BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 89 (C) of 2014-15

(Arising out of order of the learned Addl. CST (North Zone), in Appeal No. AA – CUI-259/2012-13 (under CST Act), disposed of on 11.11.2014)

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

M/s. Indian Oil Corporation Ltd. (MD),
Odisha State Office, A/2, Chandrasekharpur,
Bhubaneswar-750124 ... Appellant

-Versus-

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

For the Appellant : Sri N. Mohanty, Advocate
Sri N. Panda, Advocate &
Sri B.B. Kumar, Manager (Finance)
For the Respondent : Sri D. Behura, S.C. (CT)

Date of hearing : 09.03.2023 *** Date of order : 31.03.2023

O R D E R

Dealer assails the order dated 11.11.2014 of the Addl. Commissioner of Sales Tax (North Zone) (hereinafter called as 'First Appellate Authority') in F A No. AA – CUI-259/2012-13 (under CST Act) reducing the remand reassessment order of the Deputy Commissioner of Sales Tax, Cuttack I East Circle, Cuttack (in short, 'Assessing Authority').

2. Earlier reassessment was made on dated 19.02.2007 u/s. 12(8) of the Central Sales Tax (Odisha) Rules, 1957 (in short, 'CST (O) Rules')

after completion of regular assessment u/r. 12(4) of the said Rules. The Dealer challenged the reassessment before the Hon'ble Court in WP (C) No. 3692 of 2007. Hon'ble Court were pleased to remand the assessment keeping in view the direction contained in Para-7 of the judgment of the Hon'ble Apex Court in the case of ***Indian Oil Corporation Limited v. Commissioner of Sales Tax and another***, reported in **[2012] 51 VST 504 (SC)**, wherein the Hon'ble Apex Court were pleased to set aside the order dated 16.05.2008 of the Hon'ble Court passed in **WP (C) No. 3691 of 2007** so also the order of reassessment dated 19.02.2007. Accordingly, the Assessing Authority assessed the Dealer on remand order.

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

M/s. Indian Oil Corporation Ltd., a Government of India undertaking, deals in petroleum products. The reassessment u/r. 12(8) of the CST (O) Rules relate to the year 2002-03. The Assessing Authority completed the remand reassessment and raised tax and penalty of ₹28,54,29,476.00.

In appeal, the First Appellate Authority reduced the tax demand to ₹13,33,11,046.00 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 supporting the impugned order of the First Appellate Authority to be just and proper in the facts and circumstances of the case.

4. The learned Counsel for the Dealer submits that the assessment proceeding u/r. 12(8) of the CST (O) Rules can be reopened only on limited grounds, i.e. fraud, collusion, misrepresentation etc. after completion of assessment proceeding u/r. 12(4) of the said Rules. The Assessing Authority has accepted the 'F' forms in the assessment u/r. 12(4) of the Rules. He further submits that the State did not supply the copy of the Traffic Manager

report to the Dealer, but utilized the same against the Dealer which is violation of natural justice. He further submits that neither the assessment order nor first appellate order reflects the details quantity and manner of despatch of SKO and HSD. He further submits that the Dealer has already submitted the detailed figures before the Assessing Authority and if the despatch figure as furnished by the Traffic Manager shall be substituted, the closing balance will be negative figure, which is not at all correct.

He further submits that one who alleges fraud, collusion, misrepresentation etc. has to prove with material evidence, but the State fails to prove the same. Further, he submits that the Dealer is a Govt. of India undertaking and the entire business transactions are based on valid documents and agreement. He further submits that the Dealer is a Govt. of India undertaking and it runs the business all over the world and it is not expected that a Govt. of India undertaking can play fraud or collusion to evade the tax. He further submits that there is ocean loss during transportation of stock and the stock are retained generally in the containers of other Oil Companies as per the hospitality arrangement basing on mutual agreed principles.

