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

S.A. No. 135(C) of 2013-14

(Arising out of the order of the learned JCST, Jajpur Range, Jajpur Road in first appeal case No. AA-87 KJ (C)11-12 dtd.22.01.2013)

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

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

-Vrs. –

M/s. Hima Ispat (P) LTd., Barbil, Keonjhar. ..... Respondent.

For the Appellant : : Mr. S. Mishra, ld. S.C.(C.T.)
: Mr. S.K. Pradhan, ld. ASC(C.T)
For the Respondent : :Mr. P.K. Harichandan, ld. Advocate

Date of Hearing : 05.06.2023 * Date of Order : 30.06.2023**

O R D E R

This second appeal has been preferred by the State challenging the order dated 22.01.2013 passed by the Joint Commissioner of Sales Tax, Jajpur Range, Jajpur Road in First Appeal Case No.AA-87 KJ (C) 11-12 (hereinafter referred to as ld.FAA) in nullifying the demand of ₹22,48,938.00 raised at assessment passed u/R. 10 of the CST (O) Rules by the Assistant Commissioner of Sales Tax, Keonjhar Circle, Keonjhar (hereinafter called as ld. Assessing Authority).

2. The facts, in nutshell are that the respondent-company under the name and style of M/s. Hima Ispat (P) Limited, Barbil, KJC-768 is engaged in manufacturing of sponge iron and sale thereof. It was originally assessed u/R. 12(5) of the CST(O) Rules for the year 2004-05 raising demand of ₹13,82,613.00. The respondent-Company on being aggrieved preferred appeal against the said demand. The ld. FAA in the appeal order dated 05.02.2008 vide appeal No.AA-29/KJC/2006-07 has allowed the appeal in part and reduced the demand to ₹5,01,697.00.

3 The original order of assessment dated 30.03.2006 passed u/R.12(5) of the CST(O) Rules as discussed above was reopened u/R.10 of the CST (O) Rules by the ld. Assessing Authority on the basis of the A.G. objections. The A.G. Audit team objected to the deduction allowed towards stock transfer in respect of five consignment agents out of six on the ground that the consignment agents were manufacturers of iron and steel goods who availed CENVAT credit on receipt of sponge iron from the instant dealer-appellant and debited the CENVAT credit when goods were sold by them. The audit team only reported that transfer of stock to M/s. R. Juneja, Ludhiana for ₹53,31,734.00 was rightly allowed against form 'F'. Thus A.G. audit suggested that turnover of ₹2,81,11,727.00 should have been treated as interstate sales and tax @8% should have been levied treating sponge iron as a declared goods for want of

declaration form 'C'. The estimated amount of under assessed tax was reported at ₹22,48,938.00. In the assessment order under dispute the ld. Assessing Authority, Keonjhar Circle, Keonjhar raised demand of ₹22,48,938.00 as suggested by audit. The assessment was completed ex-parte as the dealer failed to respond to the notices and intimations issued.

4. The dealer-assessee preferred first appeal against the order of reassessment passed u/R.10 of the CST(O) Rules which was initiated on the basis of the A.G. objections. The ld. FAA annulled the demand holding the assessment as arbitrary for procedural/substantive deficiency.

5. The State being not satisfied with the order of the ld. FAA preferred second appeal before this forum citing the annulment of the demand by the ld. FAA as uncalled for, as the ld.FAA has annulled the demand relying on the judgment passed in case of Ambika Steels Ltd. Vrs. State of UP & others, 12 VST 216 which has no applicability in this case. The State filed additional grounds of appeal citing the order of the ld. FAA as illegal, without jurisdiction and without authenticity of law in view of section 18 of the CST Act.

6. The respondent-dealer filed cross objection appreciating the order of the ld. FAA in effecting annulment on the demand made in the reassessment order. It is contended that the respondent had filed the first appeal against original assessment

order dated 30.03.2006 passed u/R. 12(5) of the CST(O) Rules, wherein the ld. Assessing Authority demanded the tax by disallowing the consignment sale and the ld. FAA, vide order dated 05.02.2008, allowed the consignment sales by accepting the declaration Form F. Hence, the initiation of reassessment proceeding and passing of order u/R.10 of the CS (O) Rules is not permissible under the law by the operation of doctrine of merger for the aforesaid period. It is also urged that once the declaration Form F has been furnished by the respondent, in support of transfer of goods otherwise than by way of sale, the same should not be disallowed by any other ground, which will violate the section 6A of the CST Act.

The ld. Counsel appearing on behalf of the dealer-respondent placed citation of judgments in course of the hearing pleading that the order of the ld. Assessing Authority passed u/R.10 of the CST(O) Rules is not sustainable in law. The substance of the judgments copies of which have been placed relevant to this case has been discussed hereunder.

