

**BEFORE THE CHAIRMAN, ODISHA SALES TAX TRIBUNAL:
CUTTACK**

S.A. No. 17 (C) of 2021

(Arising out of order of the learned Addl. CST, CT & GST Territorial
Range, Balasore in Appeal No. AA 47/MBC- 2018-19 (CST),
disposed of on 24.12.2020)

Present: **Shri G.C. Behera, Chairman**

M/s. G.M. Iron & Steel Company Ltd.,
Ward No. 9, Rairangpur, Mayurbhanj ... Appellant

-Versus-

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

For the Appellant : Sri B.B. Panda, Advocate
For the Respondent : Sri S.K. Pradhan, Addl. SC (CT)

Date of hearing : 01.02.2024 *** Date of order : 22.02.2024

ORDER

Dealer assails the order dated 24.12.2020 of the Addl. Commissioner of Sales Tax, CT & GST Territorial Range, Balasore (hereinafter called as 'First Appellate Authority') in F A No. 47/MBC-2018-19 (CST) setting aside the assessment order of the Sales Tax Officer, CT & GST Circle, Mayurbhanj, Baripada (in short, 'Assessing Authority').

2. The facts of the case, in brief, are that –

M/s. G.M. Iron & Steel Company Ltd. is engaged in trading of minerals such as iron ores, pig iron and coal, in course of intra-State, inter-State and export. The assessment relates to the period 01.10.2015 to 31.03.2016. The Assessing Authority raised tax demand of ₹8,34,228.00 u/r.

12(3) of the Central Sales Tax (Odisha) Rules, 1975 (in short, 'CST (O) Rules').

Dealer preferred first appeal against the order of the Assessing Authority before the First Appellate Authority. The First Appellate Authority set aside the assessment 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.

3. The learned Counsel for the Dealer submits that the Assessing Authority and First Appellate Authority went wrong in adopting the purchase turnover of coal and ascertaining sale price by adding custom duty and port clearance charges including levying ET @ 1% thereon besides the profit margin @ 14.16%. He further submits that the First Appellate Authority has no jurisdiction to direct the Assessing Authority to initiate suo moto proceeding u/s. 10 of the OET Act in absence of any grievance of the State. He urges that the First Appellate Authority went wrong in directing the Assessing Authority to initiate proceeding u/r. 12(4) of the CST (O) Rules. He further submits that the orders of the Assessing Authority and First Appellate Authority are otherwise wrong and bad in law, so the same are not sustainable in law.

The Dealer relies on the decision of Hon'ble Bombay High Court in case of *Gujarat Export Corporation Limited v. State of Maharashtra*, reported in [1990] 77 STC 110 (Bombay); Hon'ble Madras High Court in case of *State of Tamil Nadu v. Sree Kamaraj Waste Paper Store*, reported in [2000] 118 STC 132 (Madras); Hon'ble Orissa High Court in cases of *Orient Paper Mills Ltd. v. State of Orissa*, reported in [1975] 35 STC 84 (Orissa) and *M/s. Bath Plaza v. Sales Tax Officer, Bhubaneswar-I Circle, Bhubaneswar* (OJC No. 12492 of 1997, decided on 18th August, 2000); Hon'ble Kerala High Court in case of *Southern Metal Rolling Mills (P) Ltd. v. State of Kerala*, reported in [1998] 111 STC 32 (Kerala).

4. Per contra, the learned Addl. Standing Counsel (CT) for the State submits that the Assessing Authority and First Appellate Authority have rightly assessed the sale suppression by taking into consideration the sale price as per CST Act adding the custom duty and port clearance charges. He further submits that the First Appellate Authority went wrong in setting aside the order of the Assessing Authority on the ground that 12(3) proceeding is not maintainable in absence of AVR. The First Appellate Authority had jurisdiction to direct the Assessing Authority to initiate the ET proceeding and thus, the same suffers from no infirmity thereby requires no interference in appeal.

5. Heard the rival submissions of the parties and gone through the orders of the First Appellate Authority and Assessing Authority vis-a-vis the materials on record.

It transpires from the assessment order that the Dealer had filed 'Nil' return for the tax period 01.10.2015 to 29.02.2016. The Dealer has shown sales at concessional rate against 'C' form as well as sales u/s. 6(2) CST Act. The representative of the Dealer has claimed that the Dealer has already been assessed u/s. 12(1) of the CST (O) Rules for the same period and produced a copy of order for verification.

The Dealer failed to produce declaration forms. So, the Assessing Authority levied tax at the appropriate rate. The assessment order further reveals that the Assessing Authority assessed the tax liability of the Dealer at a concessional rate for inter-State transactions on production of declaration forms.

The returned figure also reveals that the purchase value per MT of coal is for ₹3,277.19 and sale value per MT comes to ₹3,741.11. The Audited Balance Sheet till 31st March, 2016 reveals that the Dealer has purchased 16 stock. After addition of expenses incurred and entry tax, the cost of purchase per MT of coal comes to ₹4,028.20. So, the Assessing Authority observed that the purchase value of coal shall be ₹4,028.20

instead of ₹3,277.19 and the Dealer has suppressed the purchase value of ₹751.01. Admittedly, the Dealer had purchased coal at ₹3,277.19 per MT and sold the same at ₹3,741.11 with the profit margin @ 14.16%. So, the Assessing Authority arrived at the sales suppression per MT at ₹857.35 including profit margin. The explanation of the Dealer was not convincing. So, the Assessing Authority levied tax at the appropriate rate, i.e. State rate @ 5% and raised the demand.

