

SALES TAX OFFICER, GANJAM & ANR. A

v.

M/S. UTTARESWARI RICE MILLS

September 18, 1972

(With Connected Appeal) B

[P. JAGANMOHAN REDDY AND H. R. KHANNA, JJ.]

Orissa Sales Tax Act, 1947, s. 12(8)—Notice for assessment of escaped turnover—If should indicate reasons for reopening assessment.

On receipt of certain information, and, as a result of information disclosed in documents seized from the respondent, the appellant issued a notice under s. 12 (8) of the Orissa Sales Tax Act, 1947, in the Form prescribed under r. 23 made under the Act, for re-assessing the turnover of the respondent. The High Court, quashed the notice on the ground that the appellant had not indicated any reason for issuing the notice. C

Allowing the appeal to this Court,

HELD: (1) Although the opening words used in the section are "if for any reason" and not "if the sales tax authority has reason to believe" the difference in phraseology does not make any difference. A reason cannot exist in vacuum, and in the context, it should be the sales-tax authority issuing the notice who should have reason to believe that the turnover of a dealer has escaped assessment or has been under assessed. The words used in the prescribed Form also are "whereas I have reason to believe that your turnover has escaped assessment. . . ." Any view which would make the opening words of the section unworkable should be avoided. [317 C-E] D

(2) The ingredients of s. 12 (8) of the Orissa Sales-tax Act, 1947, are: (i) there must exist reason for the belief that, (a) the turnover of a dealer for any period to which the Act applies has escaped assessment or has been under-assessed; or, (b) the tax has been compounded when composition is not permissible under the Act and the rules made thereunder; (ii) in cases mentioned in cl. (i) the sales-tax authority may at any time within 36 months from the expiry of the year to which the above mentioned period relates call for a return under s. 11 (1) of the Act; (iii) after taking the steps mentioned in cls. (i) and (ii) above, the sales tax authority may proceed to assess the amount of the tax due from the dealer in the manner laid down in s. 12 (5) of the Act; (iv) the sales tax authority may also direct in cases where escapement or under-assessment or composition is due to the dealer having concealed particulars of his turnover or having without sufficient cause furnished incorrect particulars thereof that the dealer shall pay penalty in addition to the tax assessed; and (v) such penalty shall not exceed one and a half times the amount of the tax so assessed. [316 F-H; 317 A-C] E

The proceedings for assessment or re-assessment under the section start with the issue of a notice and it is only after the service of the notice that the assessee whose turnover is sought to be assessed or re-assessed becomes a party to the proceedings. Therefore, it is not necessary to intimate to the assessee the nature of the alleged escapement in the notice issued to him under the section. To hold that the reasons which led to the issue of the said notice should be incorporated in the notice and that the failure to do so invalidated the notice would be tantamount to reading something into the statute which, in fact, is not there. However, if the sales-tax officer is in F

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A possession of material which he proposes to use against the dealer in proceedings for re-assessment the said officer must, before using that material, bring it to the notice of the dealer and give him an adequate opportunity to explain and answer the case on the basis of that material. [319 B; 320 C; 321 F-H]

B *B. Patnaik Mines (P) Ltd. v. N. K. Mohanty Sales Tax Officer*, I.L.R. [1967] Cuttack 446, overruled.

Commissioner of Income Tax, Bengal v. Messrs Mahaliram Ramjidas [1940] 8 I.T.R. 442, (P.C.) applied.

K. S. Rashid and Son v. Income Tax Officer, [1964] 52 I.T.R. 355 (S.C.) and *S. Narayanaappa and Ors. v. Commissioner of Income Tax, Bangalore*. [1967] 63 I.T.R. 219, (S.C.) followed.

C (3) The fact that it is mentioned in the notice that penalty may also be imposed would not make any difference to the validity of the notice. The question of imposition of penalty will only arise at the time of making an order for re-assessment. At that stage, the sales-tax officer would go into the question whether the escapement or under-assessment has been due to the fact that the dealer concealed particulars of his turnover or without sufficient cause furnished incorrect particulars. In such an event he would have to give an opportunity to the dealer to show cause why penalty, in addition to the tax should not be imposed. [320 A; 321 A-C]

D (4) The existence of the reason that the turnover of the dealer had escaped assessment or has been under-assessed is a *sine qua non* for the issue of the notice. In the present case, the appellant had brought material on record to indicate that there did exist such reasons. [322 B]

E CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1190 and 1191 of 1969.

