BEFORE THE ODISHA SALES TAX TRIBUNAL: CUTTACK
(Full Bench)

S.A. No. 74 (C) OF 2006-07

(Arising out of order of the learned ACST, Balasore Range,
Balasore in First Appeal Case No. AA. 29-BAC/2004-05,
disposed of on dated 17.11.2005)

Present: Shri R.K. Pattanaik, Chairman,
Shri A.K. Dalbehera, 1st Judicial Member, and
Shri R.K. Pattnaik, Accounts Member-III

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

-Versus-

M/s. Annar Pharmaceutical (P) Ltd.,
Ganeswarpur Industrial Estate, Balasore ... Respondent

For the Appellant : Sri M.S. Raman, Additional S.C. (CT)
For the Respondent : N o n e

Date of hearing: 04.03.2020 ***** Date of order: 16.03.2020

O R D E R

Being aggrieved of the impugned order dated 17.11.2005 of the Assistant Commissioner of Sales Tax, Balasore Range, Balasore (in short, 'FAA') in First Appeal Case No. AA- 29- BAC/2004-05, who modified the assessment dated 27.01.2005 made by the Sales Tax Officer, Balasore Circle, Balasore (in short, 'AA') vis-a-vis the percentage Gross Turnover (in short 'GTO) with respect to the sample medicines the appellant has preferred the instant appeal on the grounds inter alia that it is erroneous and untenable in law and, therefore, deserves to be interfered with.

2. The State contends that the decision of the FAA is out rightly arbitrary, unjustified and illegal; the percentage fixed on GTO for the assessment year 2003-04 is based on an error committed by the FAA, inasmuch as, the authority under the Act and Rules does not have any discretionary power relaxing taxation. Lastly, it is contended that when the AA, who after considering the materials on record and nature of the transaction, held 1% of the GTO to be reasonable, the FAA could not have overruled and substituted and fixed it at 4% instead and, therefore, the impugned order dated 17.11.2005 is vulnerable and liable to be set aside.

3. The respondent is set ex parte by the order of the Tribunal dated 04.03.2020 on due satisfaction of sufficiency in service of notice. In fact, the respondent had challenged the initial assessment on the ground of arbitrariness which stood substituted by the impugned decision of FAA. The Tribunal is to determine as to whether the impugned order dated 17.11.2005 is sustainable in the eye of law?

4. The assessment record and the connected documents with respect to the respondent are available for the perusal of the Tribunal. As earlier mentioned, the period of assessment is 2003-04 and so far as the respondent is concerned, it deals in manufacturing and sale of allopathic medicines and maintains purchase, sale and stock account of business. In response to a notice under Rule 12(5) of the Central Sales Tax (Odisha) Rules, 1957 (in short, 'the Rules'), the respondent produced the purchase bills, register, sale invoice and sale register along with the auditor's report besides a copy of the balance sheet and the same

were examined. According to the AA, a fraud case report dated 20.01.2004 of the STO, Vigilance BD, Balasore (in short, 'STO(V)') was received, according to which, the respondent allegedly effected despatch of huge stock of medicines worth of ₹20,05,491.00 as sample medicines to outside the State of Orissa to M/s. Pan Pross Pharmaceuticals Pvt. Ltd., Howrah admitting no commercial value. The respondent allegedly claimed it as a deduction under CST Act having paid the Central Excise on the cost of medicines despatched on Sample Distribution Scheme. The AA considering the fraud case report and appreciating the materials on record arrived at a logical conclusion that the respondent purchased the raw materials and also the packing materials against 'C' forms at a concessional rate for manufacturing allopathic medicines which includes sample medicines and since, the stock as a whole attracts tax liability under the CST Act, no deduction is permissible, as the Act does not allow any such exception. At last, the AA bearing in mind the volume of total turnover under the CST Act and considering the value of sample medicines held that 1% of the GTO would be quite reasonable and just so as to allow deduction on account of distribution of sample medicines and so the balance turnover to be liable to tax at appropriate rate. The FAA, on the other hand, held 1% of the total GTO vis-a-vis the sample medicines to be unreasonable indicating that in the facts and circumstances of the case, as the AA had earlier allowed 4% inter-State sale during the previous year, could not have fixed it at the rate of 1% of GTO and resultantly, made it 4% and reduced the assessment to the aforesaid extent. The appellant questions the decision of the FAA as not only unreasonable but also grossly erroneous, while justifying the assessment made by the AA. As per

