BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 217 (VAT) of 2012-13
&
S.A. No. 84 (C) of 2012-13

(Arising out of orders of the learned JCST, Balasore Range, Balasore in Appeal Nos. AA- 50/MB 2011-12 & AA- 11/MBC 2011-12 , disposed of on 12.06.2012)

Present: **Shri G.C. Behera, Chairman**
Shri S.K. Rout, 2nd Judicial Member &
Shri B. Bhoi, Accounts Member-I

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

-Versus-

M/s. SSS Loha Marketing Pvt. Ltd.,
Link Road, Rairangur, Mayurbhanj ... Respondent

For the Appellant : Sri D. Behura, SC (CT)
For the Respondent : Sri B.B. Panda, Advocate

Date of hearing : 05.12.2023 *** Date of order : 30.12.2023

O R D E R

Both these appeals relate to the same party and for the same period, but under different Acts, involving common question of facts and law. Therefore, they are taken up for disposal in this composite order for the sake of convenience.

2. State assails the orders dated 12.06.2012 of the Joint Commissioner of Sales Tax, Balasore Range, Balasore (hereinafter called as 'First Appellate Authority') in F A Nos. AA- 50/MB 2011-12 & AA- 11/MBC 2011-12 reducing the demands raised in assessment orders of the

Sales Tax Officer, Mayurbhanj Circle, Baripada (in short, 'Assessing Authority').

3. Briefly stated, the facts of the case are that –

M/s. SSS Loha Marketing Pvt. Ltd. trades in iron ore in course of both intra-State and inter-State trade and commerce. The assessment relates to the period 01.04.2005 to 31.12.2008. The Assessing Authority raised the tax demands of ₹8,87,835.00 u/s. 42 of the Oidsha Value Added Tax Act, 2004 (in short, 'OVAT Act') on the basis of Audit Visit Report (AVR) and ₹67,85,734.00 u/r. 12(3) of the Central Sales Tax (Odisha) Rules, 1957 (in short, 'CST (O) Rules') on the basis of AVR.

Dealer preferred first appeals against the orders of the Assessing Authority before the First Appellate Authority. The First Appellate Authority reduced the demands and allowed the appeals in part. Being aggrieved with the orders of the First Appellate Authority, the Dealer prefers these appeal. Hence, these appeals.

The Dealer files cross-objections.

4. The learned Standing Counsel (CT) for the State submits that the First Appellate Authority went wrong by reducing the demand to 'nil' and by deleting the penalty imposed. He further submits that the First Appellate Authority has not whispered anything regarding sale suppression of iron ores as detected by the Audit Team. He further submits when the First Appellate Authority was at one with the finding of the Assessing Authority, but reduced the demand to 'nil' is a contrary finding. As regards the appeal under the CST Act, he urges that the tax should be levied at the appropriate rate in absence of any statutory Form-C and Form-F. He further contends that the Assessing Authority rightly disallowed the claim of credit notes for want of evidence, so, the First Appellate Authority went wrong in not raising the tax demand. He also asserts that the First Appellate Authority went wrong in assessing the Dealer to 'nil' by allowing carry forward ITC to

December, 2008. He further urges that the Dealer is precluded to take any point which he has not raised in the cross-objection and he could have raised the same at an earliest opportunity. So, he submits that the orders of the First Appellate Authority are otherwise bad in law and need interference in appeal.

5. On the contrary, the learned Counsel for the Dealer submits that the First Appellate Authority rightly levied the tax @10% and 4% respectively in absence of statutory forms. He further submits that when there is no demand, penalty cannot be imposed and even penalty cannot be imposed in case of non-submission of statutory declaration forms. He contends that the First Appellate Authority has rightly carry forwarded the ITC to the December, 2008. He further asserts that a person cannot be judge of his own cause as the Officer who had assessed the Dealer for a part period, conducted audit for the self-same period. He further asserts that point of law can be raised at any stage and an order *void ab initio* needs no avoidance. So, he submits that the Dealer can raise the issue of maintainability at this stage for the ends of justice. Therefore, he submits that the assessments under both the Acts are invalid and liable to be quashed.

6. Heard the rival submissions, gone through the orders of the Assessing Authority and First Appellate Authority vis-a-vis the materials on record. The State has challenged the impugned orders mainly on the following grounds :-

Under the OVAT Act –

(i) The First Appellate Authority reduced the demand to nil and deleted penalty imposed u/s. 42(5) of the OVAT Act without any plausible reasons;

(ii) When the First Appellate Authority agreed with the Assessing Authority regarding reduction of ITC on account

of credit notes, ultimately such reduction amount should have been demanded from the Dealer;

(iii) The First Appellate Authority has not discussed anything regarding sale suppression of iron ores 2790.930 MT valued ₹69,37,503.20 as established by the Audit and by the Assessing Authority and left this point set free leading to loss of revenue; and

(iv) The First Appellate Authority has allowed to carry forward ITC of ₹9,34,827.55 in the month of return for 12/2008, whereas the Dealer had already carried forwarded ITC of ₹59,77,547.45 in the said month, which is in contrary to the provision of Section 20(3)(d) of the OVAT Act.

