

ORISSA HIGH COURT: CUTTACK

STREV NO. 67 OF 2014

In the matter of an application under Section 24(1) of the
Odisha Sales Tax Act, 1947.

AFR

M/s. Om Shri Ashirbad
Laxmi Complex, Big Bazar
Berhampur, Ganjam

...

Petitioner

-VERSUS-

State of Odisha,
represented by
Commissioner of Sales Tax,
Odisha

...

Opposite Party

For petitioner

: M/s. Rudra Prasad Kar,
Madhablal Agarwalla
and
Mukesh Agarwal,
Advocates

For opposite party

: Mr. Sunil Mishra,
Standing Counsel
(CT & GST Organisation)

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MR. JUSTICE M.S. RAMAN**

Date of hearing : 19.04.2023 :: Date of Judgment : 25.04.2023

DR. B.R. SARANGI, J. The petitioner is a proprietorship concern of Sri A. Baikuntha Rao Subudhi. As an unregistered dealer under the Odisha Sales Tax Act, 1947 (for short referred to as “OST Act”), it started its business from April, 2004 in retail and semi-wholesale trade at Big Bazar, Berhampur and dealt in general merchandise, *i.e.*, plastic goods, salt, rubber band, disposable glasses and plates *etc.* within the jurisdiction of the Sales Tax Officer, Ganjam Range, Berhampur. The petitioner has filed this revision under Section 24 of the OST Act, 1947 to answer the questions of law formulated at paragraph 32 of the revision petition in its favour and, consequentially, reverse/set aside/annul the second appellate order dated 31.12.2013 (Annexure-13) by declaring that it is not liable to pay tax and penalty, as assessed and demanded by the revenue.

2. The factual matrix leading to filing of the revision petition, as reveals from the record, is that previously the petitioner was a registered dealer under the OST Act, 1947 bearing Registration No.GAI-6142 dated 04.05.1988, but the same was cancelled under Section

9(3-f) with effect from 01.04.1997. Consequentially, the petitioner closed its business since the date of cancellation of registration certificate and had no business up to March, 2004. The reasons for non-carrying on the business are that its proprietor met with an accident and faced serious health hazards, for which, due to paucity of funds and financial constraints, it could not start its business. Thereafter, the petitioner purchased one electronic weighing machine and obtained Weights and Measures License on 10.07.2000 and also obtained license under the Odisha Shops and Commercial Establishments Act, 1956 on 17.07.2002. Said licenses were renewed each year but could not revive its business. Thereafter, the petitioner restarted its business from April, 2004. On 11.08.2004, the Vigilance Wing of the Sales Tax Department with police personnel visited the business premises of the petitioner and conducted meticulous check of stocks lying in the shop and took inventory of the same. The maximum sale price of the said goods was valued by the vigilance officials to be Rs.82,455/-. The vigilance also

cross-checked cash found in the counter with that of the sales proceeds which was Rs.180/-. The inspecting officials enquired from the proprietor of the petitioner regarding the future plans and growth of business and the expected turnover which he thinks and hopes to achieve. In his answer, the proprietor of the petitioner explained that he expects and hopes to increase of its turnover up to around Rs.5 to Rs.7 lakhs annually, if the projected daily sales in future touches at an estimated average sale value of Rs.2,000/- per day, for which he is trying his level best in obtaining dealership of M/s. Savana Traders and Service, Cochin and others. The inspecting officials recorded the statement unilaterally of their own and made the proprietor of the petitioner to sign the same.

2.1. The Sales Tax Officer, Ganjam Circle, Berhampur, relying upon the Vigilance Report bearing No.8 dated 29.11.2004, which was forwarded to him, passed an *ex parte* order of assessment on 31.03.2006 under Section 12(5) of the OST Act, 1947 for the year 2000-01, issued in Memo No.11023 dated 05.09.2007,

determining the G.T.O. & T.T.O. at Rs.6,20,000/- and raised demand of Rs.1,70,500/-.

2.2. Aggrieved by the said *ex parte* order of assessment dated 31.03.2006, the petitioner preferred appeal and the first appellate authority by its order dated 26.05.2009 in appeal bearing No.AA 207/2007-08 allowed the appeal of the petitioner by annulling the order of assessment. As such, the first appeal order passed by the Assistant Commissioner of Sales Tax, Ganjam Range, Berhampur was received by the petitioner on 22.07.2009. Thereby, it has reached its finality as not disputed by either of the parties.

