BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 870 of 2007-08

(Arising out of the order of the learned ACST, Sambalpur Range, Sambalpur, in First Appeal case No. AA-542(SAI)/2005-06 disposed of on 30.06.2007)

P r e s e n t: Shri G.C.Behera, Chairman. Sri. S.K.Rout Judicial Member-II & Shri M.Harichandan, Accounts Member-I.

State of Odisha, represented by the Commissioner of Sales Tax, Odisha, Cuttack. ... Appellant.

- V e r s u s –

K.Zaman Q Zaman, VSS Marg, Sambalpur. ... Respondent.

For the Appellant ... Mr.M.L.Agarwal, SC.
For the Respondent ... Mr. Subrat Panda, Adv.

Date of hearing: **10.10.2022** * * * Date of Order:**20.10.2022**

O R D E R

State has preferred this appeal against the order dated 30.06.2007 passed by the learned Asst. Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, ACST/FAA) in first appeal case No.AA.542(SAI) of 2005-06 thereby allowing the appeal in full and reducing to return figures by deleting the demand of Rs.9,61,089.00 passed under Section 12(4) of the Odisha Sales Tax Act, 1947 by the learned Sales Tax Officer, Sambalpur I Circle, Sambalpur (in short, STO/AA).

2. The case at hand is that the dealer respondent carries on business in country liquor, who was originally assessed under Section 12(4) of the OST Act, Sambalpur I Circle, Sambalpur in which a demand of Rs.10,43,963.00 was raised after rejecting the books of accounts. The dealer was assessed holding the sale price of

liquor per LPL at Rs.44/- against the disclosed rate of Rs.30/- (i.e. 25 +tax of Rs.5). Being aggrieved with such assessment, the dealer preferred first appeal before the learned ACST, Sambalpur Range, Sambalpur in first appeal case No.AA.225(SAI) of 2004-05 and the learned first appellate authority by order dated 27.11.2004 observed that the learned STO has not adhered to the method prescribed under Rule 90-AA of the OST Rules which has been specifically amended for the dealers dealing in outstill liquor by depositing consideration money to Excise Department for obtaining exclusive privilege to vend outstill liquor vide Finance Department Notification No.55411-CTA-1/2002/F/(SRONo.974/2002 dtd.5.12.2002) (OGE No.2239 dtd. 5.12.2002) and Rule 90-AA has been inserted in the OST Rules which prescribes that "a dealer who carries on business in liquor and who is liable to pay tax under the provisions of the Act, shall w.e.f. the year 2004 pay in lieu of the tax assessable on his taxable turnover under the provision of the Act, a sum equal to 20% of one and one half times of the consideration money payable to Government in Excise Department for obtaining the exclusive privilege to vend such commodities". Pursuant to the above direction of the first appellate authority, fresh assessment for the year 2003-04 was done by the learned STO on dtd.20.02.2006. In the assessment learned STO observed that the dealer has paid Rs.1,16,34,000.00 towards consideration money to Excise Department during the year under assessment. So taking into account one and half times of the consideration money paid, the GTO and TTO calculated to Rs.1,74,51,000.00. Tax @ 20% on the same computes to Rs.34,90,200.00. Surcharge @ 10% thereon arrives at Rs.3,49,020.00. Interest under Section 12(4-a) of the OST Act is charged at Rs.23,128.00 on the ground that the dealer has taken the shelter of maintaining sale account to avoid payment of tax due on compounding basis. Hence, tax, surcharge and interest together payable comes to Rs.38,62,348.00. The dealer having been assessed to tax of Rs.29,01,259.00 under Section12(4) is now required to pay the

balance amount of Rs.9,61,089.00 as per the terms and conditions of the demand notice.

3. Further being dissatisfied with such order of assessment, the dealer preferred the first appeal before the learned ACST, Sambalpur Range, Sambalpur bearing first appeal case No.AA.542(SAI) of 2005-06, in which the appeal was allowed in full and the order of assessment was reduced to the figures admitted by the appellant.

4. Being dissatisfied with the order of the learned first appellate authority, the State has preferred the present second appeal as per the grounds stated in the grounds of appeal.

5. No cross objection has been filed in the instant case by the dealer respondent.

6. Heard the contentions and submissions of both the parties in this regard. Learned Counsel for the revenue during course of argument submitted that under the scheme of the Act an assessee has to be assessed in regular course of assessment as per the purchase and sales effected applying the rate of tax as per Section 5(1) of the OST Act. Another mode of assessment is by a method of compounding for certain class of dealers if so notified under the first proviso of Section 5(1) of the Act. So the dealer has to be assessed either by a mode of regular assessment or by compounding method. Further submission on behalf of the Standing Counsel for revenue is that the order of learned ACST is contradictory to his own order and as such, the same should be quashed and the order of learned STO should be restored.

