

**BEFORE THE SINGLE BENCH: ODISHA SALES TAX
TRIBUNAL: CUTTACK.
S.A. No. 301(V) of 2018**

(Arising out of the order of the learned CT & GST
Territorial Range, Bhubaneswar,
in First Appeal case No. AA-106221522000151
disposed of on 08.08.2018)

P r e s e n t:

**Sri. S.K.Rout
Judicial Member-II**

M/s. Graftek Private Limited,
Brahmeswara Patna, Bhubaneswar. ... Appellant.

- V e r s u s -

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

For the Appellant ... Mr. Mukesh Agarwal, Advocate.
For the Respondent ... Mr. D.Behura, SC(CT).

Date of hearing: **27.01.2023** * * * Date of Order: **15.02.2023**

ORDER

The dealer prefers this appeal challenging the order dated 08.08.2018 passed by the learned Joint Commissioner of Sales Tax (Appeal), CT & GST Territorial Range, Bhubaneswar) in short, JCST/FAA) in first appeal case No.AA-106221522000151(VAT), thereby confirming the order of assessment dated 13.07.2015 passed by the learned Sales Tax Officer, Bhubaneswar-I Circle, Bhubaneswar (in short, STO/AO) under Section 42 of the OVAT Act (Set aside) for the tax period from 01.04.2007 to 30.06.2011 raising a demand of Nil.

2. The case at hand is that the dealer owns a printing press and carries on business of selling paper as well as undertakes job works of printing confidential papers (question paper) of the customers and delivers the same by performing and bestowing skill and labour in printing of the same in perfection to best of its ability. The dealer maintains separate books of account for the activity of sale of paper and for the job works of printing undertaken. For the selling activity of the dealer, purchase bills, and sale bills, stock account, way bill register etc

are being maintained. Tax is being collected from the customers on the taxable amount of sale of goods. The stocks of saleable goods are being kept separately. Whenever a customer supplies paper, a Receipt is being issued by the dealer and the same is taken into stock which are kept separately and after printing the same (on the customer paper) as per the *specification/ direction* of the customers, the printed materials of the customers, are delivered to the customers and a printing bill is raised towards the printing charges which is nothing but the reimbursement towards labour, service & other charges. Both the stocks of sellable paper of the dealer and the paper so received for printing are kept separately which are easily identifiable and can be ascertainable at any point of time. In the instant case, the appellant claim is that the printed materials are not taxable under the Act as because the same are confidential in nature and does not amount to commercial transaction or qualify to be 'goods' under the OVAT Act. Moreso, the printed materials are sold in course of inter-State trade and commerce therefore, not liable to tax under the OVAT Act. That the appellant has been assessed originally by order of assessment dated 25.09.2012 for the tax period 01.01.2007 to 30.06.2011 under the OVAT Act, 2004 against which the appellant filed first appeal bearing No. AA106111211000221/BH-1/12-13 disposed by order dated 08.10.2014. The learned first appellate authority remanded the matter to the assessing officer for reassessment. That being aggrieved by the said first appeal order dated 08.10.2014, revenue as well as appellant preferred second appeals before this Hon'ble Tribunal which were numbered as SA No. 322 (V) & 389(V) of 2014-15 respectively. Both the second appeals were heard by the Full Bench of this Hon'ble Tribunal and by order dated 19.08.2021 disposed the second appeals by annulling both the orders of the forum below. In course of the said hearing, it was agitated by the appellant that the original order of assessment is without jurisdiction for the following grounds (i) the AVR has been submitted beyond the period of Seven Days (ii) the assessment order has been passed after period of limitation of 6 months from the date of receipt of assessment notice (iii) tax free goods

have been taxed and inter-State sales cannot be taxed. Thus, the appellant submitted that in view of the above, the remand order passed by the appellate authority was not proper being beyond the scope of remand. Accordingly, the Hon'ble Tribunal by order dt. 19.8.2021 annulled the order of assessment and the first appeal order. That during the pendency of the aforesaid second appeal, the assessing officer, pursuant to the remand order of the learned first appellate authority, reassessed the appellant and passed reassessment order dated 13.07.2015, against which first appeal was filed being numbered as No. AA-106221522000151(VAT), disposed by order dtd 08.08.2018.