2.3. After disposal of the first appeal for the year 2000-01, the assessing officer ignoring the findings of the said first appellate authority, again passed *ex parte* orders of assessment under Section 12(5) of the OST Act, 1947 for the years 2001-02 to 2004-05 on different dates by raising demands without serving any notice of assessment, as well as without extending due opportunity of hearing to the

petitioner. The years and dates of the orders of assessment are extracted hereunder:

<i>Year</i>	<i>Date of order of assessment</i>	<i>Issue No. & date</i>	<i>Received by the petitioner</i>
2001-02	02.11.2008	10989 dt.15.12.08	11.8.2009
2002-03	17.10.2009	5272 dt.04.06.10	09.06.2010
2003-04	15.11.2010	2388 dt.04.05.11	10.10.2011
2004-05	15.11.2010	2390 dt.04.05.11	10.10.2011

2.4. The petitioner, being aggrieved by the *ex parte* orders of assessment referred to above, filed first appeals before the Assistant Commissioner of Sales Tax (re-designated as Joint Commissioner of Sales Tax) Ganjam Range, Berhampur on 28.08.2009 for the year 2001-02, on 29.06.2010 for the year 2002-03 and on 27.10.2011 for the years 2003-04 and 2004-05, which were numbered as AA 15/2009-10, AA 02/2010-11, AA 01/2011-12 and AA 02/2011-12. The said four appeals were heard analogously on 02.08.2012 and 07.08.2012 by the Deputy Commissioner of Sales Tax, Ganjam Range, Berhampur and disposed of *vide* order dated 25.10.2012 confirming the orders of assessment passed by the assessing officer.

The first appellate orders passed on 25.10.2012 were issued on 31.10.2012, which were received by the petitioner on 03.01.2013.

2.5. Aggrieved by the orders of the first appellate authority, the petitioner filed second appeals before the Sales Tax Tribunal, Cuttack on 04.02.2013, which were numbered as SA Nos. 75 to 78 of 2012-13. The said second appeals were heard analogously by the Tribunal on 18.12.2013. Before the Tribunal, the contention of the petitioner was that the orders of assessment were passed by the assessing officer without applying its mind and, as such, without giving opportunity of hearing to the petitioner and behind the back of the petitioner. Its further contention before the Tribunal was that no liability ensued for payment of tax as per Section 4 of the OST Act, 1947 and, as such, it had no business till April, 2004. More so, relying upon the vigilance report, the assessments made by the assessing officer cannot be sustained in the eye of law. Even though the petitioner raised such objection, but the Tribunal disposed of the aforesaid four second appeals

by a common order dated 31.12.2012 upholding the order of the forums below by holding that the STO is justified in his action in completing the assessment for the impugned periods. Consequentially, the Tribunal dismissed the second appeals preferred by the petitioner confirming the orders of the Deputy Commissioner of Sales Tax in first appeals. Hence, this revision.

3. The petitioner has formulated as many as nine questions of law, as indicated in paragraph 32 of the revision petition. But, while entertaining the revision petition, this Court, *vide* order dated 15.07.2015, admitted the revision petition on the following questions of law:

“(II) Whether on the facts and in the circumstances of the case, the findings of the taxing authorities are based on no evidences and also in violation of the principles of natural justice?”

“(IV) Whether on the facts and in the circumstances of the case, report of a particular year can be relied and made basis for assessing for previous years?”

4. Mr. Rudra Prasad Kar, learned counsel for the petitioner contended that the Assessing Officer, while passing the impugned orders of assessment, had not

applied its mind in proper perspective and, as such, relying upon the allegations of vigilance officials and on their dictates, had raised the tax and demanded the penalty. It is contended that the registration certificate of the petitioner had been cancelled in the year 1997 and due to personal difficulties of the proprietor of the petitioner, it could not continue with the business, but basing on the turnover for the year 1997-98 to 2000-01 wherein it has been said that the liability was 'nil', without determining and fixing the date of liability afresh, imposition of tax cannot be sustained in the eye of law. It is further contended that on the date of inspection, the sale figures were found to be Rs.180/- and the detailed inventories counting as undertaken by the vigilance was of Rs.80,072/- as per the sale price of the petitioner and MRP value of the same was determined at Rs. 82,455/- by the vigilance officials. Thereby, brushing aside the factual determination of fact and adoption of daily sales at Rs.2,000/- and having a running stock of Rs.5,00,000/-, the assessment made by the assessing officer, which has

been confirmed in first appeal by the 1st appellate authority and in the second appeal by the Tribunal, cannot be sustained in the eye of law. It is further contended that if the petitioner is an unregistered dealer, solely on the basis of the dictates of the vigilance authority the assessment being made, the same cannot be sustained in the eye of law, as the same has been done without giving due opportunity of hearing to the petitioner.

4.1. To substantiate the contention, learned counsel for the petitioner has relied upon the judgments of the apex Court as well as this Court in the cases of **CIT v. Green World Corporation**, (2009) 7 SCC 69 = 314 ITR 81 (SC), **Amarchand Lakhiram v. CST**, (1989) 73 STC 179 (Ori), **Yeses International v. State of Kerala**, (2009) 23 VST 130 (Ker) and **J. Gopal Rao v. State of Orissa**, S.J.C. No. 1 of 1986 disposed of on 23.09.1991 reported at (1993) 88 STC 489 (Ori).

