The Commissioner of Sales Tax, Madhya Pradesh

Vs

M/s. H. M. Esufali, H. M. Abdulali, Siyaganj, Main Road, Indore

Civil Appeals Nos. 1068-1069 of 1970

(K. S. Hegde, H. R. Khanna JJHegdeHH
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18.04.1973

JUDGMENT

HEGDE, J. –

1. These appeals by special leave arise from the decision of the High Court of Madhya Pradesh in a consolidated Reference under Section 44 of the Madhya Pradesh General Sales Tax Act, 1958 (to be hereinafter referred to as the 'State Act'). That reference was made by the Board of Revenue, Gwalior, party at the instance of the assessee and partly at the instance of the Commissioner of Sales-tax, Madhya Pradesh. Four questions of law were referred to the High Court for its decision. They are :

> "(1) Whether on the facts and circumstances of the case the revised assessment enhancing the taxable turnover under the State law by Rs. 2,50,000 and the taxable turnover under the Central law by Rs. 1,00,000 on the basis of the undisputed escape in the amount of Rs. 31,171,28 by adopting the said amount of escaped turnover as the measure for determining the quantum of enhancement for the whole year was illegal, unjustified or excessive ?
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> (2) Whether a best judgment assessment could at all be made under section 19(1) of the Act or whether revision of the assessment should be confined to the quantum of proved or admitted escaped turnover ?
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> (3) If the answer to the previous question is that the revision in assessment should be confided only to the quantum of proved or admitted escape in turnover, was the penalty of Rs. 2,000 imposed on the footing of the revision of the assessment for the whole year legal and justified ? and
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> (4) Whether on the facts and circumstances of the case the imposition of a penalty under Section 19(1) of the Madhya Pradesh General Sales Tax Act, 1958, read with Section 9(3) of the Central sales Tax Act was not legal ?"

2. The first three questions were referred to the High Court at the instance of the assessee and the last one was referred at the instance of the Commissioner.

3. The High Court answered the 1st and the 3rd question in favour of the assessee and the second and the fourth question in favour of the Department. It opined :

> ".....our answer to the first question is that the estimate of taxable turnover under the local Act and the Central Act made by the assessing authority for the period from 1st November, 1959 to 20th October, 1960, on the basis of Rs. 31,171.28 as the escaped turnover for a period of 19 days was illegal and unjustified. The escaped turnover proved in the present case is only Rs. 31,171.28 and the assessee is liable to be assessed under both the Acts only on the taxable turnover comprised in the escaped turnover of Rs. 31,171.28. Our answer to the second question is that there can be a best-judgment assessment under Section 19(1) of the local act. In a best-judgment assessment the quantum of escaped turnover would be that which the assessing authority thinks is proved or is established. In other assessments the quantum of escaped turnover would be the one which the assessing authority finds proved whether on the admission of the assessee or on the material produced at the enquiry in which the assessee has participated. The third question is answered by saying that the imposed penalty of Rs. 2,000 is, in view of our answer to the first question, not legal. Our answer to the fourth question is that a penalty for escaped assessment under the Central Act can be imposed under Section 19(1) of the local Act."

4. Aggrieved by the decision of the High Court, the Commissioner has brought these appeals. The assessee had not appealed against that portion of the decision which went against him.

5. The facts of the case necessary for deciding the questions of law arising for decision in these appeals, as could be gathered from the Statement of the case may now be set out.

6. The assessee was a registered dealer under the 'State Act' as well as the Central Sales Tax Act (which will hereinafter be referred to as the 'Central Act'). He was a dealer in Iron and steel. In these appeals, we are concerned with his turnover for the period November 1, 1959 to October 20, 1960. In that year he declared a gross turnover of Rs. 3,97,356.18 and taxable turnover of Rs. 1,10,246.63 p. The Sales Tax Officer determined his gross turnover at Rs. 3,97,357 and taxable turnover at Rs. 1,21,567. Under the 'State Act' he assessed him in the sum of Rs. 3,743.34 p. on November 20, 1961. The assessee had not declared his gross or taxable turnover in respect of the year in question under the 'Central Act'. But the Sales Tax Officer determined his turnover under the 'Central Act' by his order, dated December 8, 1962, at Rs. 22,916 and levied on him a tax of Rs. 252.04. The assessee did not appeal against these orders. It appears that on September 19, 1963, the Flying Squad inspected the business premises of the assessee and found a bill book for the period September 1, 1960 to September 19, 1960. The bill book showed that the assessee had effected sales of iron and steel during that period of the value of Rs. 31,171.28 p. These sales had not been entered in the books of account maintained by the assessee. On the basis of the information provided by the bill book seized, the Sales Tax Officer initiated proceedings under Section 19(1) of the 'State Act' on January 15, 1964, by issuing the prescribed notices to the assessee. He also initiated proceedings under that section under the 'Central Act' on March 15, 1964. The notices in question were served on the assessee on April 17, 1964 and March 19, 1964 respectively. In response to those notices, the assessee submitted an explanation denying that the bill book in question pertained to his dealings. Further, he also disputed the correctness of the estimates made by the Sales Tax Officer of his turnovers in the notice issued to him. After hearing the assessee, the Sales Tax Officer re-assessed the assessee under the 'State Act' on April 20, 1964 and under the 'Central Act' on April 30, 1964. The re-assessments were made on the basis of 'best-judgment'. In estimating the assessee's turnover, the Sale Tax Officer took into consideration the fact that the assessee had dealing outside his accounts of the value of Rs. 31,171.28 during a period of 19 days. On the basis afforded by the facts

