BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

F.A. No. 1 (C) of 2022

(Arising out of assessment order of the learned STO, Cuttack-I East Circle, Cuttack dated 15.02.2007)

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

M/s. Hindustan Petroleum Corporation Ltd.,
Bhubaneswar Regional Office,
Alok Bhati Building, Sahid Nagar,
Bhubaneswar-751007 ... 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 N.K. Rout, Addl.SC (CT)

Date of hearing : 17.11.2023 *** Date of order : 04.12.2023

O R D E R

Dealer is in appeal against the assessment order dated 15.02.2007 of the Sales Tax Officer, Cuttack-I East Circle, Cuttack (hereinafter called as 'Assessing Authority') raising demand of ₹275,05,43,200.00 u/r. 12(8) of the Central Sales Tax (Odisha) Rules, 1957 (in short, 'CST (O) Rules') for the year 2002-03.

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

M/s. Hindustan Petroleum Corporation Ltd. is engaged in sale of petroleum products such as MS, HSD, LPG, lubricants, furnace oil, SKO

etc. Dealer-Corporation receives the stock from its branches throughout India as well as transfers the stock from Odisha to different branches throughout the country. Besides, Dealer effects sale of HSD, LPG etc. in course of inter-State trade and commerce. Dealer also effects purchase of petrol, diesel and SKO from other marketing Companies like Bharat Petroleum Corporation Ltd. and Indian Oil Corporation Ltd. and effects sales thereof to other marketing Companies. The assessment relates to the year 2002-03. The regular assessment u/r. 12(4) of the CST (O) Rules for the said period was completed on 31.01.2006 raising 'nil' demand. Subsequently, the Assessing Authority raised tax and penalty of ₹275,05,43,200.00 u/r. 12(8) of the CST (O) Rules vide order dated 15.02.2007.

Dealer challenged the order of assessment before the Hon'ble Court in CMAPL No. 261 of 2022, wherein the Hon'ble Court granted liberty to file appeal before the Appellate Authority for disposal as per law. Accordingly, the Dealer prefers this appeal. Hence, this appeal.

The State files no cross-objection.

3. The learned Sr. Counsel for the Dealer submits that the reopening of assessment u/r. 12(8) of the CST (O) Rules is without jurisdiction especially when the Assessing Authority has accepted the declarations in Form-F with an observation that the transfer of stock is treated as movement of goods otherwise than by way of sale within the meaning of Section 6A of the CST Act. He further submits that the reopening of assessment can only be made in limited circumstances, such as, fraud, misrepresentation, collusion etc. in view of the decision of the Hon'ble Apex Court. He also contends that the Assessing Authority cannot sit on or revisit in reassessment like an appeal/review on the same facts and circumstances in the guise of an assessment u/r. 12(8) of the CST (O) Rules in absence of certain pre-conditions. He also argues that the Dealer-Corporation and other

Oil Companies are bound by the inter-se agreement relating to handling, transportation in ex-tankers and safekeeping of the oil in hospitality arrangement, sharing of ocean loss and adjustment of accounts amongst the Oil Companies in regular intervals. The Dealer cannot be saddled with tax liability only because the Oil Companies shared the ocean loss, transportation of stock in the tankers of other Companies and kept the same in their containers in absence of any intention contrary to the agreement with a motive to sell. He argues that if the movement of goods from Paradeep to Haldia occasioned pursuant to an agreement to sale, then only such sale should be leviable to CST as per Section 3(a) of the CST Act. He also contends that some conditions require to be satisfied before a sale can be said to take place in course of inter-State trade or commerce. He further submits that the State fails to substantiate the fact alleged by leading any cogent materials on record, whereas the Dealer has already explained that the stock moved from Paradeep to Haldia otherwise than by way of sale. Therefore, he submits that the order of the Assessing Authority is otherwise bad in law and the same is liable to be quashed in the ends of justice.

He relies on the decisions of Hon'ble Apex Court in the case of ***Ashok Layland Ltd. v. State of Tamil Nadu and another***, reported in **[2004] 134 STC 473 (SC); *Balabhagas Hulaschand & Ors v. State of Orissa*, AIR 1976 SC 1016***; ***South India Viscose Ltd. v. State of Tamil Nadu***, **AIR 1981 SC 1604**; and order dated 31.03.2023 of this Tribunal passed in **S.A. No. 89 (C) of 2014-15** (***M/s. Indian Oil Corporation Ltd. (MD) v. State of Odisha***).