5. Mr. Sunil Mishra, learned Standing Counsel appearing for the revenue vehemently contended that since the weighing machine was available in the business

premise, that presupposes that the petitioner was carrying on its business and as the petitioner is an unregistered dealer while the vigilance authority found on inspection that there was stock available amounting to Rs.82,455/-, on that basis best judgment assessment has been made by the assessing officer. Thereby, no illegality or irregularity has been committed by the authority in making such assessments, which have been confirmed in first appeals as well as in the second appeals. Thereby, the claim made by the petitioner cannot be sustained in the eye of law. It is further contended that reliance placed by the petitioner in **J. Gopal Rao** (*supra*) has no application to the present context.

6. On the above backdrop of the case, the questions of law, which have been formulated and basing upon which the revision petition has been admitted, are to be taken into consideration. As a matter of fact, the Assessing Officer in support of start of business has relied upon the evidence of the inspecting officials who found that the Weights and Measures License with effect from

10.07.2000 being renewed every year and an electronic weighing machine was installed at the shop since 27.03.2000 and basing upon the confession of the dealer his daily sales was accepted by the Inspector of Sales Tax (Vigilance) at Rs.2,000/- and estimated the total sale transaction at Rs.6,20,000/- for 2001-02. Apart from the same, at the time of inspection, the dealer could not produce any purchase bill, purchase register confessing his unaccounted for purchase since 2000-01 and also at the time of inspection the dealer could not produce any sale bill or sale invoice before the officials. If it is the case of the petitioner that after cancellation of registration certificate he had stopped the business and could not revive the same, the Assessing Officer should not have drawn a presumption, on the basis of weighing machine said to have been purchased and obtained Weights and Measures License on 10.07.2000 and available in the premises, and the electronic machine said to have been installed at the shop since 27.03.2000, and come to a conclusion on the basis of best judgment assessment that

the petitioner was engaged in clandestine nature of business during 2001-02 and accepted the Gross Turnover estimated by the Inspector of Sales Tax (Vigilance) at Rs.6,20,000/-. If the assessing officer has not issued any notice to the petitioner to substantiate its contention by affording opportunity of hearing and consequentially made best judgment assessment for the year 2001-02, the same cannot be sustained in the eye of law. More so, even though the *ex parte* order dated 31.03.2006 pertaining to Assessment Year 2000-01 passed by the Assessing Officer under Section 12(5) of the OST Act, 1947 had been set aside by the Appellate Authority in appeal, *vide* order dated 26.05.2009, the same has not been taken into consideration. Had opportunity been given, the petitioner could have pointed out this fact before the assessing officer. The first appellate authority as well as the Tribunal in second appeal confirmed the order passed by the assessing officer without any application of mind in proper perspective. As such, for availability of Weights and Measures License granted with effect from 10.07.2000 and

installation of electronic weighing machine on 27.03.2000, no presumption can be drawn that the petitioner had carried out the business and on that basis the assessment is to be made. As such, mere presumption cannot be the basis for any assessment. Furthermore, the material discovered relating to any particular assessment year cannot be used for making assessment for other years, unless their relevance to any other period is established by the assessing officer. On perusal of the orders passed by the assessing officer, first appellate authority and also the second appellate authority, namely, the Tribunal, it appears that no material relevance was indicated to justify the assessment of daily sales for the assessment years 2001-02, 2002-03 and 2003-04. Thereby, fixing of liability by the Assessing Officer on surmises and conjectures cannot be sustained in the eye of law. More so, if the Vigilance Officials conducted inspection in April, 2004, that material can be utilized for the assessment made in same year, *i.e.*, 2004-05 but the same cannot be used for the assessment years 2001-02, 2002-03 and 2003-04,

particularly when the petitioner had not carried out any business due to reason beyond its control. Needless to say, on perusal of the assessment orders it appears that reliance has been placed by the assessing officer on the report of the vigilance dated 29.11.2004, which was the result of inspection of the premises of the petitioner by the Vigilance personnel on 11.08.2004 (as is recorded in the assessment order). But the assessing officer utilized the same for the assessment years 2001-02, 2002-03, 2003-04 and 2004-05 and determined the liability against the petitioner. Thereby, the said assessment cannot have any legs to stand.