Rule 12(4) of the Rules, if a registered dealer does not furnish returns in respect of any period by the prescribed date, the authority concerned shall, after giving the dealer a reasonable opportunity of being heard, assess, to the best of his judgment, the amount of tax, if any, due from the dealer. In the instant case, according to the AA, the sample medicines having commercial value despatched in stock was taxable and since, it was not included in the returns, the assessment in question was made in terms of Rule 12(4) of the Rules and thus, assessed it at 1% of the GTO amounting to ₹2,92,060.02. The FAA, however, reduced it to 4% which is under challenge at the instance of the appellant.

5. The assessment and determination which is mandated under Rule 12(4) of the Rules does require best judgment assessment by AA taking into account all the materials available at his disposal. Without referring to too many decisions, it would be quite profitable to cite few decisions, such as, Bherothan Jethmal (Private) Limited Vs. State of Orissa reported in [1970] 26 STC 536 (Orissa), M/s. Allied Dealers Vs. State of Orissa reported in [1972] 29 STC 484 (Orissa) and New Orissa Traders, Sambalpur Vs. State of Orissa reported in [1975) 35 STC 335 (Orissa), according to which, best judgment assessment means a reasonable guess work without any caprice and vindictiveness. There is no tenebrosity in the settled principle of law as encapsulated by the Hon'ble Court in the aforesaid decisions to the effect that the AA shall have to consider all such necessary and relevant materials, while making the assessment in terms of Rule 12(4) of the Rules. In other words, the law is well settled that though the assessment involves certain element of guess work and could even lead to arbitrariness at times but the AA must apply

his best judgment to all the adverse and mitigating circumstances, while making the assessment. Keeping in view the above principles in mind, the Tribunal is required to consider, whether, the FAA was justified reducing at 4% of GTO in place of 1% vis-a-vis assessment and taxability of sample medicines despatched in stock by the respondent.

6. As per the AA, GTO of the respondent stands at ₹2,92,60,602.23 and allowed deductions at ₹24,54,160.00, ₹2,92,606.02 and ₹2,40,348.84 totalling ₹29,87,114.86 towards export sales, distribution of sample medicines and collection of sales tax respectively and thus, assessed the Net Turnover (in short, 'NTO') at ₹2,62,73,487.37. As the respondent-dealer failed to furnish 'C' declaration forms for inter-State sales, the AA, took entire NTO as taxable @ 10% amounting to ₹26,27,348.74 and as the respondent had collected tax of ₹2,40,348.84 and paid tax of ₹1,77,447.00 along with the returns and withheld tax of ₹6,29,001.84, raised the demand and rounded it off at ₹24,49,902.00 as per the terms and conditions of the demand notice. The only dispute is in relation to the sample medicines, whether, it should be made taxable at 4% or 1% of GTO. If it is more, then less tax is to be paid and it is less, certainly the respondent shall have to pay more and since the FAA fixed it at 4% of GTO, the appellant obviously being dissatisfied, preferred the appeal.

7. The impugned order dated 17.11.2005 cited a reason that the AA in one of such cases had applied 4% for the inter-State sale of medicines during the previous year and on that ground held 1% of the GTO as fixed by the AA to be unreasonable. However, the FAA neither referred to any materials as a whole nor

extracted the alleged transaction of the previous year before arriving at such a conclusion. In fact, the FAA does not indicate the reason behind the assessment at 4% of GTO except referring to a previous year transaction and assessment details of which is not disclosed. It is no doubt true that in such assessments, a guess work is required applying best judgment assessment keeping at bay caprice and unreasonableness in the decision making process. The AA rather elaborately considered different aspects of the alleged transaction besides the fraud case report. According to the AA, the sample medicines do carry commercial value, which was revealed from the invoice wherein the cost of the goods was defined and calculated with admitted payment of excise duty and, therefore, it was taxable. There is no denial to the fact that sample medicines are despatched by the dealers as a means of promotion of their products and normally, a reasonable quantity is earmarked for it. The contention of the learned Additional Standing Counsel (CT) that the sample medicines having been manufactured with the raw materials received at concessional rate attracts tax liability though appears to be attractive but in trade practices, such is treated as an exception. The only restriction which is put to is that a reasonable quantity of medicines to be distributed as samples, the real purpose being to prevent tax evasion. In so far as the invoice detected by the AA, it was assumed by him that since it is subject to excisable duty, the sample medicines is having commercial value. Normally, excise duty is paid at the time of manufacture of the goods, which in the present case seems, as such. The respondent also contended so. Though the raw materials and packing materials were purchased against 'C' forms at concessional rate and notwithstanding the fact