7. Per contra, learned Counsel for the dealer respondent submitted that Rule-90AA of the OST Rule is not obligatory. It is optional, a dealer can avail either the benefit of set off provisions as per entry Serial No.24 or the benefit under the

compounding scheme as provide under Rule-90AA and is not entitled to have both the benefit of set off and compounding of tax at the same time. When a dealer is availing of the benefit of set off provisions, he is required to pay tax @20% of his taxable turnover and not on the consideration money fixed by the Excise Department. This matter has been clarified by Commissioner of Sales Tax vide his Circular No.12543 dated 20.06.2003. It is also contended by the learned Counsel for the dealer respondent that a dealer who is not maintaining regular books of account, can opt for compounding of tax, and who maintains regular books of account, is entitled to pay tax on the basis of books of account, maintained in usual manner. Further contentions raised on behalf of the dealer respondent is that a rule cannot override a section and when there is a provision for option being exercised in Section 5(1) of the Act, the Rule 90-AA cannot made obligatory to the dealer. So a dealer cannot be deprived of the statutory option available under Section 5 of the Act.

8. We have heard the rival submissions of the parties, gone through the grounds raised in the memorandum of appeal vis-à-vis the impugned orders of the forums below and the materials on record. The sole dispute in the instant case is whether in view of insertion of Rule 90-AA vide Notification No.55411-CTA-1/2002/F/ dated 05.12.2002 which came into force w.e.f. the year 2002-03, the dealer assessee right to exercise option for usual assessment in view of the provisions contained in the second proviso to Section 5(1) of the OST Act stood extinguished and whether the assessing authority is justified in determining the price of the out still liquor without justifying any reason for fixing such price. Prior to adjudication the issue whether the dealer assessee has right to exercise option for regular assessment under Section 12(4) of the OST Act after introduction of Rule 90AA of the OST Rules w.e.f. year 2002-03, we have to discuss the relevant provisions governing the field. Section 5(1) of the OST Act provides that “the tax payable by a dealer

under this Act shall be levied on his taxable turnover at such rate, not exceeding seventy five percent in case of liquor and twenty five percent in case of other goods, and subject to such conditions as the State Government may, from time to time, by notification, specify:

Provided that the State Government may direct that in such circumstances, and under such conditions and for such period as may be prescribed, a dealer shall pay in lieu of the tax assessable on his turnover, a sum fixed in such manner as may be prescribed and in such a case the tax shall be deemed to have been compounded.

Provided further that a dealer who is subject to payment of a sum fixed as aforesaid, may, by a written application to the prescribed authority made within the prescribed period, opt for being assessed in the usual manner under the provisions of this Act in respect of the year in which such option is exercised".

Rule 90-AA was introduced in the Orissa Sales Tax (Amendment) Rules vide SRO No.974/2002 dated 05.12.2002 and was given retrospective effect from 2002-03. Rule 90-AA under which the first appellate authority directed the assessing authority for assessing the dealer is extracted hereunder for better appreciation of the issue involved in the present appeal:

"90-AA – Compounding of tax on outstill liquor:

"A dealer who carries on business in outstill liquor and who is liable to pay tax under the provisions of the Act shall, w.e.f. the year 2002-03, pay in lieu of the tax assessable on his taxable turnover under the provisions of the Act, a sum equal to twenty percent of one and one half times of the consideration money payable to Government in the Excise Department for obtaining the exclusive privilege to vend such commodities."

After have a glance to both the provisions, we find that under Section 5A of the OST Act, the dealer is liable to pay tax on his turnover at such rate not exceeding 75% in case of liquor and 25% in case of other goods and the second proviso to Section 5(1) of the OST Act specifically confers right on the dealer for exercising option for being assessed in usual manner under the provisions of the OST Act in respect of the year in which such option is exercised. No doubt, Rule 90-AA of the OST Rule provides for payment of compounding tax in lieu of tax assessable on the TTO of a dealer in outstill liquor, the same is not mandatorily applicable to all the dealers dealing with outstill liquor. Rule 90-AA though has been inserted in the OST Rules in exercise of the rule making power of the Government, the same cannot override the provisions contained in the Act. Even after insertion of Rule 90-AA entry No.24 of List-C of the Rate Chart, which provides payment of tax @20% on country liquor including outstill liquor subject to reduction by the amount of tax under the OST Act, 1947 paid on mohua flower out of which it is distilled, was not withdrawn or repealed. So it cannot be said that the legislature ever intended to take away the right of the dealer to exercise the option under the second proviso to Section 5(1) of the OST Act while introducing Rule 90AA for payment of tax in lieu of tax assessable on the TTO under the provisions of the Act. This apart, the Commissioner of Commercial Taxes, Orissa in its Circular No.12534/CT dated 20.06.2003 clarified that a dealer may opt either to be assessed in usual manner under the provisions of the Act read with entry at Sl. No.24 of List-C of the rate Chart or to be compounded in accordance with Rule 90-AA of the OST Rules. The first appellate authority while directing the assessing authority for assessing the dealer assessed in accordance with the provisions contained under Rule 90-AA of the OST Rules did not take note of the circular issued by the Commissioner of Commercial Taxes, Orissa or the orders rendered by this forum in different cases. The issue whether Rule 90-AA is mandatory or not came before this Tribunal in case of M/s.Moinudin