The First Appellate Authority recorded a finding that the Dealer had additional places of business at Paradeep Port and Vishakhapatnam Port. So, the First Appellate Authority did not accept the plea that the coal was received at Dhamara Port and the same were despatched to outside the State. The Dealer has realized the exact amount of Port clearing charges in shape of handling charges from the buyer of the coal along with Service Tax and Swachha Bharat Tax. The Dealer failed to produce the copy of bill of entry issued by the authority of Dhamara Port, proof of payment and Service Tax return. The First Appellate Authority accepted the finding of the Assessing Authority regarding addition of profit margin @ 14.16% as per Audited Balance Sheet for determination of sale suppression.

Further, the First Appellate Authority found that the Assessing Authority had not issued notice in Form IV-A for assessment of tax for escaped turnover. So, he set aside the impugned assessment raising demand and penalty and remitted the matter to the Assessing Authority with a direction to initiate proceeding u/r. 12(4) of the CST (O) Rules. The First Appellate Authority further observed that no appeal has been filed under the OET Act, so he thought that the assessment under the OET Act has not been made. As such, he directed the Assessing Authority to take up assessment u/s. 10 of the OET Act as per provisions of law if not completed earlier.

6. The Dealer assails the impugned order on the grounds that –

- (i) if the seller collected the freight and delivery charges separately as per the contract, the same cannot be treated as part of sale price;
- (ii) if the custom duty and handling charges collected from the buyer as per the Customs Act is inclusive in the sale price;
- (iii) the purchase turnover shall not be taken in the CST assessment and the assessment cannot be made in any other manner as made in 12(1) proceeding after its completion;
- (iv) the First Appellate Authority has no jurisdiction to direct the Assessing Authority to initiate the proceeding under the OET Act; and
- (v) the proceeding u/r. 12(3) of the CST (O) Rules has been initiated in absence of Audit Visit Report (AVR) and the First Appellate Authority passed direction to the Assessing Authority to initiate proceeding u/r. 12(4) of the said Rules by setting aside the order of 12(3) proceeding.

The State has also challenged the setting aside order of the First Appellate Authority for initiation of 12(4) proceeding and the Assessing Authority is competent to complete the assessment u/r. 12(3) of the CST (O) Rules. The State further pleads to restore the order of the Assessing Authority. The State has not pressed any other ground except challenging the set aside order of the First Appellate Authority.

7. As both the parties raise the jurisdiction of First Appellate Authority in initiating 12(4) proceeding while sitting in appeal in a proceeding u/r. 12(3) of the CST (O) Rules, this Tribunal feels it proper to adjudicate the said issue along with maintainability of 12(3) proceeding in absence of AVR.

Rule 12(3) of the CST (O) Rules mandates that the Assessing Authority requires to assess the Dealer if the tax audit conducted u/r. 10 results in detection of suppression of purchases or sales or both, or

erroneous claims of exemption or deductions under the Act and the Rules made thereunder, evasion of tax etc. So, the moot question for initiation of the proceeding u/r. 12(3) of the CST (O) Rules in absence of AVR is definitely answered in negative. Therefore, the First Appellate Authority is justified in setting aside the assessment passed u/r. 12(3) of the CST (O) Rules.

Now, the next point requires to be adjudicated as to whether the First Appellate Authority is competent to direct the Assessing Authority to initiate the proceeding u/r. 12(4) of the CST (O) Rules.

In this connection, Rule 22 of the CST (O) Rules provides that the provisions of OVAT Act, 2004 and the Rules made thereunder shall *mutatis mutandis* apply in respect of all procedural and other matters incidental to the carrying out of the purpose of the Act for which no provision is made in these rules or in the Central Sales Tax (Registration & Turnover) Rules, 1957. Section 77(7) of the OVAT Act provides the powers of the First Appellate Authority in disposing the appeal. The same is reproduced herein below for better appreciation :-

- “77(7) In disposing of an appeal, the appellate authority may, within a period of three years from the date of admission of such appeal or as the case may be, in pending cases within a period of three years from the date of commencement of the Odisha Value Added Tax (Amendment) Act, 2015, after giving the appellant a reasonable opportunity of being heard and after causing such enquiry as he may deem necessary –
- (a) confirm, reduce or annul the assessment of tax, or the imposition of interest or levy of penalty, if any; or
 - (b) enhance the assessment including any part thereof whether or not such part is the subject-matter in the appeal; or
 - (c) set aside the assessment and direct the assessing authority to make a fresh assessment after such further enquiry as may be directed.”

Bare reading of Section 77(7) of the OVAT Act reveals that the First Appellate Authority lacks jurisdiction to direct the Assessing Authority

to initiate 12(4) proceeding while disposing of an appeal challenging the assessment order passed u/r. 12(3) of the CST (O) Rules.

As the 12(3) proceeding is not maintainable in absence of AVR and the First Appellate Authority lacks jurisdiction to direct the Assessing Authority to initiate a proceeding u/r. 12(4) of the CST (O) Rules and it strikes the root of the case, so further adjudication of the dispute on merit is redundant. So also, the decisions relied on by the Dealer require no further discussions. Hence, it is ordered.

8. Resultantly, the appeal is allowed and the impugned order of the First Appellate Authority stands set aside. As necessary corollary, the order of the Assessing Authority is hereby quashed. Cross-objection is disposed of accordingly.

Dictated & Corrected by me

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

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Chairman**