7. Before making further discussion on the merits of the matter, it may be pertinent to have a glance at relevant portions of the charging provision, i.e., Section 4 and Section 12(5) of the OST Act:

“4. Incidence of taxation.—

(1) Subject to the provisions of Sections 3-B, 5, 6, 7 and 8 with effect from such date, as the State Government may by notification, in the Gazette, appoint, being not earlier than 30 days after the date of the said notification, every dealer whose gross turnover during the year immediately preceding the

date of commencement of the Orissa Sales Tax (Amendment) Act, 1991 exceeded the limit specified in sub-section (7) shall be liable to pay tax under this Act on sales and purchases effected after the date so notified.

(2) Every dealer to whom sub-section (1) does not apply shall be liable to pay tax under this Act on sales and purchases with effect from the day immediately following a period not exceeding 12 months during which his gross turnover exceeded the limit specified in sub-section (7).

(3) Every dealer who has become liable to pay tax under this Act shall continue to be so liable until the expiry of three consecutive years during each of which his gross turnover has failed to exceed the limit specified in sub-section (7) and such further period after the date of the said expiry as may be prescribed and his liability to pay tax under this Act shall cease on the expiry of the prescribed period:

Provided that in calculating the period of three consecutive years, the part of a year during which a dealer became first or again liable shall be excluded.

(4) Every dealer who has ceased to be liable to pay tax under sub-section (3) shall again be liable to pay tax under this Act with effect from the month immediately following a period not exceeding twelve months during which his gross turnover again exceeds the limit specified in sub-section (7).

(7) For the purposes of this section, the limit shall be—

(a) in relation to a dealer
who is an importer,

Rs. 20,000/-;

(b) in relation to a dealer
who manufactures any goods
(other than such goods as
the State Government may,

by notification, specify from time to time in this behalf), Rs. 1,00,000/-;

(c) in relation to a dealer engaged in the execution of works contract and in execution thereof supplies goods (whether as goods or in some other forms), Rs. 1,00,000/;

and

(d) in relation to any other dealer not covered by clauses (a), (b) and (c), Rs. 2,00,000/-

Provided that nothing in this section shall apply in respect of a casual dealer.

12. Assessment of tax.—

(5) If upon information which has come into 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.”

8. Bare reading of aforesaid charging provisions makes it clear that a dealer shall be liable to pay tax on sales and/or purchases with effect from the day immediately following a period not exceeding 12 months during which his gross turnover exceeded the limit specified in sub-section (7). Thus, once liability accrues, the obligation to pay tax under the OST Act cannot be disputed and the date of grant of certificate of registration cannot arrest or shift that liability. The liability to pay tax under Section 4 of the OST Act accrues as and when the conditions laid down therein are satisfied.

8.1. From the facts as discussed in the Order-in-Second Appeals it is transpired as follows:

*“*** Cancellation of registration certificate does not cease the liability of the dealer from payment of tax. From the statement of the dealer it is coming forward that he started his business with effect from 01.09.1997 to 31.03.2000; his business was closed due to health hazard and accident. If at all the contention of the appellant is accepted, the dealer cannot be made free from the clutches of continuing liability as the same is not in consonance with the provision of Section 4(3) of the OST Act. Under the above factual position*

*when the dealer has the continuing liability to pay tax, fixation of fresh liability to pay tax under Section 4(4) of the Act does not arise, and hence the learned STO is justified in assessing the dealer for the impugned periods. On the point of annulling of assessment for the period 2000-01 by the learned ACST vide his order dated 26.05.2009 in AA No.207/2007-08, the learned ACST in his order observed that since there is no basis on continuing liability and the learned STO has simply accepted the allegation as made in the new case report without making any enquiry on the business activities of the dealer and passed the ex parte order, the order passed by the learned STO being not supported with any documentary evidence towards the continuing liability is not sustainable in law. ***"*

8.2. The aforesaid observation of the Tribunal is not correct view of the matter as, the liability of the assessee has been determined by the Sales Tax Officer accepting the observations contained in the very same report. As it appears from the above narration that the liability determined in respect of Assessment Year 2000-01 was nullified on the material fact that there was no evidence of liability being subsisted for the years 2000-01, and there was no enquiry as to business activities of the dealer. For the same reason being available during the period from

2001-02 to 2003-04, the Tribunal should have decided the case accordingly.

8.3. It may be pertinent to make observation that the inspection of the business premises was made on 11.08.2004 by the Vigilance personnel. On the material found available on the said date there was suggestion for determination of liability for the periods from 2000-01 to 2004-05 *vide* Vigilance New Case Report bearing No.8, dated 29.11.2004. No material is placed on record by the Revenue to the effect that any of the documents suggested sale of goods during the period from 2000-01 to 2003-04. Mere presence of weighing machine and obtaining Weights and Measures License *ipso facto* would not lead to construe that there was sale and the turnover exceeded the threshold limit as contained in Section 4(7) of the OST Act at any point of time during 2001-02 to 2003-04 particularly when the “continuing liability” fixed for the period 2000-01 was set aside by the Appellate Authority which attained finality as no second appeal was preferred thereagainst.

