

2. The dealer in the case in hand being a registered dealer under the Act engaged in trading of Micromax mobile handsets and mobile phone accessories on wholesale and retail basis. Vigilance team of the taxing authority on getting information about clandestine business transaction of the dealer made a surprise visit to dealer's unit on 29.05.2012 and prepared a tax evasion report dtd.23.05.2013 suggesting escaped assessment u/s.43 of the OVAT Act. Acting upon that tax evasion report, the Deputy Commissioner of Sales Tax, Angul Circle, Angul as assessing authority assessed the dealer for the tax period 2009-10 and 2012-13 (ending on May, 2012). In spite of repeated notice, the dealer failed to appear before the assessing authority. It has failed to produce the necessary documents including the books of account for verification, as a result the assessing authority neither could get the opportunity to confront the tax evasion report to the dealer nor could verify the books of account in the light of allegation in tax evasion report. As per the tax evasion report, the dealer had not accounted for purchase of handsets value of Rs.21,10,500.00 in its purchase register. It has also committed sale suppression of the mobile handsets worth of Rs.25,25,362.00 which was found established from verification of the stock, sale statements and other documents. The assessing authority accepted the sale suppression of Rs.25,25,362.00 as suggested by the Vigilance Team and taxed the same @ 5% calculated to Rs.1,62,268.10. Further, the assessing authority took note of the fact of unaccounted for stock of mobile accessories including batteries valued at Rs.1,17,969.00. It was held as purchase suppression and accordingly taxed at Rs.5,898.45. The total suppression was calculated accordingly at Rs.2,64,331.00 and the tax liability of the dealer was calculated at Rs.1,32,166.55. Besides tax liability, penalty of Rs.2,64,333.10 was imposed, thereby the total liability against the dealer was raised at Rs.3,96,499.65.

3. Being aggrieved with such assessment, the dealer preferred appeal before first appellate authority. Learned Joint Commissioner of Sales Tax, Angul Range, Angul as first appellate authority vide impugned order

confirmed the assessment and demand raised by the assessing authority. In the impugned order, learned first appellate authority turned down the plea of the dealer that, proper opportunity of being heard was not provided to the dealer by the assessing authority. It has also turned down the dealer's plea that, the incriminating materials were not supplied to the dealer for confrontation so as to enable the dealer to give his explanation against the tax evasion report with plea that, when the dealer did not appear and did not produce the books of account then, there was no occasion for the assessing authority to provide the tax evasion report and seized incriminating documents to the dealer.

4. When the matter stood thus, being unsuccessful before both the fora below, the dealer knocked the door of this forum by way of second appeal.

5. Main contentions of the dealer are, proper opportunity of being heard was not provided to him which is a violation of the principle of natural justice. The suppression determined is whimsical and not correct. The penalty imposed is mechanical not in consonance to the basic parameter prescribed by the Hon'ble Supreme Court in the case of **Hindustan Steel Ltd. v. State of Orissa, 1970 AIR 253 (SC)**. Another contention of the dealer that, the first appellate authority has erred in taking consideration of the dealer's regular return in the appeal order.

6. The appeal is heard with cross objection from the side of the Revenue, wherein and whereby Revenue has supported the findings of both the fora below.

7. The question struck for decision in this appeal are,

- (i) Whether the first appellate authority has committed wrong in confirming the order of assessing authority regarding suppression determined;
- (ii) Whether the first appellate authority should have held that reasonable opportunity of being heard was not extended to the dealer, thereby there was violation of principle of natural justice in this case in hand;

(iii) Whether in the facts and circumstances of the case the dealer is entitled to get the copy of the incriminating materials intended to be used against him so as to enable him to adduce his rebuttal and to that effect both the fora below have committed wrong in not providing those documents;

8. The main contention of the dealer can be summarized under three heads such as, proper opportunity of being heard was not given to him. The incriminating documents as per tax evasion report was not supplied to the dealer, so the dealer could not enable himself to adduce his defense. Besides, it is the case of the dealer that, the authorities below have not taken consideration of the regular return filed by the dealer in the escaped assessment.

To substantiate his plea, learned Counsel for the dealer placed his reliance in the matter of Deo Ispat Alloys Limited v. Unknown, W.P.(C) No. 6245 of 2014 dtd.26.09.2014 and argued that, the dealer has every right to get the copy of tax evasion report and incriminating materials to be used against him in the assessment. In absence of that, the dealer is handicapped as not in a position to advance his defense plea. So, in the case in hand, proper opportunity was not extended to the dealer to participate in the hearing.