discovered, the Sales Tax Officer estimated the assessee's turnover under the 'State Act' for the assessment period in question at Rs. 6,47,357 (3,97,357 + 2,50,000). Similarly he reopened the assessee's assessment under the 'Central Act' and estimated the turnover of the assessee under that Act at Rs. 1,22,916 (22,916 + 1,00,000). He also imposed on the assessee a penalty of Rs. 2,000 under the 'State Act' and a penalty of Rs. 1,500 under the 'Central Act'. The assessee appealed against the re-assessments made on him as well as against the penalties imposed on him. Those appeals were dismissed by the appellate authority. The assessee took up the matter in second appeal to the Board of Revenue, Madhya Pradesh, Gwalior. The Board of Revenue set aside the penalty of Rs. 1,500 imposed under the 'Central Act' but in other respects, it rejected the appeal of the assessee. Thereafter the Board, partly at the instance of the assessee and partly at the instance of the Commissioner, submitted the four questions set out earlier to the High Court.

7. Before proceeding to examine the contentions advanced on behalf of the parties, it is necessary to clarify certain aspects. It may be noted that the first assessments were made by the Sales Tax Officer primarily on the basis of the returns submitted by the assessee. In the proceedings relating to those assessments, the Sales Tax Officer relied on the books of account of the assessee. While making re-assessments on the basis of the information gathered from the bill book seized, the Sales Tax Officer rejected the accounts maintained by the assessee as unreliable and assessed the assessee on the basis of his 'best-judgment'. The distinction between a 'best-judgment' assessment and assessment based on the accounts submitted by an assessee must be borne in mind. Sometime there may be innocent or trivial mistakes in the accounts maintained by the assessee. There may be even certain unintended or unimportant omissions in those accounts; but yet the accounts may be accepted as genuine and substantially correct. In such cases, the assessments are made on the basis of the accounts maintained even though the assessing officer may add back to the accounts price of items that might have been omitted to be included in the accounts. In such a case, the assessment made is not a 'best-judgment' assessment. It is primarily made on the basis of the accounts maintained by the assessee. But when the assessing officer comes to the conclusion that no reliance can be placed on the accounts maintained by the assessee, he proceeds to assess the assessee on the basis of his 'best-judgment'. In doing so, he may take such assistance as the assessee's accounts may afford, he may also rely on other information gathered by him as well as on the surrounding circumstances of the case. The assessments made on the basis of assessee's accounts and those made on 'best-judgment' basis are totally different types of assessments.

8. Now coming to the facts of this case, it is necessary to remember that at the initial stage, the assessee denied that the bill book seized was his bill book and the entire therein related to his dealings. He asserted that he had nothing to do with the bill book in question and the entries therein do not relater to his dealings. But at a later stage, he conceded that that bill book was his and the entries therein related to his dealings. It is now proved as well as admitted that his dealings outside his accounts during a period of 19 days were of the value of Rs. 31,171.28. From this circumstance, it was open to the Sales Tax Officer to infer that the assessee had large scale dealings outside his accounts. The assessee has neither pleaded nor established any justifiable reason for not entering in his accounts the dealings noted in the bill book seized. It is obvious that he was maintaining false accounts to evade payment of sales-tax. In such a situation, it was not possible for the Sales Tax Officer to find out precisely the turnover suppressed. He could only make an estimate of the suppressed turnover on the basis of the material before him. So long as the estimate made by him is not arbitrary and has nexus with facts discovered, the same cannot be questioned. In the very nature of things the estimate made may be an over-estimate or an underestimate. But that is no ground for interfering with his 'best-judgment'. It is true that the basis adopted by the officer should be relevant to the estimate made. The High Court was wrong in assuming that the assessing authority must have