7. Heard the rival submissions. Gone through the reassessment order, first appeal order, grounds of appeal, cross objection coupled with the copies of judgments of the Hon'ble High court of Odisha submitted by the ld. Counsel representing the dealer-assessee and other relevant materials available on record. On perusal, it is amply clear that the reassessment

u/R.10 of the CST(O) Rules has been passed simply on the basis of the A.G. objections notwithstanding the fact that the original assessment dated 30.03.2006 framed u/R.12(5) of the CST(O) Rules raising demand of ₹13,82,613.00 which was challenged in the first appeal was disposed of allowing the appeal in part on 5.2.2008 vide appeal No.AA-29/KJC/2006-07 reducing the demand to 5,01,697.00. This apart, as is evident, the order sheet of the assessment order does not contain the reasons as to why the ld. Assessing Authority formed opinion for reopening the case. The order sheet dated 10.07.2006 reads as under:-

'Seen the marginal note. Issue notice u/R.10 of the CST(O) Rules for under assessment to the dealer for the year 2004-05 fixing date to 2.8.06'

The order of assessment dated 06.08.2011 passed u/R.10 of the CST(O) Rules provides as under:-

'The audit team pointed out that the dealer had sold 3542.030 MT of Sponge Iron to 6 agents of U.P., Jharkhand, Punjab, and Uttaranchal states worth ₹3,34,43,411.00 and claimed the same as consignment sales. They also scrutinized the assessment file and found that in case of agents M.R. Juneja of Ludhiana the sale made against consignment was correct and in other five cases the sales were not correct. Hence they suggested irregular deduction of ₹2,81,11,727.00 and under assessment of tax

₹22,48,938.00. It is to clarify that the A.G. Audit treated the same as interstate sale and not consignment sale.

Basing on the objection of the audit a notice in Form-III was issued to the dealer on dated 19.07.2006……'

The decisions delivered by the Hon'ble High Court of Odisha on which the learned Counsel of the dealer-assessee relied upon are perused at length. The substance of the decisions in the judgments is as follows:-

(i) The decision pronounced by the **Hon'ble High Court in case of the State of Orissa Vs Ugratara Bhojanalaya reported in 91 STC 76** provides that "the assessing officer is required to record the basis on which, action under Section12(8) of the Act is proposed to be taken.' Further, it is held that 'an assessment order gets merged with the appellate order by operation of doctrine of merger. The juristic justification of the doctrine of merger may be sought in the principle that there cannot be at one and the same time more than one operative order governing the same subject matter."

(ii) The **Hon'ble High Court of Orissa in STREV No.23 of 2021 dated 04.01.2013 passed in case of M/s. R.K. Industries Versus State of Odisha** have been pleased to observe "the reopening of the assessment was done by the AO by simply accepting the objection 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 part by mechanically reopening assessment under section 12(A) as has been done in this case."

(iii) In the matter of **Birsa Minerex Versus Sales Tax Officer and another passed by the Hon'ble High Court in W.P. (C) No.21222 of 2015 dated 17.11.2022**, it is observed that "in absence of power of review conferred by or under the statute, in the garb of reassessment, the concluded assessment could not be reopened by the Assessing Authority. As the material available on record does not show independent application of mind of the Assessing Authority having regard to the material in his possession, if any, merely based on objection of Auditor General, Odisha issue of notice in Form IVA in exercise of power under Rule 12(4) of the CST(O) Rules for reopening Audit Assessment concluded under Rule 12(3) on examination of books of account, etc. is impermissible in law and such an action is without jurisdiction."

(iv) The Judgment of the **Hon'ble High Court of Orissa passed in W.P.(C) No.3821 of 2013 dated 22.03.2021 in case of M/s.**

Goyal Traders Versus Sales Tax Officer, Sambalpur-I Circle, Sambalpur and others makes it clear that "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."

8. From the facts as emerging from the aforesaid discussion, we are inclined to conclude that the order of assessment passed u/R.12(5) of the CST(O) Rules has been merged with the appellate order by operation of the doctrine of merger, since the assessment u/R.10 of the CST(O) Rules has been passed on the same set of facts which was decided by the ld. FAA. It is ex facie manifest that the ld. Assessing Authority has simply accepted the objection of the A.G. Audit mechanically without forming independent opinion on whether such objection was correct or not. This apart, the order sheet maintained in this case does not contain any reason for initiation of the proceedings prior to issue of notice. We are, therefore, of the view that the order of assessment passed u/R.10 of the CST(O) Rules suffers from procedural deficiencies and thus, it is not sustainable in the eyes of law. The order of the ld. FAA in nullifying the impugned demand due to procedural deficiency is affirmed.

9. Under the above facts and in the circumstances of the case, the appeal filed by the State is dismissed and the order of assessment

being rendered infirmity in law, the order of the ld. FAA is confirmed. The cross objection is disposed of accordingly.

Dictated & corrected by me.

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

Sd/-
(Bibekananda Bhoi)
Accounts Member-II

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

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