing and fresh disposal, The Sales Tax Officer by his order dated 27th February, 1965, allowed some of the deductions as outside sales after examining the documents produced. The petitioner filed first appeal before the Assistant Commissioner of Sales Tax who by order dated 7th May, 1966, allowed further deductions on account of outside sales. The State Government being aggrieved by the orders of the Assistant Commissioner of Sales Tax filed second appeal before the Sales Tax Tribunal on 26th September, 1966, after a lapse of 76 days along with a petition for condonation of delay. The Tribunal condoned the delay, heard the appeal and by its order dated 25th May, 1973, not only confirmed the assessment order dated 27th February, 1965, but also enhanced the tax by disallowing the deductions allowed by the Sales Tax Officer. The petitioner thereafter filed an application u/s 24(1) of the Act requiring the Tribunal to refer the above four questions of law arising out of its order for the opinion of this Court.

2. Out of the four questions referred to us the petitioner pressed only questions Nos. (2) and (3). The other two questions are not pressed. Questions Nos. (2) and (3) are as follows :

Q. (2) Whether on the facts and in the circumstances of the case the order of the Tribunal is based on an error apparent on the face of the records and hence liable to be set aside ?

Q. (3) Whether on the facts and in the circumstances of the case the Tribunal has rightly acted in accordance with the proviso to Sub-section (3)(a) of Section 23 of the Orissa Sales Tax Act by condoning the delay of 76 days in the matter of filing the second appeal ?

3. Mr. Agarwalla, the learned counsel appearing for the petitioner, submitted that in arriving at the finding the Tribunal committed several errors of record. Though the contracts of sale were produced in support of the contention of the petitioner that the sales were made outside the State, the Tribunal in its order has stated that the contracts have not been produced and has drawn adverse presumptions against the petitioner. Thus the order of the Tribunal is vitiated for non-consideration of materials on record.

Regarding the question of limitation, the learned counsel submitted that the second appeal was filed before the Tribunal after a delay of 76 days. Though on behalf of the State no sufficient cause was shown explaining the delay in filing the appeal, the Tribunal has arbitrarily and whimsically condoned the delay. He further submitted that while condoning the delay the Tribunal has observed that the respondent (petitioner in this case) has not filed any counter refuting the assertion made in the petition for condonation of delay filed by the appellant (opposite party in this case). This is an error of record. The objection regarding limitation taken by the petitioner has not been considered by the Tribunal.

4. The learned counsel for the opposite party submitted that the jurisdiction of the High Court u/s 24 of the Act is advisory and shall be confined to the question of law arising out of the order of the Tribunal and in this case no question of law arises out of the order of the Tribunal. The Tribunal has considered all the facts and circumstances of the case and has passed a reasoned order. Regarding the question of limitation, the learned counsel submitted that the Tribunal, after considering all the facts and circumstances of this case, was satisfied that there was sufficient cause for not preferring the appeal in time. This is a finding of fact and cannot be questioned in this proceedings. He relied on a Full Bench decision of this Court reported in *Brajabandhu Nanda Vs. Commissioner of Income Tax*, .

In the decision reported in *Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd.*, the meaning of the words "any question of law arising out of such order" as occurring in Section 66(1) of the Income Tax Act, 1922, was considered and their Lordships have observed :

There was also some argument as to the position u/s 66(1) when the Tribunal decides an appeal on a question of law not raised before it. That would undoubtedly be a "question arising out of the order, and not the less so because it was not argued before it, and this conclusion does not militate against the construction which we have put on the language of Section 66(1).

The result of the above discussion may thus be summed up :

(1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.

(2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is therefore one arising out of its order.

(3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.

(4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.

