

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

(Arising out of the order of the learned Asst.CST(Appeal), Puri Range, Bhubaneswar in First Appeal Case No.AA.09/PUII-K/06-07 disposed of on 07.01.2008)

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

**S.A. No.224 of 2008-09**

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

**-Vrs. -**

M/s. Kukumina Construction (P) Ltd.,  
Chhatrama, Khurda. ... Respondent.

**S.A.No.135 of 2008-09**

M/s. Kukumina Construction (P) Ltd.,  
Chhatrama, Khurda, R.C. No.PUII-K-495. ... Appellant.

**-Vrs.-**

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

For the State: : Mr. D. Behura, ld. S.C. (CT).  
For the Dealer: : Mr. B.P. Mohanty, ld. Advocate.

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Date of Hearing : **31.07.2023** \*\*\* Date of Order : **29.08.2023**

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**ORDER**

The State and the Dealer assessee have preferred second appeals against the order dated 07.01.2008 of the Assistant Commissioner of Sales Tax (Appeal), Puri Range, Bhubaneswar (in short, ld.FAA) passed in First Appeal Case No. AA.09/PUII-K/06-07. These appeals involve common facts of law pertaining

to the same material period of the same dealer. For convenience, these are disposed of together in a composite order.

2. The factual matrix in nutshell of the case is that M/s. Kukumina Construction (P) Ltd., Chhatrama, Khurda, R.C. No.PUII-K-495 is engaged in processing of Stone products like Stone chips, Bazuri, Metal, crusher metal etc. Basing on a Fraud Case No.31 dated 19.12.2003 submitted by the IST, Puri-II Circle, proceedings under 12(8) of the OST Act was initiated by the learned STO and assessment completed ex-parte raising demand of ₹56,72,037.69 ex-parte resorting to best judgment. The learned FAA on first appeal reduced the demand to ₹5,00,021.00 holding the dealer-assessee as a works contractor instead of a supply contractor as held in the order of assessment.

3. The State assails the order of the ld. FAA as unjust and improper arguing that the ld.FAA treating the dealer assessee as works contractor passed first appeal order disowning the order of assessment passed by the assessing authority. Whereas, the learned STO is justified in assessing the dealer assessee as a supply contractor in consideration of the modus operandi of business transacted by it during the year under appeal. It is contended that the first appellate order is not justified, as the supply of stone ballast does not fall under the definition of 'works

contract' prescribed under Section 2(JJ) of the OST Act. The dealer-assessee, on the other hand, assails the proceeding framed under Section 12(8) of the OST Act by the Id. STO as not sustainable in law. Mr. B.P. Mohanty, Id. Advocate representing the dealer-assessee relying on the decision rendered by the Hon'ble High Court of Orissa in case of ***Indure Limited Vs. Commissioner of Sales Tax Cuttack Orissa*** reported in ***(2006) 148 STC 61 (Orissa)*** defends that the Sales Tax Officer has totally abdicated or surrendered his discretion to the dictates of the IST by mechanically reopening the assessment. Therefore, the exercise of power under Section 12(8) of the OST Act has been vitiated and the impugned notice of reassessment is liable to be quashed.

4. Here lies the pertinent question that revolves on whether under the facts and circumstances of the case the transactions effected by the dealer assessee with the SE Railways involve either ingredients of the works contract or elements of sale and purchases in pursuance of the Agreement/Contract entered into thereunder.

As for the dealer-assessee's case, the substantial points of law is whether initiation of proceeding under Section 12(8) of the OST Act merely based on allegation contained in the Fraud

Case Report is sustainable or not without the assessment being completed on application of independent mind by the ld. STO.

5. On perusal of the order of assessment, it transpires that the learned STO was in receipt of a Fraud Case Report from the IST, Puri-II Circle. The said Report specifies that the dealer-assessee in pursuance of an Agreement with the S.E. Railways, Khurda Road has supplied Stone ballast to the S.E. Railways. Stone ballast quantifying 4190780 cft was said to have been supplied in the year 2001-02, 2002-03 and 2003-04 (up to 31.08.2004). Out of the said quantify of stone ballast, as much as 3,712.27cft was supplied during 2003-04. Being thus, 38,195.54 cft was reported as supplied during 2001-02 and 2002-03. 19,097.77cft of Stone ballast on an average was supplied in each year i.e. in 2001-02 and 2002-03. As per the Frauds Case Report, the cost of Stone ballast was ₹300.00 per cft. Basing on the above finding of the Fraud Case Report, the learned STO initiated proceedings under Section 12(8) of the OST Act ignoring the basic requirement of assessment prior to re-assessment under Section 12(8) of the OST Act. The learned STO assessed the dealer-assessee to tax of ₹56,72,038.00 including penalty and surcharge to best of judgment by causing

enhancement of five times of the cost of Stone ballast purportedly supplied during 2001-02.