material before it to prove the exact turnover suppressed. If that is true, there is no question of 'best-judgment' assessment. The assessee cannot be permitted to take advantage of his own illegal acts. It was his duty to place all facts truthfully before the assessing authority. If he fails to do his duty, he cannot be allowed to call upon the assessing authority to prove conclusively what turnover, he had suppressed. That fact must be within his personal knowledge. Hence the burden of proving that fact is on him. No circumstance has been placed before the assessing authority to show that the assessee's dealings during September 1, 1950 to September 19, 1960, outside his accounts were due to some exceptional circumstances or that they were proportionately more than his dealings outside his accounts, during the remaining periods. The assessing authority could not have been in possession of any correct measure to find out the escaped turnover during the periods November 1, 1959 to August 31, 1960 and September 20, 1960 to October 20, 1960. The task of the assessing authority in finding out the escaped turnover was by no means easy. In estimating any escaped turnover, it is inevitable that there is some guess-work. The assessing authority while making the 'best judgment assessment no doubt should arrive at its conclusion without any bias and on rational basis. That authority should not be vindictive or capricious. If the estimate made by the assessing authority is a bona fide estimate and is based on a rational basis, the fact that there is no good proof in support of that estimate is immaterial. Prima facie, the assessing authority is the best judge of the situation. It is his 'best-judgment' and not of any one else's. The High Court could not substitute its 'best-judgment' for that of the assessing authority. In the case of 'best-judgment' assessments, the courts will have to first see whether the accounts maintained by the assessee were rightly rejected as unreliable. If they come to the conclusion that they were rightly rejected, the next question that arises for consideration is whether the basis adopted in estimating the turnover has a reasonable nexus with the estimate made. If the basis adopted is held to be a relevant basis even though the courts may think that it is not the most appropriate basis, the estimate made by the assessing authority cannot be disturbed. In the present case, there is no dispute that the assessee's accounts were rightly discarded. We do not agree with the High Court that it is the duty of the assessing authority to adduce proof in support of its estimate. The basis adopted by the Sales Tax Officer was a relevant one whether it was the most appropriate or not. Hence the High Court was not justified in interfering with the same.

9. The law relating to 'best-judgment' assessment is the same both in in the case of Income Tax assessment as well as in the case of sales-tax assessment. The scope of 'best-judgment' assessment under the Income Tax law come up for consideration before the Judicial Committee as early as 1937 in Commissioner of Income Tax, Central and U.P. v. Laxminarain Badridas ((1937) 5 ITR 170.). Therein Lord Russel of Killowen speaking for the Judicial Committee observed (at p. 180) :

> "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 guess-work. In that sense, too, the assessment must be to some extent arbitrary."

10. In Raghubar Mandal Harihar Mandal v. The State of Bihar (1958 SCR 37 : 8 STC 770 : AIR

1957 SC 810: 1958 SCJ 22.), a case arising under the Bihar Sales Tax Act, 1944, the law relating to 'best-judgment' assessment was examined at length by this Court. Therein S. K. Das, J., speaking for the Court observed (at p. 778) :

> "No doubt it is true that when the returns and the books of account are rejected, the assessing officer must make an estimate, and to that extent he must make a guess; but the estimate must be related to some evidence or material and it must be something more than mere suspicion. To use the words of Lord Russel 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 or previous returns and all other matter which the assessing officer thinks will assist him in arriving at a fair and proper estimate."

Proceeding further the learned judge quoted with approval the observations of Din Mohammad, J., in Ganga Ram Balmokand v. Commissioner of Income Tax, Punjab ((1937) 5 ITR 464.) :

> "It cannot be denied that there must be some material before the Income Tax Officer on which to base his estimate, but no hard and fast rule can be laid down by the Court to define what sort of material is required on which his estimate can be founded."

After quoting those observations, the learned judge proceeded to observe :

> "With that observation we generally agree. If, in this case, the Sales Tax Authorities had based their estimate on some material before them, no objection could have been taken."

11. Applying the rule laid down in Raghubar Mandal Harihar Mandal case (supra), to the facts of the present case, it is seen that the Sales Tax Officer had material before him to find out, how much turnover had escaped assessment during a period of 19 days. On the basis of that material he estimated the escaped turnover for the entire year. Hence it cannot be said that there was no basis for the estimate made by the Sales Tax Officer. It may be that his estimate was an over-estimate or an under-estimate but it cannot be said that the estimate was without any basis. In making that estimate, there was an element of guess-work which was inevitable in the circumstances of the case. If the Sales Tax Officer was compelled to adopt a rule of thumb which in a sense is an arbitrary rule, assessee was entirely responsible for that situation.

12. In State of Kerala v. C. Velukutty ((1965) 60 ITR 239 : (1966) 17 STC 465.), this Court speaking through Subba Rao, J., (as he then was) observed (at p. 244 of the Report) :

> "The limits of the power are implicit in the expression 'best of his judgment'. Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon the arbitrary caprice of a judge, but on settled and invariable principles of justice. Though there is an element of guess-work in a 'best-judgment' assessment, it shall not be a wild one, but shall have a reasonable nexus to the available material and the circumstances of each case."