Appeal by special leave from the judgment and order dated June 24, 1968 of the Orissa High Court at Cuttack in O.J.C. Nos. 464 and 463 of 1967.

F *T. A. Ramchandran, S. P. Nayar, B. D. Sharma* and *R. N. Sachthey*, for the appellants (in both the appeals).

Gobind Das and *B. Parthasarathi*, for the respondents (in both the appeals).

G The Judgment of the Court was delivered by

H KHANNA, J. Whether notice issued under section 12(8) of the Orissa Sales Tax Act, 1947 (Act 14 of 1947) (hereinafter referred to as the Act) should be quashed on the ground that it does not mention the reasons for the issue of the notice is the main question which arises for determination in these two appeals, Nos. 1190 and 1191 of 1969, which have been filed by special leave against the common judgment of the Orissa High Court allowing writ petitions filed by the respondents against the appellants.

For sake of convenience we may give the facts giving rise to appeal No. 1190 of 1969 as it is the common case of the parties that the decision in that appeal would govern the other appeal also. The respondent in appeal No. 1190 is a dealer registered under the Act. The matter relates to the assessment for 1963-64. The date of the order of assessment is not on file but it is stated that it was made sometime in the later part of 1964. On March 30, 1967 the Sales Tax Officer, Intelligence Wing, Vigilance, Berhampur made a search of the business premises of the respondent and seized several account books. On the following day further search was made and some additional account books were taken into possession. Later on that day, viz, March 31, 1967 the Sales Tax Officer issued the following notice under section 12(8) of the Act to the respondent :

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“Notice to a dealer under section 12(8) of the
Orissa Sales Tax Act
[See rules 22, 23 and 28(2)]

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To

M/s Utteswar Rice Mills (Dealer)
At/P.O. Berhampur, GAI 2127-A (Address)

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.....

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“Whereas I have reason to believe that your turnover for the quarter ending 1963-64 on which Sales Tax was payable under the Orissa Sales Tax Act, 1947 has escaped assessment/has been under assessed.

You are hereby required to submit within one calendar month from the date of receipt of this notice a return in Form IV (enclosed) showing the particulars of your turnover for the year ending 1963-64.

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“You are also hereby required to attend in person or by agent at my office at Berhampur on 11-5-67 at 11 A.M. and thereto produce or cause to be produced the accounts and documents specified on the reverse and also to show cause why in addition to the amount of tax that may be assessed on you a penalty not exceeding one and a half time that amount should not be imposed on you under sub-section (5) of section 12 of the Act.

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In the event of your failure to comply with all the terms of this notice I shall proceed to assess you under

A section 12 of the Act to the best of my judgment without further reference to you.

Sd/- Illegible

Signature

Sales Tax Officer

B Intelligence Wing, Vigilance
Berhampur"

Place—Berhampur

Date—31-3-67.

C The notice was received by an employee of the respondent. Appearance was thereafter put in on behalf of the respondent before the Sales Tax Officer and a copy of the old return which had been earlier filed in accordance with section 11 of the Act was again filed before the Sales Tax Officer. According to the respondent, appearance was put in on its behalf on several occasions with a view to know the reason for the issue of the above notice, but the respondent was not informed of that reason.

D It is further stated that the Sales Tax Officer recorded the statements of a number of witnesses behind the back of the respondent with the intention of making reassessment under section 12 of the Act. Request was made on behalf of the respondent to the Sales Tax Officer for being furnished with copies of those statements so that the respondent might be in

E a position to know the reason for the issue of the notice. Copies of those statements were, however, not supplied and the application filed by the respondent for obtaining copies of the statements was rejected by the Sales Tax Officer. It was mentioned by the Sales Tax Officer that the question of grant of copies of the statements would be considered if the statements

F were used against the respondent. The respondent filed a revision petition against the order rejecting that application, but the revision petition too was dismissed. The respondent thereafter filed petition under articles 226 and 227 of the Constitution in the High Court on December 26, 1967.