that excise duty was paid and invoice was raised, it was permissible for the respondent to despatch the sample medicines but again within a reasonable limit.

8. Returning to the principle of best judgment assessment, the Tribunal is to decide and determine, whether, the assessment should be at 4% or 1% of GTO vis-a-vis the sample medicines. The AA relied upon the fraud case report, confronted the same to the respondent and finally, applied 1% of GTO. The volume of the total turnover was found to be at 8.65% of GTO under CST Act and so he applied 1% GTO so as to allow the deduction on account of distribution of sample medicines. As the law allows a guess work with reasonableness, the AA to the best of his judgment, considered 1% of GTO in juxtaposition to 8.65% of total turnover. The distribution of sample medicines as being essential for promoting market of finished products was duly considered by the AA but having regard to the total turnover as against the volume of sample medicines, it was held that 1% of GTO would be quite reasonable and just. On the contrary, the FAA cited a previous year assessment without disclosing its detail and indicating if such consistency to be maintained or not in all circumstances, fixed it at 4% of GTO. In any case, the FAA does not appear to have applied independent mind to the materials on record, while making the assessment in terms of Rule 12(4) of the Rules. The AA rather taking into account the fraud case report and such other materials available at his end and having regard to the fact that the value and volume of the total turnover appears at 8.65% of GTO directed an assessment at 1% of the GTO which rather appears far more reasonable than that of the FAA. It can well be said that the AA applied best of his judgment by referring to the relevant materials and held 1% of

GTO with respect to the sample medicines as just and reasonable, which in considered opinion of the Tribunal, does seems to be in conformity with the standard norms and law. In other words, the Tribunal arrives at an inescapable conclusion that without any reasonable basis, the FAA was not at all right and justified to reduce the assessment, fixing it at 4% of GTO instead of 1%.

9. At first blush, the Tribunal thought it proper to remand the matter for an exhaustive recollection of evidence by the AA keeping in view the principles enumerated in the decisions (supra) of the Hon'ble Court so as to make it comprehensive. But, while considering so, the Tribunal made an attempt to assess the materials which appeared to have been dealt with by the AA. The FAA ought to have indicated the grounds upon which the percentage as to GTO was to be changed instead of simply substituting the decision of AA. In fact, the AA did the ground work and on a subjective satisfaction of the materials arrived at a just decision which could not have been subjected to a modification by the FAA without any rational basis as to the percentage of GTO vis-a-vis the sample medicines, as it may vary from case to case depending on variety of factors. It is not that in one case a particular percentage of GTO decided to be the basis in all other cases and circumstances. The settled law is that the nature and limitation of business besides other factors are to be kept in mind, while fixing the percentage for deduction. In the present case, the FAA, without assigning good grounds and understanding that the AA to be the best person to adjudicate and to render a decision best of his judgment, straightaway attempted to apply 4% instead of 1% of GTO, which in the considered opinion of the Tribunal, is wholly unjustified.

10. Hence, it is ordered.

11. In the result, the appeal stands allowed. Consequently, the impugned order dated 17.11.2005 promulgated in First Appeal Case No. AA- 29-BAC/2004-05 is hereby set aside. As a necessary corollary, the assessment dated 27.01.2005 is affirmed to the extent as to determination of the percentage vis-a-vis sample medicines with a direction to the AA for recomputation of tax demand taking into account acceptance of the 'C' forms at the 1st appeal stage.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(A.K.Dalbehera)
1st Judicial Member

I agree, Sd/-
(R.K. Pattnaik)
Accounts Member-III