

dealer's unit and found the dealer involved in clandestine business transactions. The Enforcement Team recovered and seized certain incriminating documents (loose slips) indicating unaccounted for transactions. Some of the seized loose slips do not contain description of the goods, some contains less quantity of goods towards dispatch. On the basis of the loose slips seized and on the basis of afterthought invoices submitted later, the escaped assessment covering tax period from 01.04.2008 to 31.03.2010 relating to the dealer undertaken by the STO, Rourkela II Circle, Panposh as assessing authority. In the assessment, in consideration of the fraud case report, seized documents, statement of the dealer before the Enforcement Team, the plea of the dealer before him and the books of account and connected documents, the learned assessing authority in an ex parte assessment came to a conclusion to the effect that, the dealer is guilty of unaccounted for sale. Thereby, extra demand of tax u/s.43(1) of the OVAT Act to the tune of Rs.12,07,271.00, interest of Rs.3,62,190.00 u/s.34(1) of the OVAT Act and penalty of Rs.24,14,542.00 u/s.43(2) of the OVAT Act was raised.

3. Felt aggrieved, the dealer carried the matter into appeal before the first appellate authority. Learned Joint Commissioner of Sales Tax (Appeal), Sundargarh Range, Rourkela as first appellate authority vide its order dtd.26.10.2017 confirmed the order of assessing authority, thereby the demand raised remained undisturbed.

4. As against the confirming order above, the dealer knocked the door of this Tribunal with the following contentions. Determination of suppressed turnover on the basis of unsubstantiated loose slips, involuntarily confession statement of B. Raju Reddy ignoring requirements under law is bad. The very initiation of proceeding without being preceded by assessment under any of the provision u/s.39, 40, 42 or 44 of the OVAT Act is illegal. The determination of taxable turnover is baseless and without

jurisdiction, the penalty as imposed is not sustainable, the interest has no sanction of law in view of the facts and circumstances of the case, the impugned order being unreasoned one, is unsustainable in law.

5. The appeal is heard with Cross Objection from the respondent. In cross objection, the Revenue has supported the findings of both the fora below and contended that, the dealer has failed to discharge the burden of proof raised on him under law i.e. as per provision u/s.95(k) of the OVAT Act and whereas the initiation of proceeding u/s.43 of the OVAT Act is not illegal or unlawful in view of the well settled principle laid down by the Hon'ble Court in M/s. Nilachal Ispat Nigam v. State of Orissa W.P.(C) No.22343/2015 decided on 07.12.2016.

6. In the case in hand, from the rival contentions mentioned above, we can framed the disputed question as follows,

- (i) Whether the determination of suppression by the authorities below is erroneous?
- (ii) Whether the initiation of proceeding u/s.43 of the OVAT Act is not sustainable?
- (iii) Whether the imposition of penalty and interest as determined are unwarranted in the case in hand?
- (iv) What order?

7. **Question No.(i)**

The claim of the dealer is, determination of suppression on the basis of loose slips recovered and seized by the Enforcement Team during the visit of dealer's unit is not sustainable in law. Learned Counsel, Mr. Kurmy advancing argument for the dealer submitted, Mr. B. Reddy whose statement was recorded by Enforcement Team has sworn an affidavit on oath that, the statement was not a volunteer one. The incriminating documents were not seized in presence of the deponent Mr. Reddy, so no reliance can be placed on the statement of Mr. Reddy which was prepared at the

instance of the officer of the Enforcement Team. It is further argued that, the loose slips are no way reflects dealer's business, so no positive inference can be drawn on the basis of those seized documents regarding sale suppression by the dealer. Learned Counsel placed reliance in the matter of **Commission of Central Excise, Delhi-I Vrs. Vishnu & Co. Pvt. Ltd. 2016 (332) E.L.T. 793 (Del.)** and argued that, the Enforcement Wing has not tried to identify the person who had prepared those loose slips and the transporter through whose vehicle the goods were sent out. So, the prosecution case is not conclusively proved. Further, reliance is placed in the matter of **Commissioner, Trade Tax, U.P., Lucknow v. Varanasi Bottling Company Pvt. Ltd. [2010] 29 VST 251 (All)**, wherein the Hon'ble Court has held that, on the basis of loose slips no positive inference can be drawn conclusively. In **Continental Cement Company v. Union of India 2014 (309) E.L.T. 411 (All.)**, it is held that,

“12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects:

- (i) To find out the excess production details.
- (ii) To find out whether the excess raw materials have been purchased.
- (iii) To find out the dispatch particulars from the regular transporters.
- (iv) To find out the realization of sale proceeds.
- (v) To find out finished product receipt details from regular dealers/buyers.
- (vi) To find out the excess power consumptions.”