9. Per contra, learned Addl. Standing Counsel strongly placed reliance in the matter of M/s. Lakhiram Jain and sons v. STO, Rayagada 2008 SCC online 63 and argued that, in the case of escaped assessment the well settled principle is, the tax evasion report and incriminating documents can be supplied to the dealer or the documents which are confronted to the dealer in the assessment should be supplied to the dealer so as to enable the dealer to advance his defense but, before hand the dealer has to produce all his registers including books of account, so that the dealer may not get opportunity to manipulate his registers or prepare his registers in a way to answer the allegations against him. The Hon'ble Court has held as follows-

“Therefore, it cannot be said that the assessing officer has committed any error in insisting upon production of books of account before issuing the certified copy of the seized materials. Production of books of account prior to issuance of certified copy the seized material is necessary to rule out the possibility of preparation of accounts in line with the seized documents. This has become further necessary in this case as at no stage books of account were produced earlier at the time of inspection or before the assessing officer. However, we make it clear that where in course of inspection the inspecting officer seizes incriminating materials as well as regular books of account from the business premises of a dealer, the assessing officer or the inspecting officer shall supply copies of the seized regular books of account and incriminating material (s) to the dealer if he asks for the same before asking the dealer for furnishing his explanation in connection with any proceeding under the OVAT Act.”

10. Gone through both the decisions. Both the decisions are offered by Hon'ble Justice B.N. Mohapatra of our Hon'ble Court at two different point of time. On careful perusal of both the decisions and the mandate of the provision u/s.43 of the OVAT Act, more to say the basis on which escaped assessment takes place, it can be summarized as follows.

Because in a case of escaped assessment basis of which depends on the detection of incriminating materials on surprise visit regarding suppression by the dealer, the tax evasion report and the incriminating materials cannot be supplied to the dealer before or at the initiation of the escaped assessment more particularly before submission of books of account of the dealer as there is possibility the dealer may get the opportunity to know the allegations against him and to prepare his registers and documents to answer the allegations against him. So, the authority has held that, the dealer is required to deposit his documents first before the assessing authority and then has a right to ask for all the incriminating materials. Similarly, on the other hand, when the authorities are going to confront the alleged documents to the dealer in the assessment, opportunity of being heard to be provided to the dealer so that, the dealer can avail reasonable opportunity to give explanation against the allegations brought in.

With the principle hereinabove, when we delve into the case in hand, it is found that, the dealer remained absent before assessing authority in spite of several opportunities given to him. Act and conduct of a party is very much material in case of escaped assessment. The dealer knows his unit was visited by the Vigilance Wing surprisingly. The dealer knows documents were seized from his business unit by the Vigilance Team. The dealer has received the notice of escaped assessment proceeding but remained absent. Such absence is not an act of innocence or ignorance but an attempt with a design to frustrate the proceeding. Thus, in the case in hand, it is hard to accept the argument of the learned Counsel for the dealer that, the dealer was not provided with sufficient opportunity of being heard.

11. If we take the impugned order, there also it is found that, the dealer has not made any application for supply of the documents and has not made any application to adduce rebuttal evidence. However, the fact remains, whether it is intentional or unintentional but, the dealer has not adduced his rebuttal evidence or the dealer has not availed the opportunity to counter the allegations against him. Besides, it is found that, the first appellate authority has gone wrong in his view that, the dealer has never filed any return. Learned Counsel for the dealer furnished copy of the returns filed by the dealer for the period 2011-12 and 2012-13. The returns by the dealer should have been taken into consideration in the escaped assessment and it is a glaring defect and mistake committed by both the fora below. So, on this score only it is believed that, the escaped assessment as determined need to be re-determined again.

12. From the discussion above here in this case, we can sum up with the observations that, the conduct of the dealer in participating in the assessment in this case is casual and callous. As per the authorities relied by both the sides, it can safely be said that, the dealer cannot ask for the incriminating documents before submitting the books of account and registers so as to avoid any manipulation in the line of tax evasion report by the dealer. Here, it is made clear that, in the remand assessment the assessing authority will apply his prudence to verify and accept the entries

in the books of account and connected registers as genuine or afterthought. In the event, he believes the entries are afterthought made for the purpose to meet the incriminating documents, he is at liberty to reject the books of account and registers. But, he is under obligation to supply the incriminating documents and tax evasion report to the assessee so as enable him to raise his rebuttal.

With this finding hereinabove, it is held that, the matter is remitted back to the assessing authority for assessment afresh in the light of observation hereinabove. The appeal is allowed accordingly on contest.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

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