The ld. FAA in turn when approached for relief by the dealer-assessee took up different perceptive and disowned the order of assessment in entirety. The ld.FAA assessed the dealer-assessee on his own accord treating it as a works contractor.

6. On perusal of the orders of the forums below, it is observed that the initiation of proceeding under Section 12(8) of the OST Act by the learned STO seems to be violative of the prescriptions enshrined under Section 12(8) of the OST Act. Provision of Section 12(8) of the OST Act is attracted in the event of any turnover of the dealer has escaped assessment or under assessed. In the present case, as is apparent from the order of re-assessment passed by the ld.STO, there is no mention of any turnover escaped from assessment taken up earlier. Since there is no occasion of escaped turnover emerged from any assessment completed earlier precedent to initiation of the impugned proceeding, initiation of 12(8) proceeding suo moto by the learned STO is anti-law and unsustainable. The ld. STO has specifically spelt out that the dealer has not filed any return during the year 2001-02. It signifies that the dealer was not assessed earlier. So occasion of escapement of turnover from assessment or under

assessment of turnover leading to re-assessment under Section 12(8) of the OST Act does not arise.

Similarly, the ld. FAA without quantifying the escaped assessment of turnover or under assessment thereof in assessment that completed earlier precedent to the impugned 12(8) proceeding has resorted to fresh assessment on accepting returns filed by the dealer-assessee on examining the books of accounts as produced at appeal. It is a clear infraction of the provision of law mandated under Section 12(8) of the OST Act.

7. Notwithstanding the above facts observed in contrary, it is further to hold that the ld. STO has initiated proceedings under Section 12(8) of the OST Act totally dictated by the findings contained in the Fraud Case Report. The allegation as reported upon has been the basis of the 12(8) proceeding.

In view of the above elaborate discussion, it is apt to quote the decision delivered by the Hon'ble High Court of Orissa

in case of ***Indure Limited Vs. Commissioner of Sales Tax, Cuttack Orissa*** and Others reported in (2006) 148 STC 61 (Orissa). The said decision is relevant to the present facts and circumstances of the case. It is observed in the said decision as under:-

“Audit objection may be a relevant consideration but the sales tax other as to form his objective opinion taking that objection

into consideration. But the sales tax officer has totally abdicated or surrendered his discretion to the objection for the audit party by mechanically reopening the assessment. Therefore, the exercise of power under section 12(8) of the Act has been vitiated and the impugned notice of reassessment is liable to be quashed.”

The above decision of the Hon’ble High Court of Odisha is in the ratio of the judgments of the Hon’ble Apex Court in case of Sales Tax Officer vs. Uttrareswari Rice Mills reported in (1972) 30 STC 567 (SC) and that of the Hon’ble High Court of Orissa in case of State of Orissa vs. Ugratara Bhojanalaya reported in (1993) 91 STC 76 (Orissa).

8. In view of the above deliberations with respect to maintainability of initiation of proceedings under Section 12(8) of the OST Act, we are of the considered view that the ld. STO is found to have not formed his independent opinion on whether the findings of the Fraud Case Report was correct or not. There was no recording by the ld. STO about being satisfied independently there was escapement or taxable turnover. The order of assessment under Section 12(8) of the OST Act in the instant case is vitiated on the ground that there was no escapement of turnover detected in assessment earlier that contemplated re-assessment under Section 12(8) of the OST Act. Without any turnover having been escaped assessment, 12(8) proceeding cannot be thought of. Under this eventuality, the

notice together with the proceedings framed under Section 12(8) of the OST Act in the instant case is not sustainable in law. In view of the above, other grounds of appeal and additional grounds of appeal filed by both the parties are rendered redundant.

9. In view of the above background of the case, the appeal filed by the dealer-assessee is allowed and that of the State is dismissed. The order of the ld. FAA is set-aside and the order of the ld. STO is hereby quashed. Cross objection and additional cross objection are disposed of accordingly.

Dictated & Corrected by me

**Sd/-**  
**(Bibekananda Bhoi)**  
**Accounts Member-II**

**I agree,**

**Sd/-**  
**(Bibekananda Bhoi)**  
**Accounts Member-II**

**I agree,**

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

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