13. The question before us is whether there is a reasonable nexus between the basis adopted by the assessing authority and the estimate of escaped turnover made. We have no doubt that there is such a

nexus.

14. On behalf of the assessee, reliance was placed on the decision of this Court in Commissioner of Income Tax, West Bengal v. Padamchand Ramgopal ((1970) 76 ITR 719 (SC) : (1970) 3 SCC 866.). Therein, while investigating into the case of the assessee, the Income Tax Officer found two insignificant mistakes in the assessee's accounts relating to the assessment year 1953-54. No mistakes were found in the accounts relating to the assessment year 1954-55 to 1957-58. Merely because there were some insignificant mistakes in the accounts maintained by the assessee for the assessment year 1953-54, the Income Tax Officer rejected the accounts of the assessee for all the concerned assessment years and added to the income returned half the amount of gross receipts shown by the assessee under the head "interest" for each of the years as escaped income. The Tribunal upheld the addition but the High Court came to the conclusion that the additions made by the Income Tax Officer were quite arbitrary. This Court agreed with that view. We do not think that the said decision lends any support to the assessee's contention.

15. For the reasons mentioned above, we are unable to agree with the High Court that the Sales Tax Officer had arbitrarily assessed the assessee.

16. It was next contended that in a re-assessment under Section 19(1) of the Act, Sales Tax Officer was not competent to make 'best-judgment assessment' as no such power was conferred on his under the said section. This contention had been rejected by the High Court and the assessee had not appealed against that part of the judgment. be that as it may, even though Section 19 does not in specific terms confer on the assessing authority power to make 'best-judgment assessment' that section specifically says that the assessment made under that section is a re-assessment. Section 18 deals with assessment of tax. Section 18(4) says :

#"If a registered dealer -(a) * * *(b) * * *(c) * * *##

> (d) has not maintained any account or has not regularly employed any method of accounting, or if method employed is such that in the opinion of the Commissioner assessment cannot properly be made on the basis thereof; the Commissioner shall in the prescribed manner assess the dealer to the best of his judgment."

17. What is true of the assessment must also be true of re-assessment because re-assessment is nothing but a fresh assessment. When re-assessment is made under Section 19, the former assessment is completely reopened and in its place fresh assessment is made. While re-assessing a dealer, the assessing authority does not merely assess him on the escaped turnover but it assesses him on his total estimated turnover. While making re-assessment under Section 19, if the assessing authority has no power to make best-judgment assessment, all that the assessee need do to escape re-assessment is to refuse to file a return or refuse to procure his account-books. If the contention taken on behalf of the assessee is correct, the assessee can escape his liability to be re-assessed by adopting an obstructive attitude. it is difficult to conceive that such could be the position in law.

18. Before making re-assessment, the assessing authority has to, under Rule 33(1) framed under the Act, call upon the assessee to produce his books of account and other documents which the assessing authority may require and any evidence which the dealer may wish to produce in support of his objection. When such a notice is issued to the dealer, he may appear before the assessing authority on the date fixed in the notice and prefer his objections and produce such evidence as he may think necessary. Sub-rule (2) of Rule 33 provides that if the assessee appears in response to the

notice under Section 33(1), the assessing authority may make re-assessment, if necessary, only after considering the objections raised by the dealer and after examining such evidence as may be produced by him. It is important to note that in the notice which the assessing authority is required to issue to the dealer in From 16, the extent of the escaped turnover as estimated by the assessing authority has to be specified. The procedure laid down in Rule 33 could not have been a mere empty formality. If the assessee's contention is right, in order to escape re-assessment all that the assessee need do is to ignore the notice issued under Rule 33(1) and refuse to co-operate with the assessing authority in the re-assessment proceedings. We are unable to accept that is the true position in law.

19. In our opinion the decision of the Andhra Pradesh High Court in State of Andhra Pradesh v. Ravuri V. Narasimhan (16 STC 54.), relied on by the assessee was not correctly decided.

20. For the reasons mentioned above, we allow these appeals, vacate the answers given by the High Court to Questions Nos. 1 and 3 and answer those questions in favour of the Department, i.e. that the estimate of taxable turnover under the 'State Act' and the 'Central Act' made by the assessing authority for the period from November 1, 1959 to October 20, 1960, on the basis of Rs. 31,171.28 as the escaped turnover for a period of 19 days was legal and justified and consequently the penalty of Rs. 2,000 imposed on the assessee was in accordance with law. The assessee shall pay the costs of the Department both in this Court and in the High Court.

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