4. On the contrary, the learned Standing Counsel (CT) for the State submits that the Dealer transferred the stock in the tankers of other Oil Companies from Paradeep Port to Haldia, which was kept in their respective containers and the ocean loss was shared by them which reveals that the stock were sold in course of inter-State trade. He further submits that the

Assessing Authority can reassess on the strength of any information regarding under assessment or escaped assessment. He further submits that in this case the Dealer had suppressed the material facts and sold the stock in the guise of stock transfer, so the Assessing Authority has rightly reassessed the Dealer and saddled tax liability with penalty, which requires no interference in appeal.

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. Record reveals that the Assessing Authority accepted the 'F' forms and completed regular assessment u/r. 12(4) of the CST (O) Rules with 'nil' demand. The Assessing Authority in the said assessment found that the Dealer has effected stock transfer of HSD, SKO and LPG for ₹537,63,84,973.66 besides LPG and lubricants. He further found that the transfer of stock and movement of goods are otherwise than by way of stock transfer within the meaning of Section 6A of the CST Act. The Assessing Authority further found that the Dealer had produced declaration in Form-C covering the transaction of ₹52,18,971.24 and could not produce 'C' form in respect of sale of LPG of ₹60,795.00 and HSD of ₹35,399.16 out of disclosed turnover. The Assessing Authority had specifically observed that besides this no other discrepancies are noticed while examining the statement and the declaration forms furnished by the Corporation, hence, he accepted the GTO of the Dealer.

It is also not in dispute that the Assessing Authority reopened the assessment u/r. 12(8) of the CST (O) Rules on the ground that the Dealer has been under assessed due to default in disclosing true and correct picture of the inter-State transactions during the period under assessment. The Assessing Authority found from the disclosed return that the sale price received or receivable by the Dealer during the period was for ₹763,82,23,068.94. Out of the same, inter-State sale was for ₹55,38,299.40

and the rest amount was branch transfer. But, the Assessing Authority received the information from the documents furnished by the IOCL before the Reporting Official reveals that despatch of HPCL goods through Paradeep Port are mostly to other Oil Companies. The document also reveals transaction relating to ocean loss reports. The report further reveals that the ocean loss has been shared amongst other Oil Companies in proportion. The Assessing Authority further found that the Dealer has neither reflected in the return nor disclosed at the time of assessment. So, the Assessing Authority concluded that the goods in question have been delivered to ex-tanker at the port of destination at Haldia and Port Blair to other Oil Companies, such as IOCL and BPCL and as such, the same is liable to be taxed. So, the Assessing Authority computed the tax liability of the Dealer in reassessment and raised the impugned demand.

6. The Dealer claims that the Assessing Authority lacks jurisdiction to reopen the proceeding especially when the same has been assessed by him in 12(4) proceeding and accepted the 'F' form. Dealer also claims that there must be ocean loss and the retention of the oil in tankers of other Oil Companies is only in mutual agreement/arrangement, whereas the State claims that the Dealer has effected inter-State sales in guise of stock transfer to Haldia Port.

7. The Dealer has challenged the maintainability of 12(8) proceeding as preliminary issue. Admittedly, 12(8) proceeding can only be initiated on a limited ground such as fraud, collusion, misrepresentation or suppression of material fact or giving or furnishing of false particulars.

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 ***Ashok 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."

8. The assessment order passed u/r. 12(4) of the CST (O) Rules reveals that the then Assessing Authority determined the GTO at ₹55,38,299.40 & NTO at ₹53,15,165.40 and computed tax of ₹2,23,134.00. The Assessing Authority had also accepted the 'F' form by considering the fact and material of the case. The same set of fact and materials of the case, the Assessing Authority reopened the assessment u/r. 12(8) of the CST (O) Rules. The State has taken a ground that the ocean loss was shared by other Oil Companies, the consignment was sent to Haldia Port from Paradeep Port through ex-tanker and kept in the containers of the respective Oil Companies. The record reveals that there was a mutual agreement in between all the Oil Companies.