Under the CST Act –

(i) When the Dealer fails to furnish Form- C & Form-F, the First Appellate Authority should have levied full rate of CST and differential tax should have been realized;

(ii) Due to failure to produce evidence on issue of credit notes for the years 2006-07, 2007-08 and 2008-09, the Assessing Authority has disallowed the adjustment of ITC and demanded the tax thereon, whereas the First Appellate Authority even though upheld the same, but did not make any demand;

(iii) The First Appellate Authority has calculated the balance tax due of ₹11,48,847.19 in the appeal order, but again allowed adjustment of ₹11,48,547.19 out of carry forward of ITC of ₹59,77,547.45 shown in the VAT return for the month of December, 2008 thereby assessed the Dealer to ‘nil’ demand, which is not proper in law;

(iv) The First Appellate Authority has illegally deleted the penalty imposed u/r. 12(3)(g) of the CST (O) Rules in view of the decision of the Hon'ble Apex Court in case of ***Shree Krishna Electricals v. State of Tamil Nadu***, **[2009] 23 VST 249 (SC)**.

7. During course of hearing of appeals, the Dealer raised the point of maintainability on the ground that the person who had completed the assessment for a part period, who conducted the Audit Visit, though he has not taken the same as a ground in the cross-objection. The State had vehemently objected to the ground of maintainability raised by the Dealer as he has not taken in the cross-objection.

It is settled principle of law that point of law can be raised at any stage even before this forum. The impugned order of the First Appellate Authority under the CST Act transpires that the Officer who has assessed the Dealer for the period 2005-06 and Q.E. 06/2006 is also the Officer who conducted the audit for the tax period from 01.04.2005 to 31.12.2008. The point of law which strikes the root can be raised even in absence of any cross-objection as an order which is not in conformity with law requires no avoidance. So, the submission of the learned Standing Counsel (CT) does not merit for consideration.

8. As the Dealer has raised the point of maintainability, the same is taken up as a preliminary issue for adjudication. It transpires that both the assessments u/r. 12(3) of the CST (O) Rules and u/s. 42 under the OVAT Act for the tax period 01.04.2005 to 31.12.2008 were initiated on the basis of the Audit Visit Report. The impugned order under the CST Act reveals that it was within the knowledge of the First Appellate Authority that the Officer who has assessed the Dealer for the period 2005-06 and 06/2006 is also the Officer who had conducted the audit for the tax period 01.04.2005 to 31.12.2008. The impugned order further transpires that the notice vide

No. 4228/CT dated 17.05.2008 was issued for audit visit for the period 01.04.2005 and onwards fixing the date to 17.06.2008. On 20.01.2009 the Audit Team visited the business premises of the Dealer and submitted the AVR on 01.10.2009. During the audit period, the assessment for the year 2005-06 and 06/2006 was completed on *ex parte* by the Assessing Officer on 31.03.2009. The First Appellate Authority further observed that when the regular assessment for the period 2005-06 and 06/2006 has been completed prior to submission of AVR again completion of assessment for the said period is not inconformity with the provisions of law and also goes against the principle of natural justice and contrary to the decision of the Hon'ble Court of Orissa in case of ***M/s. Kusum Power Pvt. Ltd. v. ACST, Jajpur Range*** in W P (C) No. 16882/2007 duly communicated by the CCT (O) vide letter No. 6846/CT dated 04.04.2008. Accordingly, the First Appellate Authority excluded the aforesaid period from the period under assessment. But, interestingly the same First Appellate Authority had disposed of the appeal under OVAT Act for the entire period under assessment.

In the case of ***National Trading Co. v. Assistant Commissioner of Sales Tax, Cuttack I Range, Cuttack & others***, reported in **[2001] 122 STC 212 (Orissa)**, wherein the Hon'ble Court were pleased to observe that the reporting officer himself cannot be the assessing officer. Hon'ble Court further observed that the justice should not only be done but should manifestly be seen to be done. Justice can never be seen to be done if a person acts as a Judge in his cause or is himself interested in its outcome. The principle applies not only to judicial proceeding, but also to quasi judicial and administrative proceeding.

In the instant case, the Assessing Authority who completed the assessment for a part period also conducted the audit. It is also settled principle of law that when the AVR is itself vitiated in law, the same cannot be considered for assessment. Relying on the aforesaid decision, the Hon'ble

Court in case of ***M/s. Tata Sponge Iron Ltd. v. Commissioner of Sales Tax***, reported in **[2012] 49 VST 33 (Orissa)**, reiterated the proposition of law by observing that there will be violation of cardinal principle of natural justice.

9. In view of the decisions of the Hon'ble Court cited supra, we are of the unanimous view that the AVR cannot be utilized for assessment as there will be violation of cardinal principle of natural justice. As the matter has been decided on preliminary issue on maintainability, it is redundant to decide other issues raised by the Revenue on merit. Hence, it is ordered.

10. Resultantly, the appeal both under the OVAT Act and CST Act are dismissed. As a necessary corollary thereof, the impugned orders of the First Appellate Authority and assessment orders of the Assessing Authority are hereby quashed. Cross-objections 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/-
(B. Bhoi)
Accounts Member-I