8.4. The undisputed fact remained that the liability of the petitioner-unregistered dealer for the first period, i.e., 2000-01, has been nullified by the Appellate Authority which stood unchallenged by the Revenue in further proceeding. Therefore, in absence of fixation of liability for the purpose of assessment under Section 12(5) the Tribunal erred in sustaining the liability determined for the subsequent periods, i.e., 2001-02 to 2004-05. This Court in the case of **B.K. Parida v. State of Odisha, O.J.C. No.933 of 1973, decided on 11th December, 1974**, observed as follows:

“The other contention raised by the assessee seems to have force. Admittedly the assessment is one under Section 12(5) of the Act on the footing that the assessee was liable to pay tax under the Act and had nevertheless without sufficient cause failed to apply for registration. Liability to pay tax arises under Section 4 of the Act and before an assessment under Section 12(5) thereof can be made, the Assessing Officer has certainly to determine as to with effect from which period the liability accrues.

****”*

8.5. It may also be relevant to take note of the fact that the inspection of the premises being conducted on 11.08.2004, and no scrap of paper showing transaction of sale being brought on record by the Revenue, the material detected during such inspection could be confined to the period 2004-05, but not earlier thereto. In this regard, the learned counsel for the petitioner, Sri Rudra Prasad Kar, aptly relied on the case decided by this Court in **J. Gopal Rao** (supra), wherein it has been observed as follows:

“6. The prime question is whether there can be backward and forward projection of materials detected which are relevant to a particular assessment for the purpose of making assessment for some other year. However, if the assessing officer wants to do so, some material has to be brought on record to justify just projection. Mere presumption cannot be the basis for any assessment. The date when material was discovered is not relevant. What is material is the nature of evidence or material discovered during inspection. If materials discovered relate to any particular assessment year, those cannot be utilised for making assessment for other years, unless their relevance to any other period is established by the assessing officer. Similar view was

expressed by the Allahabad High Court in Babu Ram Vishnoi Vrs. Commissioner of Sales Tax, [1972] 29 STC 392 and Hukam Chand Mahendra Kumar Vrs. Commissioner of Sales Tax, [1972] 29 STC 394. In the case at hand, no material of relevance has been indicated to justify the estimation of daily sales for assessment years 1979-80 and 1980-81. Therefore, the fixation of liability with effect from April 1, 1980, cannot be sustained. We accordingly answer the questions.”

8.6. The Supreme Court of India in the case of **CIT v. Sati Oil Udyog Ltd.**, (2015) 7 SCC 304 laid down as follows:

“23. The Court further went on to hold in *K.P. Varghese case*, (1981) 4 SCC 173:

“13. *** It is a well-settled rule of law that the onus of establishing that the conditions of taxability are fulfilled is always on the Revenue ***.

24. Finally, the Court held:

“18. We must, therefore, hold that sub-section (2) of Section 52 can be invoked only where the consideration for the transfer has been understated by the assessee or in other words, the consideration actually received by the assessee is more than what is declared or

disclosed by him and the burden of proving such understatement or concealment is on the Revenue. This burden may be discharged by the Revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has not correctly declared or disclosed the consideration received by him and there is understatement or concealment of the consideration in respect of the transfer. Sub-section (2) has no application in case of an honest and bona fide transaction where the consideration received by the assessee has been correctly declared or disclosed by him, and there is no concealment or suppression of the consideration.”

25. Taking a cue from Varghese case, (1981) 4 SCC 173, we therefore, hold that Section 143(1-A) [of the Income Tax Act, 1961] can only be invoked where it is found on facts that the lesser amount stated in the return filed by the assessee is a result of an attempt to evade tax lawfully payable by the assessee. The burden of proving that the assessee has so attempted to evade tax is on the Revenue which may be discharged by the Revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has, in fact, attempted to evade tax lawfully payable by it. ***”

8.7. It is the “sale”, but not the “stock”, which attracts charge/liability under the OST Act which is manifest from the long title. The long title reads as follows:

“An Act to impose a tax on the sale or purchase of goods in Odisha”.