In another decision of the Supreme Court reported in *The Commissioner of Income Tax, Bihar and Orissa, Patna Vs. S.P. Jain*, their Lordships have held :

In our view, the High Court and this court have always the jurisdiction to intervene if it appears that either the Tribunal has misunderstood the statutory language, because the proper construction of the statutory language is a matter of law, or it has arrived at a finding based on no evidence or where the finding is inconsistent with the evidence or contradictory of it, or it has acted on material partly relevant and partly irrelevant or where the Tribunal draws upon its own imagination, imports facts and circumstances not apparent from the record, or bases its conclusions on mere conjectures or surmises, or where no person judicially acting and properly instructed as to the relevant law could have come to the determination reached. In all such cases the findings arrived at are vitiated.

In the present case the question whether the petitioner is entitled to the deduction on the ground that sales were made outside the State was raised before the Tribunal. The Tribunal held :

The contract of sale in the circumstances must be presumed to have been made when the goods were in Orissa. The respondent-dealer has not produced the contracts of sales at any stage. The fact when the contracts were made is within the special knowledge of the dealer and he is supposed to be in possession of the same. When such contracts are not produced, the presumption would be that when produced they would go against his interest. The registration of the vehicles whether permanent or temporary in the State of Orissa is also relevant in the context of the question whether the goods were inside the State of Orissa at the time of contract of sale. It is no good assuming things contrary to law and to say that the vehicles might not have been produced before the registration authority at the time of their registration. It is obvious that the vehicles were inside the State when the contracts were made and hence there is no escapement from the conclusion that the sales had taken place in Orissa. The appellant in his returns claims that sales were outside the State. He should, have produced evidence that the contracts took place when the goods were outside the State and as the matter is within his special knowledge the presumption must be adverse to him.

The observation of the Tribunal that the contracts were not produced by the petitioner is based on error apparent on the face of the record. This will be evident from the order of the Assistant Commissioner of Sales Tax, the first appellate authority, wherein it has been mentioned :

...Contracts are available in respect of sales to M/s. TISCO Ltd. and M/s. Kaiser Engineering Overseas Corporation, Jamshedpur. In respect of these contracts the vehicles had to be delivered at job site (Jamshedpur) and the buyers desired that the sales should be treated as inter-State in nature not attracting liability under the provisions of the Bihar Sales Tax Act.

Similarly, in the assessment order also the Sales Tax Officer has referred to the agreements by correspondence with "M/s. Kaiser Engineering. The opposite party, State of Orissa, has also in its written synopsis filed before the Sales Tax Tribunal has annexed a copy of the contract with M/s. Kaiser Engineering Overseas Corporation as annexure C. Thus it is quite evident from the above facts and circumstances that the order of the Tribunal is based on error apparent on the face of the record. Without considering the materials on record the Tribunal has observed that the documents were not produced and has drawn adverse presumption against the petitioner. The Tribunal has drawn upon its own imagination and imported facts and circumstances not apparent from the records and has based his conclusion on mere conjectures and surmises.

Regarding the question of limitation, in the decision reported in Brajabandhu Nanda Vs. Commissioner of Income Tax, , it has been held :

It is a matter of discretion for the Tribunal to condone delay on sufficient cause being shown as it may think fit in the facts and in the circumstances of the particular case. It is, thus, a question of fact in each case and no point of law is involved for reference to the High Court.

We are no doubt bound by the decision of the Full Bench of this Court. But in this case while considering the question of condonation of delay the Tribunal observed that the respondent (petitioner) has not filed any counter refuting the assertion made in the petition of the appellant (opposite party) praying for condonation of the delay. This is evidently an error apparent on the face of the record. The petitioner (respondent before the Tribunal), in fact, filed objection to the petition for condonation of delay on 11th July, 1970, before the Tribunal. The Tribunal did not consider this objection filed by the petitioner. Thus the order of the Tribunal is passed on non-consideration of the materials on record, i.e., the objection filed by the petitioner. The order of the Tribunal in condoning the delay is also vitiated for the above reason.

Considering the facts and circumstances of the case and the argument of both sides, we answer question No. (2) in the affirmative and question No. (3) in the negative. As already observed, questions Nos. (1) and (4) were not pressed before us, so we decline to answer these two questions. There shall be no order as to costs.

B.N. Misra, J.

I agree.