

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

S.A. No. 310 OF 2002-03

(Arising out of order of the learned ACST, Ganjam Range,  
Berhampur in Sales Tax Appeal No. AA. 252/2001-02,  
disposed of on dated 28.02.2002)

Present: Shri R.K. Pattanaik, Chairman,  
Smt. Sweta Mishra, 2<sup>nd</sup> Judicial Member, and  
Shri R.K. Pattnaik, Accounts Member-III

M/s. Mahendra Traders,  
Desibehera Street, Berhampur ... Appellant

-Versus-

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

For the Appellant : Sri M.K. Panda, Authorized Representative  
For the Respondent : Sri M.L. Agarwal, Standing Counsel (CT)

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Date of hearing: 11.03.2020 \*\*\*\*\* Date of order: 19.03.2020  
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**ORDER**

To take a call on the fate of the appeal filed under Section 23(3)(a) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act'), the following points are to be considered by the Tribunal:

- (a) Whether the remand directed by the Assistant Commissioner of Sales Tax, Ganjam Range, Berhampur (in short, 'FAA') while disposing of the Sales Tax Appeal No. AA. 252/2001-02 upsetting the assessment of the Sales Tax Officer, Ganjam-I Circle, Berhampur (in short, 'AA') is justified in law?

- (b) .If at all the determination of Gross Turnover (in short, 'GTO') and Taxable Turnover (in short, 'TTO') by the AA were based on materials on record or supported by necessary evidence, as is required under law?
- (c) Was it sufficient on the part of the AA to rely upon the fraud case report while arriving at a decision as to the extent of exigibility of tax vis-a-vis the appellant and whether, while doing so, best of his judgment was exerted?

2. In fact, the appellant questions the legality of remand without confirming to the amount of taxability based on books of account and other relevant documents so produced before the AA on the grounds inter alia that the decision regarding enhanced TTO and tax liability merely on the strength of an investigation report without being supported by any material particulars to be palpably wrong, erroneous and illegal and such illegality was in a way perpetuated by the impugned order dated 28.02.2002 promulgated by the FAA.

3. The State, on the contrary, resisted the grounds in appeal and contended that more or less the decision of the FAA does appear to be in consonance with sound principles of law. It is contended that the decision of enhancement as to GTO and consequently TTO based on meagre evidence and required further elicitation which was rightly understood and taken cognizance of by the FAA and accordingly, a remand was directed for a fresh determination on the subject matter in dispute. According to the State, it was in the best interest of the appellant and taking into account, the possibility of tax evasion and imminent

revenue loss, the FAA rightly decided to set aside the determination on the assessment vis-a-vis the appellant for the year 1999-2000 with an order for further investigation delineating specific points for the same.

4. Sri M.K. Panda, Authorized Representative, while defending the appellant contended that there was no basis to direct for further investigation, particularly when, the FAA arrived at a definite conclusion regarding proper maintenance of complete set of books of account including stock account by them, as required under the law. It is claimed that the investigation report was unduly considered by the AA and liability as to tax was imposed on the appellant without any ground or basis especially when the books of account and all other formal documents found to have been duly maintained. The aforesaid fact, as contended by Sri Panda, was completely lost sight of by the FAA, while directing a remand and for further investigation by highlighting certain aspects of the matter. The learned Standing Counsel (CT), on the other hand, justified the remand on the ground that it would serve best purpose to safeguard the interest of the parties on the whole. The Tribunal is to determine as to what would have been the right course of action, whether, the remand to be proper or instead, the enhanced assessment was to be rejected, confirming the assessment so claimed by the appellant based on the books of account.