He relies on the decision of the Hon'ble Apex Court in case of ***Asok Layland Ltd. v. State of Tamil Nadu and another***, reported in **[2004] 134 STC 473 (SC)**. So, he submits that the orders of the First Appellate Authority and the Assessing Authority are not tenable in law and liable to be set aside.

5. Per contra, the learned Standing Counsel (CT) for the State submits that there is difference in figures in despatch quantity of SKO and HSD as per the figures submitted by the Traffic Manager to that of the figures of the Dealer disclosed. He further submits that other Oil Companies are incurring ocean loss proportionate to the stock despatched. He further

submits that the HSD and SKO are being transported in the tankers of other Oil Companies and they are retaining the same in their respective containers.

He further submits that the burden lies on the Dealer to account for how the transported stock were utilized. He further submits that assessment proceeding u/s. 12(8) of the CST (O) Rules can be initiated in case of suppression of goods. He further submits that in the instant case the Dealer has not explained the excess 15021.00 KL quantity of SKO and 7830.00 KL quantity of HSD. So, he submits that the Assessing Authority rightly reopened the assessment u/r. 12(8) of the CST (O) Rules and the First Appellate Authority rightly passed the order, which requires no interference in appeal.

6. Having heard the rival submissions and on going through the materials on record, it transpires from the record that original assessment u/r. 12(4) and reassessment u/r. 12(8) of the CST (O) Rules for the year assessment year 2002-03 were made. The issue of HSD and SKO as detailed below was considered by the Assessing Authority in both the proceedings :-

In 12(4) proceeding -

Sl. No.	Product	Despatch Quantity in KL
1.	HSD	221440.849
2.	SKO	**131892.573**

After cross-verification of the declarations in Form ‘F’ with reference to the statement of the Dealer, the Assessing Authority treated the aforesaid stock transfer of diesel and SKO from Odisha to the State of West Bengal was otherwise than in pursuance of sale within the meaning of Section 6A of the CST Act.

In 12(8) proceeding -

Sl. No.	Product	Received Quantity in KL	Despatch Quantity in KL
1.	HSD	286474	214357
2.	SKO	180543	**146914**

The Assessing Authority concluded in the reassessment proceeding that the goods in question had been delivered to ex-tanker at the port of destination at Haldia to other Oil Companies, such as HPCL, BPCL and IBP Co. as inter-State sale and liable for tax. Accordingly, the Assessing Authority assessed the tax liability with penalty as above.

7. The record further reveals that Hon'ble Apex Court were pleased to set aside the order of the Hon'ble Court passed on 16.05.2008 in WP (C) No. 3691 of 2007 and the order of reassessment passed on dated 19.02.2007 by the Assessing Authority with a direction to decide the reassessment proceeding including the jurisdictional fact as to whether reopening of assessment was at all maintainable in accordance with law and to consider the effect of Form-F declaration submitted by the Dealer. Hon'ble Apex Court were further pleased to direct the Assessing Authority to give full opportunity to the Dealer at time of reassessment.

Record further reveals that the Assessing Authority completed the remand reassessment proceeding u/r. 12(8) of the CST (O) Rules and raised tax and penalty of ₹28,54,29,476.00. The First Appellate Authority partly allowed the appeal of the Dealer and reduced the tax liability to ₹13,33,11,046.00.

8. The learned Counsel for the Dealer advances argument before this Tribunal that the Assessing Authority and the First Appellate Authority did not complete the remand reassessment in pursuant to the direction of the Hon'ble Apex Court. The learned Counsel for the Dealer further argues that the First Appellate Authority and the Assessing Authority did not answer the aforesaid issues, i.e. as to whether reopening of assessment was at all maintainable in accordance with law and to consider the effect of Form-F declaration submitted by the Dealer. So, we shall proceed to examine, if the said issues were considered by the Assessing Authority and the First Appellate Authority or not ?

9. Now, we have to examine whether proceeding u/r. 12(8) of the CST (O) Rules is maintainable after completion of 12(4) proceeding on the self-same goods, i.e. HSD and SKO, in relation to sales u/s. 6A of the CST Act.