3. Being aggrieved by the orders dated 13.07.2015 & 08.08.2018 (set-aside reassessment order) passed by the forums below, the present second appeal bearing SA No. 301 (V) of 2018 has been filed by the appellant.

4. Cross objection is filed in this case by the State respondent.

5. Heard the contentions and submissions of both the parties in this regard. Perused the materials available on record and the orders of the forum below. Now, the question that twinkle for consideration before this Tribunal are:

(i) Whether, on the facts and the circumstances of the case, the impugned first appeal order dated 13.07.2015 and set aside reassessment order dated 08.08.2018 can be sustained in view of the original first appeal order dated 08.10.2014 being annulled by this Tribunal in S.A. No.322 (V) and 389(V) of 2014-15?

(ii) Whether, on the facts and circumstances of the case, the original first appeal order dated 08.10.2014 being annulled by this Tribunal in S.A.No.322(V) and 389(V) of 2014-15, the consequent direction issued there on to reassess the dealer survives?

(iii) Whether, on the facts and in the circumstances of the case, the impugned first appeal order dated 13.07.2015 and the set aside reassessment order dated 08.08.2018 becomes void ab initio in view of the second appeal order dated 21.10.2021 passed by this Tribunal in S.A.No.390(V) of 2014-15 passed in **Rainbow Offset Pvt. Ltd. Vrs. State of Orissa.**?

(iv) Whether, on the facts and in the circumstances of the case, the impugned orders are beyond the scope of AVR?

The admitted fact is that the original assessment order dated 25.09.2012 and the original first appeal order dtd 08.10.2014, have been annulled by this Tribunal by second appeal order dated 19.08.2021. The subsequent impugned re-assessment order [arising out of the directions of the first appeal order which has been annulled by this learned Tribunal) & first appeal order thereon do not survive. In the present second appeal, the appellant submits and prays that re-assessment order and the first appeal order are liable to be annulled being void ab initio. Since, this Tribunal has annulled the first appeal order pursuant to which the impugned re-assessment order has been passed, therefore, such direction and the consequent order also become void.

On perusal, it becomes evident that the above proposition has been set to rest by the Full Bench of Hon'ble Tribunal in case of **Rainbow Offset Pvt Ltd. v State of Orissa vide SA No. 390(V) of 2014-15 & SA No. 300(V) of 2018 disposed of by order dated 21.10.2021**, wherein the Hon'ble full bench has answered the same by holding thus:

11. We have heard the learned counsels for both the parties, gone through the grounds of appeal, order of assessing officer as well as the first appellate authority vis-a-vis the materials on record. In view of the rival contentions of the parties, the question that arises for consideration in the present second appeal is ... (ii) whether the S.A. No.390(V) of 2014-15 becomes infructuous in view of the fact

that the appellant did not stay the further proceeding of the reassessment before the assessing officer and during the pendency of this second appeal the assessing officer gave effect to the order of remand and dispose of the matter on merit?

12. Now, the second issue raised in the present second appeal as to whether the S.A. No.300(V) of 2014-15 will be infructuous because of the fact that the order of remand passed by the first appellate authority was given effect to by the assessing officer and the reassessment proceeding was completed when the second appeal was subjudiced? There is no dispute at bar that order of lower forum merges with the order passed by the higher forum. In the present case, the assessment order passed by the assessing officer merged with the order passed by the first appellate authority and the order passed by the first appellate authority will merge with the order to be passed in the present second appeal. The contention raised by the learned Counsel for the revenue-respondent that the second appeal No.390(V) of 2014-15 becomes infructuous after disposal of the reassessment proceeding before the assessing officer does not sound good and must fall to the ground. **Once the S.A. No.390(V) of 2014-15 is disposed of on merit, the order passed by the assessing officer after remand becomes nonest in the eye of law. Merely because, the dealer-appellant participated in the reassessment proceeding, his right to pursue the second appeal which was filed challenging the order of remand is not taken away.** The question of limitation is a mixed question of fact and law which can be raised at any stage of the proceeding. The dealer-appellant raised the question of limitation before the first appellate authority in First Appeal Case No. AA106111211000213/BH-I/12-13 and the learned first appellate authority under misconception of law decided the question of limitation against the dealer-appellant and while passing such order he did not take note of the law laid down by the Hon^{ble} Court in different judicial pronouncement. Therefore, the order of the first appellate authority cannot sustain in the eye of law. The learned Counsel for the Revenue relying on the judgment