8. The other decision relied is **Girdhari Lal Nannelal v. The Sales Tax Commissioner, M.P. [1977] 39 STC 30**, it is held that-

"We have given the matter our earnest consideration and are of the opinion that the judgment of the High Court cannot be sustained in so far as it has answered question No. (1)(a) against the assessee-appellant. It would appear from the resume of facts that an entry was made in the account books of the appellant showing a credit of Rs. 10,000 in the name of the wife of Kanji Deosi, partner of the appellant-firm. In order to impose liability upon the appellant-firm for payment of sales tax by treating that amount as profits arising out of the undisclosed sales of the appellant, two things had to be established, (i) the amount of Rs. 10,000 was the income of the appellant-firm and not of Kanji Deosi or his wife, and (ii) that the said amount represented profits from income realised as a result of transactions liable to sales tax and not from other sources. The onus to prove the above two ingredients was upon the department. The fact that the appellant-firm or Kanji Deosi and his wife failed to adduce satisfactory or reasonable explanation with regard to the source of Rs. 10,000 would not in the absence of some further material have the effect of discharging that onus and proving both the ingredients."

9. Learned Counsel, Mr. Kurmy argued that, the determination of suppression in this case is full of surmises and whimsical.

The order of the assessing authority was *exparte* one, whereas the order of first appellate authority is mechanical.

10. Per contra, learned Addl. Standing Counsel, Mr. Pradhan strenuously argued that, the loose slips recovered from the dealer's premises necessarily relates to the business transactions of the dealer in view of the provision u/s.95(k) of the OVAT Act. It is the duty of the dealer to explain the circumstance of the loose slips recovered. Failure to do so, a presumption under law against the dealer should be taken. The statement of the dealer never can be disbelieved on the basis of an affidavit sworn which is an afterthought.

11. On perusal of the impugned order, it is found that, the learned first appellate authority has accepted the seized documents

as proved on the basis of presumption under law, such as, sec.95(k) of the OVAT Act. Provision u/s.95(k) of the OVAT Act reads as follows:-

“95. Burden of proof.-

(k) any book, document or account kept or found in his business premises or any place including a godown, warehouse, vehicle or vessel over which he has ultimate control does not relate to his business.

the burden of so proving shall be on him and, for the purpose of proving one or all or any of the claims, he shall produce or furnish such documents containing such particulars, within such time, before such authority and in such manner, as may be prescribed and such authority may, for sufficient reasons; require him to produce such further evidence as it may deem necessary, and where no document has been prescribed, such authority may require such evidence to be produced before it as it may deem necessary.”

12. Learned Addl. Standing Counsel for the Revenue argued that, the word “documents” contemplated in the provision includes any incriminating documents seized or recovered from the premises of the dealer. On the other hand, learned Counsel for the dealer vehemently argued that, the loose slips if any does not cover u/s.95(k) of the OVAT Act. The word “documents” relates to the statutory position or registers only.

In a case where some papers/documents depicting entries relating to business transactions are recovered, that too the place of recovery is the dealer’s premises, then the provision u/s.95(k) can be drawn successfully. It is settled principle of law that, a person who asserts a particular fact is required to affirmatively establish it but it is when the circumstance indicates knowledge about a particular fact is with a person having exclusive domain over the subject by virtue of his position either official or personal, then, the burden rests on him to rebut the presumption under law.

Burden of proof as to any particular fact lies on that person who wish the court to believe in its existence unless it is provided any law that, the proof of that fact shall lie on any particular person. Sec.95(k) is a provision under special statute resting the burden of proof on the dealer to explain any document relating to its business. By producing those documents, the department has discharged the initial burden. In consequence, the burden is shifted to the dealer to disprove the facts which is presumed on the basis of those incriminating documents. Putting it in another way, the burden of proof as to any particular fact when lies on that person who wishes the court to believe a thing and its existence who by reason of circumstance especially having the knowledge of that thing.

13. Reverting to the case in hand, it can be said that, the affidavit sworn by Mr. Reddy in a later period is a self-serving documents. So, on the basis of that affidavit the entries in the seized documents cannot be disbelieved but the facts remains even though prima facie it is established that, the documents relates to unaccounted for business activities but without any investigation into it by procuring best piece of evidence, no opinion can be formed based on surmises and conjectures. The assessing authority need to examine the seized documents in detail in comparison with the books of account in comparison with the dealer or the person who is supposed to be the maker of the document. It is when the dealer is found to be non-cooperative to meet the queries by the assessing authority, in that case presumption under law will necessarily lie in favour of the department by virtue of the provision u/s.95 of the OVAT Act.

14. In the case in hand, it is found that, the assessment by the learned assessing authority is an exparte order. The finding of the first appellate authority is cryptic. So, it only can be said that, the matter relating to determination of suppression on the basis of seized documents needs to be answered afresh on due consideration of the

seized documents with the explanation by the dealer. Be that as it may, it is held that, this is a fit case where the matter should be remitted back to the assessing authority for assessment afresh.

15. However, it is made clear that, by virtue of remand of the case the assessing authority will not be influenced by any of the observation on the merit of the case in hand relating to suppression. He is to form his opinion independently on the basis of evidence at his hand.

It is also observed that, Question No.(ii) regarding maintainability of the proceeding is not pressed by the dealer, hence confirmed.

16. In the discussion above, it is held that, the matter required to be remanded back to the assessing authority for assessment afresh. The finding on the question of penalty is redundant. However, it is made clear that this being a question of suppression in the event the dealer is found guilty, penalty u/s.43(2) of the OVAT Act is necessarily attracted to the case in hand in particular. The quantum of penalty will be in accordance to the suppression determined and the well settled principle on the date of order by the assessing authority.

Dictated & corrected by me,

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

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