In the case of ***Asok Layland Ltd.*** cited supra, Hon'ble Apex Court have been pleased to observe that the Revenue is not entitled to reassess the assessment after completion of regular assessment except on limited grounds.

The relevant observation of the Hon'ble Apex Court are extracted herein below for better appreciation :-

> "37. By reason of sub-section (2) of section 6-A, a legal fiction has been created for the purpose of the said Act to the effect that transaction has occasioned otherwise than as a result of sale.
>
> On an analysis of the aforementioned provisions, therefore, the following propositions of law emerge :
>
> (i) The initial burden of proof is on the dealer to show that the movement has occasioned by reason of transfer of such goods which is otherwise than by reason of sale. The assessee may file a declaration. On a declaration so filed an inquiry is to be made by the assessing authority for the purpose of passing an order on arriving at a satisfaction that movement of goods has occasioned otherwise than as a result of sale.
>
> (ii) Whenever such an order is passed, a legal fiction is created.
>
> Legal fiction, as is well-known, must be given its full effect."

Hon'ble Apex Court further observed that –

> "Section 6-A of the Central Sales Tax Act, 1956, as amended provides for a conclusive proof, except on a limited ground. The order of an authority under Section 6-A is conclusive for all practical purposes, and the reopening of an assessment is permissible only on limited grounds, such as fraud, occlusion, misrepresentation or suppression of material facts or giving or furnishing of false particulars, since in such cases the order would be vitiated in law. When an order passed in terms of sub-section (2) of section 6-A is found to be illegal or void ab initio or

> otherwise voidable, the assessing authority derives jurisdiction to direct reopening of the proceedings and not otherwise. Mere change in the opinion of the assessing authority or to have a relook at the matter would not confer any jurisdiction upon him to get the proceedings reopened. Discovery of new material, although it may form a ground, by itself may not be a ground for reopening the proceedings unless by reason of such discovery it turns out that a jurisdictional error had been committed."

10. In view of the aforesaid ratio laid down by the Hon'ble Apex Court, the 12(8) proceeding is permissible only on limited grounds such as, fraud, collusion, misrepresentation or suppression of material facts or giving or furnishing a false particular.

Hon'ble Apex Court further observed that when an order passed in terms of sub-section (2) of Section 6A is found to be illegal or void ab initio or otherwise voidable, the Assessing Authority derives jurisdiction to direct reopening of the proceeding and not otherwise.

In the present case, the Dealer has produced declarations in Form 'F' for the claim of 6A sale in respect of HSD and SKO. The same has already been accepted in a proceeding u/r. 12(4) of the CST (O) Rules for the assessment period for quantity of 221440.849 KL of HSD and SKO of 131892 KL.

The Assessing Authority initiated proceeding of reassessment u/r. 12(8) of the CST (O) Rules on the basis of report of the Traffic Manager dated 23.12.2003, which is a third party information. The Assessing Authority examined all the facts in assessment and found that the Dealer has not furnished copy of bill of lading. There was also ocean loss, the movement of goods were in the tanker of other Oil Companies and kept in the containers of other Oil Companies.

In the proceeding u/r. 12(8) of the CST (O) Rules, the despatch quantity of HSD is less than the quantity in 12(4) proceeding, i.e. 214357 KL (7083.849) whereas the despatch quantity of SKO is more, i.e. 146914

KL (excess of 15021.427). The order of the First Appellate Authority reveals that the details of stock from opening balance to closing balance in respect of HSD and SKO furnished by the Dealer at the time of assessment. The same is reproduced herein below for better appreciation :-

Sl. No.	Particulars	HSD in KL	SKO in KL
1.	Opening balance as on 01.04.2002	5737.51	4443.852
2.	Purchase and imports	321561.220	205131.017
3.	Receipt on safe keeping accounts	263885.995	165270.957
4.	Stock gain	569.776	119.770
5.	Total receipt	591754.44	374965.596
6.	Stock transfer to West Bengal	221440.849	131892.573
7.	Sale within Odisha	30099.607	264.750
8.	Stock transfer within Odisha	49551.545	72888.696
9.	Issues on safe keeping accounts	260065.600	164315.566
10.	Own use	30.580	0
11.	Closing stock	26785.868	4648.620
12.	Closing stock on hospitality account	3820.495	955.392

