

**BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL:
CUTTACK**

S.A. No. 45 (C) of 2016-17

(Arising out of order of the learned JCST, Balasore Range,
Balasore in Appeal No. AA- 05/MBC- 2015-16 (CST),
disposed of on 28.07.2016)

Present: **Shri G.C. Behera, Chairman**
Shri S.K. Rout, 2nd Judicial Member &
Shri S.R. Mishra, Accounts Member-II

M/s. Ghanashyam Mishra & Sons (P) Ltd.,
At/PO- Garumahisani, Mayurbhanj ... Appellant

-Versus-

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

For the Appellant : Sri J.B. Sahoo, Sr. Advocate &
Mrs. Kajal Sahoo, Advocate
For the Respondent : Sri D. Behura, S.C. (CT) &
Sri S.K. Pradhan, Addl. SC (CT)

Date of hearing : 09.01.2024 *** Date of order : 22.01.2024

ORDER

Dealer assails the order dated 28.07.2016 of the Joint Commissioner of Sales Tax, Balasore Range, Balasore (hereinafter called as 'First Appellate Authority') in F A No. AA- 05/MBC- 2015-16 (CST) reducing the demand raised in assessment order of the Sales Tax Officer, Mayurbhanj Circle, Baripada (in short, 'Assessing Authority').

2. The facts of the case, in short, are that –

M/s. Ghanashyam Mishra & Sons (P) Ltd. carries on business in mining and sales of iron ore lumps, sized iron ores and fines in course of

intra-State sales, inter-State trade and commerce as well as export. The assessment period relates to 01.07.2008 to 31.10.2010. The audit assessment u/r. 12(3) of the Central Sales Tax (Odisha) Rules, 1957 (in short, 'CST (O) Rules') for the said period was completed on 18.04.2012 raising extra demand of ₹76,57,977.00. Subsequently, on the basis of A.G. (Audit) report, the Assessing Authority raised tax and penalty of ₹48,32,244.00 u/r. 12(4) of the CST (O) Rules.

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority reduced the tax demand to ₹16,10,748.00 and allowed the appeal in part. Being aggrieved with the order of the First Appellate Authority, the Dealer prefers this appeal. Hence, this appeal.

The State files cross-objection and additional cross-objection.

3. The learned Sr. Counsel for the Dealer as per additional grounds of appeal submits that the defective 'H' form can be returned for due rectification towards allowance of exemption on export sale. He further submits that the Assessing Authority has not applied his independent mind before initiation of the reassessment proceeding basing on A.G. (Audit) report. He further submits that the reassessment proceeding cannot be opened on the self-same material which has already been decided in audit assessment. So, he submits that the orders of the Assessing Authority and First Appellate Authority are otherwise bad in law and the same require interference in appeal.

He relies on the decisions of the Hon'ble Court in cases of *Indure Limited v. Commissioner of Sales Tax, Orissa, Cuttack & others*, reported in [2006] 148 STC 61 (Orissa); *M/s. Goyal Traders v. Sales Tax Officer, Sambalpur-I Circle, Sambalpur & others* (W.P. (C) No. 3821 of 2013 decided on 22.03.2021); *M/s. R.K. Industries v. State of Odisha* (STREV

No. 23 of 2021 decided on 04.01.2023); and the decision of Hon'ble Apex Court in case of *Steel Authority of India v. STO*, [2008] 16 VST 181 (SC).

4. Per contra, the learned Standing Counsel (CT) for the State submits that the reassessment proceeding can be initiated on the strength of A.G. (Audit) report as the statutory Form-H was not proper, but in spite of that the same was considered in the audit assessment. He further submits that the Assessing Authority and the First Appellate Authority have rightly disallowed the claim of exemption on export sale and thus, the same needs no interference in appeal.

He relies on the decisions of the this Tribunal passed in **S.A. Nos. 365-367 of 2009-10** decided on 28.12.2021 (*M/s. Bharat Motors v. State of Odisha*); and in **S.A. No. 1676 of 2001-02** decided on 07.03.2022 (*M/s. B. Engineers & Builders Ltd. v. State of Odisha*).