Ahmed and Israr Ahmed Vrs. State of Orissa (S.A.No.1092 of 2005-06), wherein the Full Bench of this Tribunal by its order dated 23.04.2007 ruled that the right of the dealer to exercise option for regular assessment under the provisions of the Act is not taken away after introduction of Rule 90AA of the OST Rules and it cannot be deprived of the statutory option available under Section 5 of the OST Act. Similarly, in S.A. No.1306 of 2006-07 and S.A.No.879 of 2006-07 in case of instant dealer assessed for the assessment year 2004-05, it was held by this Tribunal that Rule 90-AA is not mandatory in nature and as per second proviso to Section 5(1) of the OST Act that right is available to the dealer to exercise option for regular assessment under the provisions of the OST Act. Further in case of M/s.Indra Bhusan Sahu Vrs. State of Orissa (S.A. NO.1717 of 2006-07) disposed of on 12.08.2013, the Division Bench of this Tribunal took the similar view for assessment of the dealer under Section 12(4) of the OST Act in view of the written option exercised by it (dealer assessee). The first appellate authority on erroneous interpretation of the provisions contained in Section 5(1) of the OST Act and Rule-90AA of the OST Rules, directed the assessing authority for assessing the dealer under Rule 90-AA instead of regular assessment under Section 12(4) of the OST Act in spite of exercise of option in writing by the dealer. Here fact remains that the order for assessment of the dealer under Rule 90-AA was passed unilaterally by the assessing authority without giving any opportunity of hearing to the dealer assessee. So such unilateral order cannot bind the dealer taking away his right for regular assessment under the provisions of the Act. Such issue raised before us having already been adjudicated by this forum holding that Rule-90AA is not mandatory and the dealer has right to exercise option under second proviso to Section 5(1) of the OST Act, accordingly, it is answered. So the impugned order of the first appellate authority, therefore, is unsustainable in the eyes of law. With regard to fixation of sale price of liquor at Rs.44/- per LPL is concerned, we are of the view that the assessing authority has fixed the price of the liquor at higher side

taking into consideration different factors. There is no dispute that determination of the sale price of liquor is bound to differ from place to place as fixation of sale price depends upon several factors like demand and supply of commodities, location of out still shops, the purchasing capacity of the consuming public and the establishment and other expenditure like consideration money paid and expenditure incurred for purchase of mohua flower. It is evident from the record that the dealer assessee did not issue sale invoice to the customers for which the sales effected by the dealer were not verifiable from the books of account maintained by it. The assessing authority due to non availability of the sale invoice, determined the sale price at Rs.44.00 which in our view, is at higher side. When the sale price of liquor per LPL was fixed at Rs.39/- for the previous year as it appears from the contention raised by the learned Counsel for the dealer assessee before the first appellate authority which was not disputed by the other side, there was no justification to fix the sale price of liquor per LPL at Rs.44.00 for the assessment year in question even though there is no change in the place of business, paying capacity of the consumers and the population of the area. Therefore, we hold that fixation of sale price of liquor per LPL at Rs.39/- including tax to be just and reasonable for the purpose of computation of the tax liability of the dealer assessee. So far as fixation of purchase price of mohua flower is concerned, the same has been fixed at appropriate rate which needs no interference.

9. We are of the unanimous view that the dealer assessee having exercised the option for regular assessment under Section 12(4) of the OST Act, his assessment under Rule 90-AA of the OST Rules is illegal, unjust and improper.

10. In the result, the appeal filed by the State is allowed in part and the impugned orders of the forums below are hereby set aside. The matter is remitted back to the learned assessing authority to recompute the tax liability of the dealer assessee in accordance with law, keeping in view the observations made herein

above within a period of three months from the date of receipt of this order.

Dictated and Corrected by me,

Sd/-
(Shri S.K.Rout)
Judicial Member-II

Sd/-
(Shri S.K.Rout)
Judicial Member-II

I agree,

Sd/-
(Shri G.C.Behera)
Chairman

I agree,

Sd/-
(Shri M.Harichandan)
Accounts Member-I