The Traffic Manager submitted a report regarding despatch of HSD of 214357 KL and SKO of 146914 KL. Neither the Assessing Authority nor the First Appellate Authority supplied the copy of the alleged report to the Dealer for conciliation. During hearing of the case, Dealer furnished a reconciliation figures relating to HSD and SKO. If the figures reported by the Traffic Manager can be taken into consideration, then ultimate closing stock will be negative figure, which is not at all correct. The same are reproduced herein below for better appreciation :-

Reconciliation figure submitted by IOCL during assessment -

Sl. No.	Particulars	HSD in KL	SKO in KL
1.	Opening balance as on 01.04.2002	5738.00	4444.00
2.	Purchase and imports	321561.00	205131.00

3.	Stock gain	570.00	120.00
4.	Stock transfer to West Bengal	221441.00	131893.00
5.	Sale within Odisha	30100.00	265.00
6.	Stock transfer within Odisha	49552.00	72889.00
7.	Own use	31.00	0
8.	Closing stock	26786.00	4649.00
9.	Receipt on safe keeping account	263886.00	165271.00
10.	Issues on safe keeping	260066.00	164316.00
11.	Closing stock on hospitality account	3820.00	955.00

Comparison figure by taking only the despatch figure of SKO and HSD as per Traffic Manager Report -

Sl. No.	**Particulars**	**HSD in KL**	**SKO in KL**
1.	Opening balance as on 01.04.2002	5738.00	4444.00
2.	Purchase and imports	286474.00	180543.00
3.	Stock gain	570.00	120.00
	Total receipt	292782.00	185107.00
4.	Stock transfer to West Bengal	214357.00	146914.00
5.	Sale within Odisha	30100.00	265.00
6.	Stock transfer within Odisha	49552.00	72889.00
7.	Own use	31.00	0
	Total despatches	294040.00	220068.00
8.	Closing stock	**- 1258.00**	**- 34961.00**
9.	Receipt on safe keeping account	263886.00	165271.00
10.	Issues on safe keeping	260066.00	164316.00
11.	Closing stock on hospitality account	3820.00	955.00

11. On careful scrutiny of the aforesaid figures, it reveals that if the despatch figures will be substituted by keeping all the data as per assessment, the closing balance of SKO is **minus** 34,961 KL, which is quite impossible. Moreover, the Assessing Authority and the First Appellate Authority have not issued a copy of report of the Traffic Manager to the Dealer being third party information, which is clear violation of principle of natural justice. The Assessing Authority and the First Appellate Authority have also not mentioned the details of the despatched quantity in the order of assessment or in the first appellate order. In absence of the same, the Dealer shall not be in a position to explain the same. Moreover, even if the same is taken to be true, the closing balance of SKO will be negative figure, which is impossible.

12. The Dealer has not disputed that some stock were transported to Haldia from Paradeep in small tanker and the same were delivered in the container of different Companies. The Dealer has also not disputed that there shall be an ocean loss while transporting the goods to destination due to rise in temperature.

The State claims that the stock transferred to Haldia terminals in the tanker of other Companies and share of ocean loss by all the Companies amounts to concluded sale.

Whereas the Dealer has rebutted it by submitting that the stock transfer through tankers and retaining the same in the containers of other Companies are only hospitality arrangement for safe keeping of stock as mutually agreed. The Dealer further argued that the ocean loss will be shared in the ratio of quantity shared by each party.

The Dealer has taken a ground that the bulk amount of oil products are kept generally in the containers of other Companies in hospitality arrangement as per the agreement.

13. The goods in question were received in Paradeep terminal and the same was transferred to Haldia Port in small tankers due to lower draft.