5. Heard rival submissions of the parties, gone through the orders of the First Appellate Authority and Assessing Authority vis-a-vis the materials on record. The assessment order reveals that the completion of audit assessment for the tax period is not in dispute. The present assessment u/r. 12(4) of the CST (O) Rules has been completed on the strength of A.G. (Audit) report. It further reveals from the assessment order that the A.G. (Audit) detected the date of agreement by the foreign buyer with the Indian exporter (March, 2011) is much later than the date of sale of goods (May, 2010) to be sent in course of export as evident from 'H' form. So, the Assessing Authority disallowed export sale of ₹4,02,68,699.00 and added to the net turnover.

The order of the First Appellate Authority reveals that the Dealer has taken a ground that the original purchase contract No. STEER-CONTI-2010-002 dt. 24.03.2010 executed with the foreign buyer for the transaction of sale made by the Dealer on 25.05.2010 for ₹4,02,68,699.00 (present transaction amount on export sale) was produced before the Assessing

Authority during the reassessment proceeding, which he had discarded the same without assigning any reason. The First Appellate Authority confirmed the finding of the Assessing Authority. The Dealer has taken a plea before the First Appellate Authority that the purchase contract dated 24.03.2011 with the foreign buyer, which is the basis of audit objection, was furnished in original assessment inadvertently. The impugned order of the First Appellate Authority further reveals that the Dealer had also contended before him that the agreement with the foreign buyer dated 24.03.2010 should form part of the assessment record and the same is required to be considered by the First Appellate Authority as his power is coextensive with that of the power of the Assessing Authority to allow the claim of exemption from tax on penultimate sale covered by 'H' form. The impugned order further reveals that the Dealer had also filed an application before the First Appellate Authority that the 'H' form No. 107503 was wrongly filled in and the same may be returned for rectification. He has also relied on the decision of the Hon'ble Apex Court in case of *Srikrishna Electrical v. State of Tamil Nadu*, [2009] 23 VST 249 (SC). It appears that the First Appellate Authority has rejected the said prayer on the ground that the selling dealer can correct the same. The First Appellate Authority had also observed that the Dealer took no steps to rectify the same even at the reassessment stage and dismissed the appeal.

The Dealer assails such finding of the First Appellate Authority on the following grounds :-

- (i) The audit assessment cannot be reopened on the self-same materials under the CST Act; and
- (ii) The defective 'H' form can be returned to the seller for necessary rectification;

As per additional grounds of appeal, the Dealer also took a new ground –

- (iii) The reassessment u/r. 12(4) of the CST (O) Rules has been initiated by the Assessing Authority basing on A.G. (Audit) report without applying his independent mind.

As the additional ground being a preliminary ground which touches the root of the case, i.e. issue of maintainability, so, the same is taken up at the outset for adjudication.

6. On perusal of the assessment record produced by the State, it transpires that the Assessing Authority has not recorded the grounds of reopening of the assessment after completion of audit assessment. The relevant portion of the order passed in the order sheet is reproduced herein below for better appreciation of the case:-

“01.08.2014 Seen the marginal note. Issue notice in form IV-A (under Central Sales Tax (Orissa) Rules, 1957) as per audit objection report fixing the date to 11.8.2014.

Sd/-
S.T.O.”

Assessment order reveals that the Assessing Authority initiated the reassessment proceeding on the strength of A.G. (Audit) report. The relevant portion of the said order is quoted herein below for better appreciation :-

“ xxx On scrutiny of such assessment record the AG audit team has detected short levy of tax due to irregular allowance of exemption for export for ₹4,02,68,699.00. Accordingly proceeding under section 10 of the CST Act has been initiated and notice in form IV A bearing No. 3653 dt. 01.08.2014 has been issued to the dealer. xxx”

Bare reading of the order sheet dated 01.08.2014 of the assessment record and the assessment order, it reveals the Assessing Authority has not assigned the reason either at the stage of reopening of assessment u/r. 12(4) of the CST (O) Rules nor in the assessment order that

he applied his mind independently on the objection raised by A.G. (Audit) and accordingly, reopened the assessment. The Assessing Authority specifically mentioned that he reopened the assessment u/r. 12(4) as the A.G. (Audit) raised objection detecting short levy of tax due to irregular allowance of exemption