8.8. It is not in dispute that the subject-goods alleged to be dealt in by the assessee do not fall within the scope of items declared to be taxed under Section 3B, i.e., “Goods liable to purchase tax”. Therefore, unless the Revenue is in a position to demonstrate that consideration has been received in connection with “sale” effected, no sales tax could be levied by analogy. Noteworthy here to refer to a Division Bench decision of this Court rendered in the case of **Bansi Tyre Services v. Orissa Sales Tax Tribunal, (2009) 20 VST 475 (Ori)** where the goods being not subject to tax at purchase point, it has been observed that,

*“12. *** To a query made to the learned counsel for the Revenue as to whether ‘any purchase tax’ is payable on the purchase of tyres. Shri Kar submitted that purchase tax was not payable on tyres. **Therefore, we fail to understand as to how ‘suppression of***

purchase' by a dealer would have any bearing on the question of 'suppression of sales'. It is obvious therefore, that the purchase of 16 tyres and not accounting the same, cannot have nexus with the 'suppression of sales' and therefore, to this extent it must be held that the authorities have failed to substitute any 'nexus' between the same. *** Obviously non-disclosure of expenditure is of no relevance to 'suppression of sale' ***

8.9. Mere fact of stock being found by the Vigilance Wing *per se* was not sufficient to conclude that there was suppression of turnover. Whole exercise of the Department was on presumption and surmises. There was no corroborative evidence to establish the suppression of sales. In absence of any findings as to sale with respect to the alleged stock, levy of tax on surmise is untenable in law as per the ratio laid down in case of ***Mahabir Rice Mill v. State of Orissa in SJC Nos.125 and 174 of 1976 decided on 11.09.1980*** and ***M/s. Lachminarayan Sawalram v. State of Orissa in OJC No.286 of 1968 decided on 20.07.1971***. In the case of ***Mahabir Rice Mill*** (supra), it was the case of the assessee that taking into consideration the report of the Food Corporation of India, wherein it was found on physical verification short fall in

the stock of super-fine rice as also paddy. The Assessing Officer after confrontation rejected the books of account of the assessee and estimated the price of short fall by adopting prevailing Government rate and raised an additional demand. In the reference after considering the material on record, this Court held that there is no material at all in the assessment record to support the fact that there has been any clandestine purchase of paddy or similar sale of rice. The only basis was shortage report of the Quality Inspector of Food Corporation of India. In the absence of supporting evidence, merely on the report of the Inspector jumping to the conclusion that there had been purchase and sale making the assessee liable to tax and resorting to best judgment assessment is untenable. In the case of **M/s. Lachminarayan Sawalram** (supra), this Hon'ble Court held that, before any tax can be levied, there must be a finding that the quantity of petrol and diesel oil which fell short with reference to the stock account had been sold; without such a finding the tax cannot be levied.

8.10. This Court applying ratio of aforesaid two Judgments held in **Gupta Distributors v. State of Odisha, (2023) 108 GSTR 154 (Ori)** as follows:

“7. The main charge against the Assessee was regarding unexplained shortage of stocks. As explained by this Court in *Laxminarayan Sawalram v. State of Orissa* (order dated 20th July, 1971 in OJC No.286 of 1968), unless the Department is further able to show that the suppressed stocks were sold by the Assessee, there cannot be an automatic enhancement of the taxable turnover.

8. For the aforementioned reasons, the Court is unable to sustain the reasoning of the Tribunal for restoring the order of the STO and reversing the order of the ACST. The question framed by this Court is answered in the negative by holding that the enhancement of turnover, in the absence of any material to establish that the goods found short have been sold, is neither lawful nor valid and is contrary to the law explained by the Court in *Mahabir Rice Mills (supra)*. The question is accordingly answered in favour of the Assessee and against the Department.”

8.11. In yet another case being **Radhakeshav Rice Mill Pvt. Ltd. v. State of Odisha, 2022 (I) ILR-CUT 300**

= **(2023) 108 GSTR 157 (Ori)** it has been observed as follows:

“In the present case, there is no material brought on record from the side of the Department to suggest that the shortage stock was sold by the Petitioner. Therefore, in absence of any such evidence, it would not be just and proper to hold that there was deficiency in stock and so the suppression of sales by the Petitioner. Apart from that, the shortage in stock is based on mere eye-estimation of the inspecting officers, which as discussed earlier, may not be sufficient for the purpose of fixing liability against the Petitioner. In any case, since the shortage of stock, even if it is assumed, per se cannot be a ground for enhancement of turnover, since no material evidence is produced by the Department to further indicate that the same was sold by the Petitioner. Having said that, the Court reaches at a conclusion that the Tribunal was not right in interfering with the order of the ACST and directing enhancement.”

8.12. From the above it is crystal clear that the charge of tax is stemmed on “sale”, and in absence of charge being brought on record no tax liability can be fastened on the assessee. In this respect, the golden words on interpretation as restated in **Gursahai Saigal v. CIT, (1963) 3 SCR 893 = AIR 1963 SC 1062 = (1963) 48 ITR 1 (SC)** are quoted hereunder:

*“8. *** The assessee relies on a rule of construction applicable to taxing statutes which has been variously stated. Rowlatt J. put it in these words in Cape Brandy Syndicate v. Inland Revenue Commissioners, (1921) KB 64, 71:*

“In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

The object of this rule is to prevent a taxing statute being construed “according to its intent, though not according to its words”: In re: Bethlehem Hospital, LR 19 Eq 457. This Court has accepted this rule. Bhagwati J. in A.V. Fernandez Vrs. State of Kerala, (1957) SCR 837, said,

“If ... the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter.”