G The High Court accepted the writ petition on the ground that the Sales Tax Officer had not indicated any reason for issuing notice under section 12(8) of the Act. This fact, in the opinion of the High Court, was sufficient to warrant quashing of the notice. The High Court in this context relied upon its earlier decision in the case of *B. Patnaik Mines (P) Ltd. v. N. K. Mohanty Sales Tax Officer*⁽¹⁾. It was held in the earlier

H case that the Sales Tax Officer had no jurisdiction under section 12(8) of the Act to issue notice for making a fishing enquiry

(1) I.L.R. [1967] Cuttack 446.

without indicating therein the reason for the alleged under-assessment. A

In appeal before us Mr. Ramachandran on behalf of the appellants has referred to the provisions of section 12(8) of the Act and has argued that it is not essential to give the reasons in the notice issued under the above provision of law. The impugned notice, according to the learned counsel, cannot be quashed for non-mention of the reasons. The above stand has been controverted by Mr. Gobind Das on behalf of the respondent and, according to him, the failure of the Sales Tax Officer to mention the reasons which led to the issue of the impugned notice would vitiate the notice. B

There is, in our opinion, considerable force in the stand taken in this respect by the learned counsel for the appellants. Section 12 of the Act deals with assessment of tax. Sub-sections (5) and (8) of the above section read as under : C

“(5) If upon information which has come into his 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 causes failed to apply for registration, the Commissioner shall, 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 the Commissioner may direct that the dealer shall pay, by way of penalty, in addition to the amount so assessed, a sum not exceeding one and a half times that amount : D

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. E

(8) If for any reason the turnover of a dealer for any period to which this Act applies has escaped assessment or has been under-assessed or where the tax has been compounded when composition is not permissible under this Act and the rules made thereunder, the Commissioner may at any time within thirtysix months from the expiry of the year to which that period relates call for a return under sub-section (1) of section 11 and may proceed to assess the amount of tax due from the dealer in the manner laid down in sub-section (5) of this section and may also direct, in cases where escapement or under-assessment or composition is due to the dealer having concealed particulars of his turnover or having without sufficient cause furnished incorrect particulars thereof, that the dealer shall pay, by way of penalty, in addition F

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A to the tax assessed under this sub-section, a sum not exceeding one and a half times of the said tax so assessed.”

B The Orissa Sales Tax Rules, 1947 (hereinafter referred to as the rules) have been framed by the State Government in exercise of the powers conferred by section 29 of the Act. According to sub-section (1) of that section, the State Government may subject to the condition of previous publication make rules for carrying out the purposes of the Act. Sub-section (2) of that section mentions the subjects, without prejudice to the generality of power given by sub-section (1), regarding which rules may prescribe. Section 29-A requires that all rules made under section 29, and notifications issued under section C 3-B, sub-section (1) of section 5 and section 6 shall, as soon as possible after they are made or published, as the case may be, be laid before the Assembly for a total period of fourteen days which may be comprised in one or more sessions. Rule 23 may be reproduced below :

D “23. Calling for return when turnover has escaped assessments or has been under-assessed—(1) If for any reason the turnover of sales or the turnover of purchases of a dealer has escaped assessment or has been under-assessed or has not been assessed due to the tax having been compounded when composition is not E permissible under the Act and those rules and it is proposed to assess it the Commissioner shall serve on the dealer a notice in Form VI within one calendar month from the date of receipt of such notice.

F (2) Such notice may also require the dealer to attend in person or by his agent at the office of the authority issuing the notice on the date specified therein and to produce or cause to be produced the accounts and documents specified in the notice.”

The relevant part of Form VI referred to in rule 23 is in the following words :

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FORM VI

H To (dealer)
 (Address)

Whereas I have reason to believe that your turnover of sales and/or purchases for the quarter/year endingon which tax payable under the Orissa Sales Tax Act *has escaped assessment/has been under-assessed/has not been assessed due* to the tax having been compounded when composition is not permissible.