Article 1 (ii) & (iii) of the mutual agreement reveal that the parties to the agreement are Government of India undertakings and for their mutual benefit, the parties had executed the mutual agreement. Clause (ii) reveals that the Oil Marketing Companies are required to avail of product sharing/ assistance from each other in order to ensure smooth supply and distribution of POL products and to avoid any kind of disruption of supply all over India.

Article 3.1 of the agreement shows that the agreement shall cover HSD and SKO.

Article 4.6 of the agreement reveals that the coastal movement shall be as per the detailed procedure, as mutually agreed as placed at **Annexure-B**.

Article 6.1.5 of the agreement stipulates that product directly purchased from refineries and moved coastally to destination by one Oil Marketing Company and if stored in other Oil Marketing Company terminal will be treated on safekeeping account as mutually agreed.

Article 6.5.3 of the agreement provides that the terminal charges applicable for rail/road despatches as mentioned in the above shall also be applicable for Hospitality and Safekeeping assistance. For tanker loading at Marketing terminals like Paradeep and for safekeeping of product at any Port terminals shall also attract terminal charges as mentioned in Articles 6.5.1 and 6.5.2.

Article 6.1.8 of the agreement stipulates share of ocean loss and other import related cost in the ratio of the quantity received by each party. Prorated ocean loss shall be settled between Oil Companies. The Dealer has filed Proration report duly signed by all the Oil Companies.

So, in view of the aforesaid conditions of the agreement shows that the Dealer can transport the goods to Haldia Port in the tanker of other Oil Companies, retain the stock in the containers of the other Oil Companies as per mutual agreement subject to payment of certain charges. The ocean loss shall be shared proportionately as per the Proration Report. The Dealer has also filed the agreement along with the Annexures relating to Hospitality for safekeeping as well as ocean loss of the goods in question. The Dealer has also filed excise documents showing receipt of the goods at Haldia besides the declaration in Form 'F'. After verification of the Form 'F', the Assessing Authority in the proceeding u/r. 12(4) of the CST (O) Rules recorded a finding that the stock was transferred otherwise than by way of sale. Revenue fails to establish any materials to show that the Dealer has committed fraud or collusion or misrepresentation, whereas the Dealer has filed relevant material evidences, i.e. agreement, 'F' form, excise documents etc. in rebuttal. Moreover, the Assessing Authority and the First Appellate Authority have not examined the materials on record in consonance with the directions of the Hon'ble Apex Court. The Dealer is a Government of India undertaking and ordinarily is not expected to commit fraud to evade payment of tax to the State exchequer.

14. In view of the decision cited supra, the assessment can only be reopened on the limited grounds like fraud, collusion etc. It is also settled principles of law that the party who alleges fraud, collusion, etc. has to prove its case by adducing material evidence. The State fails to substantiate the allegation of fraud, collusion or misrepresentation of the Dealer to make out a case for reopening the assessment u/r. 12(8) of the CST (O) Rules after completion of assessment u/r. 12(4) of the said Rules.

15. For the foregoing discussions, the Revenue fails to establish any fraud, collusion or misrepresentation of the Dealer to reopen the proceeding u/r. 12(8) of the CST (O) Rules. Mere transportation in the

tankers of other Oil Companies, storing of stock in Hospitality arrangement for safekeeping and sharing of cost of ocean loss are not sufficient to discard the 6A transaction of the Dealer. Moreover, the First Appellate Authority and the Assessing Authority have not examined the materials on record in consonance with the directions of the Hon'ble Apex Court. So, the finding of the First Appellate Authority requires interference in appeal. Hence, it is ordered.

16. Resultantly, the appeal stands allowed and the impugned orders of the First Appellate Authority and the Assessing Authority are hereby set aside. As a necessary corollary, the proceeding u/r. 12(8) of the CST (O) Rule for the year 2002-03 is hereby quashed. Excess tax paid, if any, shall be refunded to the Dealer as per law. Cross-objection is 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-II