It has even been said that “if the provision is so wanting in clarity that no meaning is reasonably clear, the courts will be unable to regard it as of any effect.”: see Inland Revenue Commissioners Vrs. Bladnoch Distillery Co. Ltd. (1948) All ER 616.”

8.13. The Odisha Sales Tax Tribunal has returned a finding to the effect that “when the dealer was in possession of physical stock of goods without any purchase bills, does it not amount to purchase suppression?” Such a presumption is hard to chew. Keeping in view the aforesaid Judgments and reading Section 4 alongside definition of “sale” given under Section 2(g), there is no ambiguity that it is the “transfer of property in goods” which is subject-matter for levy of sales tax. In the case at hand, there is no evidence on record to show that the petitioner had sold goods. Detection of physical stock of Rs.82,455/- alleged to have been available in the business premise on the date of visit by the Vigilance personnel, i.e., 11.08.2004 cannot itself be an indicator for assuming that the petitioner-dealer had been engaged in clandestine business activity since 2001-02 or prior thereto. Admittedly, the goods found in stock are not declared to be levied with tax at purchase point. Therefore, the conclusion arrived at by the Tribunal is not only contrary to the provisions of the statute, but suffers

perversity of fact. It is trite that any determination of fact by the Revenue Authorities including the Tribunal, as final-finding authority, which is not in conformity with the requirement of relevant provisions of the statutory provisions can be treated to be perverse and it may be considered as a question of law as perversity itself can be said to be a question of law. Reference may be had to *Ahmedabad Municipal Corporation Vrs. Virendra Kumar Jayantibhai Patel*, (1997) 6 SCC 650; *Dale & Carrington Investment Pvt. Ltd. Vrs. P.K. Prathapan*, AIR 2005 SC 1624; *Allied Dealers Vrs. State of Orissa*, (1972) 29 STC 484 (Ori). If the finding of fact recorded by the Tribunal is based on no evidence, such a finding would suffer from error of law apparent on the face of record.

9. From the above discussions it is manifest that the Odisha Sales Tax Tribunal dismissed the second appeals of the petitioner-dealer by dwelling heavily on the following aspects:

- i. *Admission of the petitioner before the Inspecting Officials that his daily average sales was at Rs.2,000/-.*
- ii. *There was stock of goods estimated at Rs.82,455/-.*
- iii. *There was non-maintenance of books of account.*
- iv. *Cash of Rs.180/- found available in the business premises during the course of inspection.*

9.1. This Court does not find any of such reason germane to conclude that there was “transfer of property in goods” so as to fasten the liability on the petitioner under the OST Act for sale of goods for valuable consideration in terms of Section 2(g)— “Sale” and Section 2(h)— “Sale price” read with Section 4— “Incidence of tax”.

9.2. Glaring from the Orders of the authorities below that liability of the dealer has been determined for the Assessment Years 2001-02 to 2004-05 basing on the allegations contained in the Report submitted by the Additional Commercial Tax Officer of Vigilance Wing which

was confirmed by the Odisha Sales Tax Tribunal notwithstanding the fact that the continuing liability as per Section 4(3) of the OST Act was set aside in respect of Assessment Year 2000-01 based on same material. This aspect attained finality inasmuch as no second appeal was preferred by the State of Odisha against the Order of the Appellate Authority. The tax on estimated figures on presumed sales has been levied basing on the statement of the petitioner made before the Vigilance personnel during the inspection. Availability of cash of Rs.180/- does not lead to infer that it is out of sale proceeds as the visiting officials have not bring on record fact of sale any goods out of the stock found. Records reveal nothing more has been enquired into by neither the Assessing Authority nor the Appellate Authority. The Tribunal also without appreciating the legal position affirmed the conclusion of the authorities below.

9.3. In this connection it may be worthwhile to refer to the following dicta as enunciated in *CIT Vrs. Ashok Kumar Soni*, (2007) 291 ITR 172 (Raj):

*“15. It is trite to say that admissions are relevant pieces of evidence and are not conclusive proof of fact. An admission can always be explained. Once this position is accepted, the question remains of appreciating evidence which is on record, which includes the evidence in the form of attending circumstances and the statements by which the previous statement is sought to be explained.***”*