A

You are hereby required to submit within one calendar month from the date of receipt of this notice a return in Form IV (enclosed) showing the particulars of your turnover for the quarter ending.....

B

You are also hereby required to attend in person or by agent at my office at on at A.M./P.M. and there to produce or cause to be produced the accounts and documents specified on the reverse, and also show cause why in addition to the amount of tax that may be assessed on you a penalty not exceeding one and a half times that amount should not be imposed on you under sub-section (5)/sub-section (8) of section 12 of the Act.

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In the event of your failure to comply with all the terms of this notice I shall proceed to assess you under section 12 of the Act to the best of my judgment without further reference to you.

Place
Date

Signature
Designation"

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Section 12(8) of the Act reproduced above may be analysed as under :

- (i) There must exist reason for the belief that
 - (a) the turnover of a dealer for any period to which the Act applies has escaped assessment or has been under-assessed; or
 - (b) the tax has been compounded when composition is not permissible under the Act and the rules made thereunder.
- (ii) In cases mentioned in clause (i) the sales tax authority may at any time within 36 months from the expiry of the year to which the above mentioned period relates call for a return under section 11(1) of the Act.
- (iii) After taking the steps mentioned in clauses (i) and (ii) above, the sales tax authority may proceed to assess the amount of the tax due from

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the dealer in the manner laid down in section 12(5) of the Act.

(iv) The sales tax authority may also direct in cases where escapement or under-assessment or composition is due to the dealer having concealed particulars of his turnover or having without sufficient cause furnished incorrect particulars thereof that the dealer shall pay penalty in addition to the tax assessed.

(v) Such penalty shall not exceed one and a half times the amount of the tax so assessed.

Although the opening words used in section 12(8) are "if for any reason" and not "if the sales tax authority has reason to believe", the difference in phraseology, in our opinion, should not make much material difference. A reason cannot exist in vacuum. Somebody must form the belief that reason exists and looking to the context in which the words are used, we are of the view that it should be the sales tax authority issuing the notice who should have reason to believe that the turnover of a dealer has escaped assessment or has been under-assessed. The approach in this matter has to be practical and not pedantic. Any view which would make the opening words of section 12(8) unworkable has to be avoided. It may be noted in this context that in Form VI appended to the rules, which has been prepared in pursuance of rule 23, the words used are "whereas I have reason to believe that your turnover has escaped assessment".

In the case of *Commissioner of Income Tax, Bengal v. Messrs Mahaliram Ramjidas*⁽¹⁾ the Judicial Committee dealt with the provisions of section 34 of the Indian Income Tax Act, 1922 as it then existed. The section read as under :

"34. If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits, or gains, or in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

(1) (1940) 8 I.T.R. 442.

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be." A

The opening words of section 34 of the Indian Income Tax Act, as it then existed were similar to those of section 12(8) of the Act. The Judicial Committee while dealing with the language of section 34 observed : B

"Section 34 is unhappily and even ungrammatically phrased. It is expressed impersonally, and it fails to state by whom and by what procedure it is to be established that income, profits or gains have escaped assessment or have been assessed at too low a rate. There is fortunately no dispute that the person who must make that decision is the Income-tax Officer, for, apart from the assessee, no one else is in a position to say whether income has been assessed or at what rate it has been assessed. The omission to prescribe expressly what the nature of the decision should be and by what procedure it must be reached is all the more surprising because in other sections of the Act the legislature has been careful to define what is necessary in these respects. This circumstance was founded on by the learned Counsel for the respondents, who pointed out that where some fact had to be established merely *prima facie* to the satisfaction of the Income-tax Officer in the *bona fide* exercise of his discretion, this was expressed by such phraseology as "When it appears to be Income-tax Officer." or "if the Income-tax Officer has reason to believe". On the other hand, when the statute requires that the Income-tax Officer shall make a decision, which is final so far as he is concerned, upon a matter of fact, the usual expression is "if he is satisfied"."
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It was further observed : F