The Dealer does not dispute that some stock were transported to Haldia from Paradeep in small tanker and the same were delivered in the container of different Companies for safekeeping. The Dealer also does not dispute that there shall be an ocean loss while transporting the goods to destination due to rise in temperature and all the Oil Companies shared such loss proportionately.

The State claims that the stock transferred to Haldia terminals in the tanker of other Companies, retain the stock in containers of their respective Companies and shares the ocean loss by all the Companies amounts to concluded inter-State sale.

In course of hearing, 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 safekeeping 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.

9. 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 relevant documents showing transportation of goods from Paradeep to Haldia besides the declarations 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, etc. in rebuttal. 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.

10. Even on merit, we are to adjudicate whether the transfer of stock constitute an inter-State sale as defined in Section 3(a) of the CST Act or transfer of goods otherwise than by way of sale as per Section 6A of the said Act.

In order to constitute an inter-State sale u/s. 3(a) of the CST Act, the following factors should coexist :-

(i) that there is an agreement to sell which contains a stipulation express or implied regarding the movement of the goods from one State to another;

(ii) that in pursuance of the said contract the goods in fact moved from one State to another; and

(iii) that ultimately a concluded sale takes place in the State where the goods are sent which must be different from the State from which the goods move.

Likewise, in case of transfer of goods claimed otherwise than by way of sale as per Section 6A of the CST Act, the movement of such goods from one State to another was occasioned by reason of transfer of such goods by the Dealer to any other place of his business or to his agent or principal and not by reason of sale.

11. The word 'sale' appearing in Section 2(g) of the CST Act as also in Section 3(a) of the said Act includes an agreement to sell also provided the said agreement contains a stipulation regarding passing of the property. In other words, a sale occasions a movement of goods when the contract of sale so provides. Bare perusal of Section 3(a) of the CST Act, makes it amply clear that there must be a contract of sale preceding the movement of goods from one State to another and the movement of goods should have been caused by and be the result of that contract of sale. If there was no contract of sale preceding the movement of goods, the movement can obviously be not ascribed to a contract of sale nor can it be said that the sale has occasioned the movement of goods from one State to another.

But, in the instant case, there is no agreement/contract to sell the goods, nor the sale of goods occasions a movement of goods from Paradeep to Haldia on the strength of any agreement/contract. The inter-se agreement among the Oil Companies is only for the purpose of smooth arrangement for transportation and safekeeping of the goods. So, as the vital ingredient that the fact of contract of sale does not exist in the present case, the movement of goods from Paradeep to Haldia will not be treated as 'sale' within the meaning of Section 3(a) of the CST Act.

In the cases of ***Balabhagas Hulaschand & Others*** and ***South India Viscose Ltd.*** cited supra, Hon'ble Apex Court reiterated that the inter-State sale is liable for sales tax u/s. 3 of the CST Act only when the goods

were to move as per contract of sale. The State fails to justify that the alleged sale occasions the movement of goods from one State to another pursuant to contract of sale.

Therefore, we are unable to accede to the contention of the State that the movement of goods from Paradeep to Haldia falls within the ambit of Section 3(a) of the CST Act and exigible to CST.

12. In the case of ***Naba Bharat Ferro Alloys Ltd. & another***, the Hon'ble Court have been pleased to observe that Assessing Authority has no power to review though he has power to reassess, but reassessment has to be based only fulfilment of certain preconditions. In the instant case, if the concept of change of opinion is removed, as contended by the State, then the reopening of assessment will be definitely in the guise of review, which is not permissible under law.

13. It is settled law that one who takes the plea of fraud, collusion, misrepresentation or suppression of material facts or giving or furnishing false particulars, he is required to strictly plead and proof the same by adducing material evidence in order to get the relief. In the instant case, the State has filed no cross-objection nor could show any relevant material of fraud, collusion etc. on record to justify the reassessment.

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. Moreover, we have already addressed the self-same issue in the case of ***M/s. Indian Oil Corporation Ltd. (MD)*** in **S.A. No. 89 (C) of 2014-15**, by observing therein that 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, which will hold good in the present case of the Dealer.

16. 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. So, the finding of the Assessing Authority requires interference in appeal. Hence, it is ordered.

17. Resultantly, the appeal stands allowed and the impugned assessment order of the Assessing Authority for the year 2002-03 is hereby quashed. Excess tax paid, if any, shall be refunded to the Dealer as per law.

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