9.4. It is significant to notice that the entire case of the Revenue as culled out from the Order-in-Second Appeal of the Odisha Sales Tax Tribunal is that the determination of turnover for levy of tax liability cropped on the basis of admission of the petitioner that its daily sales is at Rs.2,000/-. Taking into consideration observations made in the case of *State of Odisha Vrs. Banita*, 109 (2010) CLT 146 = (2010) I ILR-CUT 555 = 2010 Supp. (I) OLR 835 = (2010) 29 VST 477 (Ori) it may be stated that alleged admission by the petitioner before the Inspecting Officer cannot be the basis for determination of tax liability inferring that there was sale suppression. In *Jagannath Sweets Vrs. State of Odisha*, 2016 (II) ILR-CUT 86 = (2016) 91 VST 493 (Ori), this Court in the context of

exercise of “best judgment assessment” made the following observation:

*“11. With due respect, It is found that the power of making a best judgment assessment is to be exercised within the frame work of settled and invariable principles of justice. The judgment should not depend upon the arbitrary caprice of a quasi-judicial authority and should be based on true wisdom and meet the legal principle. It has also been laid down in the aforesaid decision although the best judgment revolves around the element of guess work but the same cannot be a wild one, it must have a reasonable nexus to the available material and the circumstances of the case. It is also reported in **Raghubar Mandal Vrs. State of Bihar, (1957) 8 STC 770 (SC)**, at page 778 where Their Lordships observed:*

‘We find nothing in those observations which runs counter to the observations made in Dhakeswari Cotton Mills’ case [(1949) 1 SCR 941]. 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 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 the case under our consideration, the assessing officer did not do so, and that is where the grievance of the assessee arises.'

12. With due respect to the decision, it appears that the best judgment procedure adopted by the assessing authority must be related to some evidence or material and must be more than their suspicion."

9.5. Section 12(5) of the OST Act empowers the Assessing Officer to undertake assessment "to the best of his judgment"; nevertheless, a mere assumption based on a visit on a particular date of inspection of the possible daily average sale cannot and ought not to form the foundation for resorting to best judgment assessment. Reference may be had to dicta laid down in *Laxmi Lime Centre Vrs. State of Odisha*, 2017 (I) ILR-CUT 432 = (2017) 100 VST 220 (Ori).

9.6. It needs to be mentioned that Section 15 of the OST Act deals with "Accounts" which requires "every registered dealer or other dealer on whom a notice has

been served to furnish returns under sub-section (1) of Section 11” to keep true account of the value of goods bought and sold by him, and the books of accounts relating to his business. In the instant case, it is not the case of the Department that the dealer is a “registered dealer” nor did the Revenue contend that notice was served to furnish returns under sub-section (1) of Section 11. Therefore, non-maintenance of books of account by the present petitioner-dealer, whose registration has been cancelled under Section 9(3-f) of the OST Act with effect from 01.04.1997, cannot be taken as pointer for suppression of sales so as to saddle on him the burden of tax on the specious plea that the assessee failed to discharge liability, more so when the liability fixed for the year 2000-01 was set aside by the Appellate Authority which attained finality being not questioned by the Revenue in the further proceeding.

10. Now, the prime question is whether there can be backward and forward projection of materials detected which are relevant to a particular assessment for the

purpose of making assessment for some other year. If the assessing officer wants to do so, some material has to be brought on record to justify just projection, which is absent in the present case. Thereby, the orders so passed by the authorities cannot be sustained in the eye of law. It is also evident that on 11.08.2004, the vigilance officials inspected the premises and discovered that there was electronic weighing machine and the petitioner was found to have obtained Weights and Measures License. But that *ipso facto* cannot be construed to be materials available to make assessment. Therefore, the date when the material was discovered is not relevant. What is relevant is the nature of evidence or material discovered during inspection is the most important thing. In absence of the same, the same cannot be utilized for making assessment for other years unless their relevance to any other period is established by the Assessing Officer.

11. In the above view of the matter, the orders dated 02.11.2008, 17.10.2009, 15.11.2010 and 15.11.2010 passed by the assessing officer under Annexures-1 to 4, as

well as the orders passed by the first appellate authority in AA 15/2010, AA 02/2010-11, AA 01/2011-12 and AA 02/2011-12 on 25.10.2012; and the orders dated 31.12.2013 passed by the Tribunal in S.A. Nos. 75, 76, 77 and 78 of 2012-13 cannot be sustained in the eye of law and the same are liable to be quashed and are hereby quashed. The matter is remitted back to the assessing officer to make fresh assessment in adherence to the principles of natural justice and in conformity with the provisions of law.

12. As a consequence thereof, the questions of law, as formulated by order dated 15.07.2015, are answered in favour of the petitioner and against the revenue. The revision is accordingly allowed, but, in the facts and circumstances, there shall be no order as to costs.

(DR. B.R. SARANGI)
JUDGE

M.S. RAMAN, J. I agree.

(M.S. RAMAN)
JUDGE

Orissa High Court, Cuttack
The 25th April, 2023, Ashok