"The section, although, it is part of a taxing Act, imposes no charge on the subject, and deals merely with the machinery of assessment. In interpreting provisions of this kind the rule is that that construction should be preferred which makes the machinery workable, *ut res valeat potius quam pereat*."
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In view of the criticism levelled against the wording of section 34 of the Indian Income Tax Act, the above section was amended by Amendment Act of 1939. Despite the amendment made in section 34 of the Indian Income Tax Act, the Orissa Legislature, H

A it would appear, has used phraseology in section 12(8) of the Act similar to that of section 34 of the Indian Income Tax Act, 1922 as it existed before the said amendment.

B The above decision of the Judicial Committee is also an authority for the proposition that it is not necessary to intimate to the assessee the nature of the alleged escapement in the notice which is issued to him under section 34 (as it then existed) of the Indian Income Tax Act, 1922. The notice which was issued in that case did not give any particulars and was in the following words :

C “Whereas I have reason to believe that your income from business and other sources which should have been assessed in the financial year ending the 31st March, 1933, has wholly escaped assessment and I therefore propose to assess the said income that has escaped assessment. I hereby require you to deliver to me, not later than the 9th March, 1934, or within 30 days of the receipt of this notice, a return in the attached form of your income from all sources which was assessable in the said year ending the 31st March, 1933.”

D It was observed while dealing with the validity of the above notice :

E “Accordingly their Lordships are of opinion that the Income-tax Officer is not required by the section to convene the assessee, or to intimate to him the nature of the alleged escapement, or to give him an opportunity of being heard, before he decides to operate the powers conferred by the section. In the opinion of their Lordships the view which the learned Judges of the High Court have taken of the section is too narrow, and the notice sent to the respondents on 8th February, 1934, is in form a competent preliminary to a new assessment.”

G In the case of *K. S. Rashid and Son and Others v. Income Tax Officer*⁽¹⁾ this Court expressed the view that the assessee was not entitled to a copy of the reasons which were recorded by the income tax officer when he issued the notice under section 34 of the Indian Income Tax Act, 1922. In the later case of *S. Narayanappa and Others v. Commissioner of Income Tax, Bangalore*⁽²⁾ an argument was advanced that the income tax officer should have indicated to the assessee the reasons which

(1) [1964] 52 I.T.R. 355.

(2) [1967] 63 I.T.R. 219

led him to initiate the proceedings under section 34 of the Act. This contention was repelled in the following words :

"It was also contended for the appellant that the Income-tax Officer should have communicated to him the reasons which led him to initiate the proceedings under section 34 of the Act. It was stated that a request to this effect was made by the appellant to the Income-tax Officer, but the Income-tax Officer declined to disclose the reasons. In our opinion, the argument of the appellant on this point is misconceived. The proceedings for assessment or reassessment under section 34(1)(a) of the Income-tax Act start with the issue of a notice and it is only after the service of the notice that the assessee, whose income is sought to be assessed or reassessed, becomes a party to those proceedings. The earlier stage of the proceedings for recording the reasons of the Income-tax Officer and for obtaining the sanction of the Commissioner are administrative in character and are not quasi-judicial. The scheme of section 34 of the Act is that, if the conditions of the main section are satisfied, a notice has to be issued to the assessee containing all or any of the requirements which may be included in a notice under subsection (2) of section 22. But before issuing the notice, the proviso required that the officer should record his reasons for initiating action under section 34 and obtain the sanction of the Commissioner who must be satisfied that the action under section 34 was justified. There is no requirement in any of the provisions of the Act or any section laying down as a condition for the initiation of the proceedings that the reasons which induced the Commissioner to accord sanction to proceed under section 34 must also be communicated to the assessee."

As the provisions of section 12(8) of the Act and section 34 of the Indian Income Tax Act, 1922 are substantially similar, the dicta laid down in cases under section 34 of the Indian Income-Tax Act has, in our opinion, a direct bearing.