reported in (1994) 95 STC 216 in case of Lipton India Ltd. V. Asst. Commissioner (CT), Penguin Paper Plast (P) Ltd. V. Commissioner of Commercial Taxes in W.P.(C) No.20514/2010 dtd.03.01.2011 argued that the dealer-appellant not having obtained the stay order from this Tribunal and the assessing authority having disposed of the reassessment proceeding on merit with full participation by the dealer-appellant he is precluded from raising question of limitation in S.A. No.390(V) of 2014-15 which has become infructuous. This court has inherent power to grant stay of further proceeding of mater pending before the assessing officer is not in dispute as observed in the preceding paragraphs. The right of the dealer-appellant cannot be taken away to pursue the S.A. No.390(V) of 2014-15 merely because the order of remand passed by the first appellate authority was given effect to and reassessment proceeding was completed with full participation by the dealer-appellant as he has not abandoned his right of pursuing the earlier second appeal filed by him before this Tribunal. **Whatever order has been passed by the assessing officer in reassessment proceeding pursuant to the order of remand by the first appellate authority will merge with the order to be passed by this Tribunal in S.A. No.390(V) of 2014-15. So the contention raised by the learned Counsel for the respondent is legally unsustainable.**

13. For the foregoing discussions, we are of the considered opinion that the order of assessment dtd.22.07.2012 passed by the assessing officer was squarely barred by time, hence without jurisdiction. Accordingly, the impugned orders of both the forums below are hereby set aside. **The order of assessment passed by the assessing officer being barred by time and nonest in the eye of law, the subsequent order passed by it after remand is also nonest in the eye of law. Accordingly, the order dtd.13.07.2015 passed by the assessing officer which was confirmed by the first appellate authority in its order dtd.08.08.2018**

being nonest in the eye of law are hereby set aside.

That the full Bench of this learned Tribunal has categorically and clearly held that “*the order of assessment passed by the assessing officer being barred by time and non-est in the eye of law, the subsequent order passed by it after remand is also non-est in the eye of law.*” The ratio of the decision is squarely applicable to the appellant’s case. In the present case also the original order of assessment has been declared and held by this Tribunal to be barred by time and non-est in the eye of law. Therefore, the subsequent order passed on remand is also non-est in the eye of law and is liable to be annulled.

This apart, it is pertinent to mention that the impugned orders travel beyond the scope of AVR which is not permissible in view of the judgment rendered in ***M/s. Balaji Tobacco Store v. STO (2015) 81 VST 170 (Ori.) & Bhusan Power & Steel Ltd. v. State of Orissa (2012) 47 VST 466 (Ori.)***.

15. That in view of the above analysis, the second appeal order dated 19.08.2021 passed in appellant’s case in SA No. 322 (V) & 389(V) of 2014-15 and second appeal order dated 21.10.2021 passed in Rainbow Offset Pvt Ltd. v State of Orissa vide SA No. 390(V) of 2014-15 & SA No. 300(V) of 2018, the impugned first appeal order dated 08.08.2018 and the (set-aside) reassessment order dated 13.07.2015 are hereby annulled. Accordingly, the cross objection is disposed of.

Dictated and Corrected by me,

Sd/-
(Shri S.K.Rout)
Judicial Member-II

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