7. In case of *Indure Limited* cited supra, Hon'ble Court relying on the principles decided by the Hon'ble Apex Court in case of *State of U.P. v. Maharaja Dharamander Prasad Singh*, reported in (1989) 2 SCC 505 : AIR 1989 SC 997, were pleased to observe that a statutory authority cannot permit its decision to be influenced by the direction of others as that would amount to abdication and surrender of its discretion. Hon'ble Court were pleased to further observe that the manner in which reassessment proceeding was blindly initiated on audit objection by the Sales Tax Officer without any independent application of mind, the exercise of power under Section 12(8) of O.S.T. Act has been vitiated and as such the impugned notice of reassessment is liable to be quashed.

In case of *M/s. Goyal Traders* cited supra, Hon'ble Court were pleased to observe as under :-

“3. An order reopening the assessment must reflect the reasons for such reopening in the body of the order itself. The reasons cannot be supplied later. If the reason is simply due to the ‘objection raised by the A.G., Odisha’, it must state what the nature of such objection was. Only then will the assessee be in a position to answer the notice issued effectively. Since this basic principle has not been adhered to, the Court sets aside the impugned order reopening the assessment.”

In case of *M/s. R.K. Industries* cited supra, Hon'ble Court have been pleased to observe as under :-

“10. The factual finding by the JCST was that the reopening of the assessment was done by the AO by simply accepting the objection of the AG (Audit) without forming independent opinion on whether such objection by the AG (Audit) was

correct or not. There was no recording by the Addl. STO about being satisfied independently then there was escapement of taxable turnover. The legal position in this regard has been explained by this Court in *Indure Ltd. v. Commissioner of Sales Tax, [2006] 148 STC 61 (Orissa)* where it has been held that an objective opinion has to be formed by the STO and that he cannot “totally abdicate or surrender his discretion to the objection of the audit party by mechanically reopening assessment under Section 12(A) as has been done in this case.” It may be noticed here that the above observation was made in the context of Section 12(8) of the OST Act which corresponds to Section 43 of the OVAT Act.”

Hon’ble Apex Court in case of *Steel Authority of India* cited supra, were pleased to observe that the reason is the heart beat of every conclusion : it introduce clarity in an order without the same it becomes lifeless.

8. On the contrary, the State relies on the decisions of this Tribunal passed in **S.A. Nos. 365-367 of 2009-10** and **S.A. No. 1676 of 2001-02** cited supra wherein this Tribunal had occasioned to observe that proper notice was duly served on the dealer, accepting which it appeared and was made known about the objection raised in the audit report. In that case, the dealer never challenged such notice before any forum nor raised any objection with regard to the same before the assessing authority rather the dealer waited for the outcome of the demand and thereafter filed the first appeal. The said decisions are not applicable to the present facts and circumstances of the case as the proceeding was initiated without assigning any reason.

9. In the instant case, the Assessing Authority reopened the assessment proceeding without recording any reason, which shows that the Assessing Authority has not applied his independent mind before initiation of such proceeding.

In view of the ratio decided by the Hon’ble Court in the cited cases above, we are of the considered opinion that the present reassessment

proceeding cannot stand the test of law. As such, the orders of the Assessing Authority and the First Appellate Authority are liable to be set aside. As the matter has already been decided on the preliminary issue of maintainability which touches the root of the case and nothing is left to be adjudicated, so the other grounds are redundant. Hence, it is ordered.

10. Resultantly, the appeal stands allowed and the impugned order of the First Appellate Authority is hereby set aside. The order of the Assessing Authority is quashed. Cross-objection and additional cross-objection are disposed of accordingly.

Dictated & Corrected by me

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

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

I agree,

**Sd/-
(S.K. Rout)
2nd Judicial Member**

I agree,

**Sd/-
(S.R. Mishra)
Accounts Member-II**