Mr. Govind Das has tried to distinguish the cases under section 34 of the Indian Income Tax Act on the ground that, unlike section 12(8) of the Act which also provides for the imposition of penalty, there was no mention of penalty in section 34 of the Indian Income Tax Act. This circumstance, in our opinion, makes no substantial difference and cannot prevent the applicability of the dicta laid down in cases under section 34 of the Indian

A Income Tax Act, 1922 to cases under section 12(8) of the Act. The question of imposition of penalty can only arise at the time of making an order for reassessment. Mr. Ramachandran on behalf of the appellants has frankly stated that it would be only at that stage that the sales tax officer would go into the question as to whether the escapement or under-assessment or composition

B has been due to the fact that the dealer concealed particulars of his turnover or without sufficient cause furnished incorrect particulars thereof. The sales tax officer in such an event, it is not disputed, would have to give opportunity to the dealer to show cause why penalty in addition to the tax should not be imposed upon him.

C Reference has also been made by Mr. Gobind Das to the fact that notice issued to the respondent on March 31, 1967 related not merely to the escaped assessment or under-assessment, it also called upon the respondent to show cause why penalty should not be imposed upon him. It is urged that such a combined notice is invalid even though it may be in accordance with Form

D VI prescribed by the rules. Calling upon the respondent to show cause why penalty should not be imposed upon him, according to the learned counsel, is premature at this stage. In this respect we find that no such ground was taken by the respondent in the writ petition before the High Court. As such, it is not necessary for the purpose of this case to express an opinion on the point

E as to whether a notice under section 12(8) should be struck down on the aforesaid ground.

There is nothing in the language of section 12(8) of the Act which either expressly or by necessary implication postulates the recording of reasons in the notice which is issued to the dealer under the above provision of law. To hold that reasons which

F led to the issue of the said notice should be incorporated in the notice and that failure to do so would invalidate the notice, would be tantamount to reading something in the statute which, in fact, is not there. We are consequently unable to accede to the contention that the notice under the above provision of law should be quashed if the reasons which led to the issue of the notice are

G not mentioned in the notice. At the same time, we would like to make it clear that if the sales tax officer is in possession of material which he proposes to use against the dealer in proceedings for reassessment, the said officer must before using that material bring it to the notice of the dealer and give him adequate opportunity to explain and answer the case on the basis of that

H material.

Mr. Gobind Das has also argued that the existence of a reason that the turnover of a dealer has escaped assessment or has been

under-assessed in cases not dealing with composition is a condition precedent to the issue of a notice under section 12(8) of the Act. It is urged that such reason is not shown to have existed in the present case. Although we agree with the learned counsel that the existence of the reason that the turnover of a dealer has escaped assessment or has been under-assessed is a *sine qua non* for the issue of the notice, we are unable to accept the contention that the said reason has been shown to be non-existent in the present case. Although the High Court did not go into this aspect of the matter, we find that the appellant has brought material on the record to indicate that there did exist such reasons. Affidavit of Shri Prakash Chandra Mohanty, Sales Tax Officer, Intelligence Circle was filed in opposition to the petition. Shri Mohanty is the successor of Shri Patnaik who had issued the notice under section 12(8) of the Act to the respondent. According to the affidavit of Shri Mohanty, the material on record indicates that Shri Patnaik issued the impugned notice after he had obtained information about certain clandestine dealings of the respondent. It was further stated that the seized documents disclosed *prima facie* material to hold that the respondent had failed to disclose his entire turnover. It was also mentioned that the details of the material which led to the initiation of proceedings under section 12(8) of the Act had been recorded in the relevant case file. The said file, it would appear from the affidavit of Shri Mohanty, was kept available for reference by the High Court at the time of hearing. No reference, it would seem, was however made to that file because the High Court did not feel the necessity of doing so.

In our opinion the view taken by the High Court in the judgment under appeal as well as in the earlier case of *B. Patnaik Mines (P) Ltd. v. N. K. Mohanty Sales Tax Officer* (supra) was not correct. We accordingly accept the two appeals, set aside the judgment of the High Court and dismiss the writ petitions. Looking to all the circumstances, we leave the parties to bear their own costs of this Court as well as in the High Court.

V.P.S.

Appeals allowed.