5. As per the AA, the Inspector of Sales Tax, Intelligence, Berhampur furnished a fraud case report against the appellant for the assessment year 1999-2000 according to which purchase of 'supari' worth of ₹2,01,19,024.00 from M/s. CAMCO Ltd., Mangalore during the year under assessment was revealed, whereas,

the returned GTO stood at ₹9,55,207.85 for which the entire purchase so made was held to be out of account transactions and on verification of the books of account, it was further revealed that out of 191 transactions covering the entire purchase, only two stand accounted for at ₹54,799.00 and ₹49,809.00 in respect of transactions dated 19.05.1999, which means, for the remaining 189, the purchases could not come forth and substantiated, as the appellant denied about such consignments outrightly. For the reasons indicated in the assessment dated 20.06.2001, the books of account was rejected and the AA proceeded to complete the assessment to the best of his judgment in accordance with Section 12(4) of the Act and arrived at a conclusion that the suppressed purchases stand at ₹2,00,14,426.00 and considering the possibility of such clandestine transactions, estimated the purchase suppression at ₹50,00,000.00 and then, assessed the GTO and TTO respectively and fixed the tax demand at ₹27,02,392.00 payable by the appellant as per the terms and conditions of the demand notice. The FAA noticed certain shortfalls in the decision of the AA on the ground that some more evidence was required than the one in hand in order to fix the liability. It was also held that the appellant did not have the opportunity to confront the fraud case report and all such documents allegedly received from the selling dealer, namely, M/s. CAMCO Ltd., Mangalore. The specific points on which further investigation is necessary were stated precisely by the FAA in the impugned order dated 28.02.2002.

6. It is the primary responsibility of the State to prove and establish that the purchases alleged to have been made by the appellant have been suppressed

and unaccounted for, or in other words, the alleged purchases are the result of out of account transactions and such burden of proof does not shift to the dealer and once the burden is discharged, then onus lies on the part of the dealer to disprove it by leading rebuttal evidence. In the instant case, no doubt there was a fraud case report against the appellant for the alleged year of assessment and as per the report, good number of transactions alleged to have been entered to, which according to the Inspector of Sales Tax, Intelligence, Berhampur were not duly accounted for, thus, it resulted in suppression of purchases in order to avoid payment of tax. Admittedly, invoice Nos. G-09401 and 09403 dated 19.05.1999 found place in the books of account and the rest are not, the alleged transactions of which have been completely disputed by the appellant but then the AA arrived at a prima facie conclusion that the transactions do relate to the dealer in question and such a decision was based on a Sundry Debtor Register (in short, 'SDR'). Such a register is normally maintained which is to indicate the details of the dealers with whom transactions have been effected to on credit. So far as the appellant is concerned, whether, the entire of the transactions including 189, as made to appear from the SDR, to have been gone into by him as against M/s. CAMCO Ltd., Mangalore. There is a need of substantive proof or at least reasonable evidence to prove and establish that the alleged transactions had taken place in the assessment year and the appellant to be the purchasing dealer. Merely on the strength of the fraud case report and nothing more, such a conclusion cannot be arrived at before fixing tax liability vis-a-vis the appellant. Indeed, the SDR was to be confronted to the appellant and that apart, the authority concerned was required to satisfy itself

about the genuineness of the transactions allegedly with the appellant. There has been no detailed examination with reference to the SDR and particularly, as regards the banking transactions and receipt of payments by the selling dealer and whether, the bank drafts had really been honoured at Berhampur in relation to the alleged transactions. The appellant that apart did not have the opportunity to go through the SDR confronting the selling dealer and also its agents which was a duty enjoined on the AA. Had the materials been confronted to the appellant, then real facts would have been elicited by the AA. In fact, as rightly pointed by the FAA, there was a need of further investigation with respect to the alleged transactions in order to reveal the mode of transactions taking place between the parties and if at all the consignments of betel nut really despatched, received and procured by the appellant at Berhampur. In absence of any such details regarding the transportation with regard to the alleged 189 consignments and if at all, it were transported by the selling dealer having been duly received by the appellant at Berhampur, it was not correct and justified on the part of the AA to fix and impose the liability of tax to the tune of ₹27,02,392.00. Unless until such material is brought on to record with a reasonable opportunity being provided to the appellant to defend and if necessary, to lead rebuttal evidence, any decision to fix the liability on him would certainly lead to miscarriage of justice.

7. In absence of sufficient materials, the AA could not have proceeded to apply best of his judgment to determine the GTO and TTO with reference to the suppressed purchases by the appellant. It is well settled law that the best judgment assessment should be based on certain materials and little bit of guess work and

while doing so, there should not be any element of caprice and arbitrariness. In catena of decisions, the Hon'ble Court observed that in best judgment assessment, estimation of turnover has to be based on principles laid down in the cases of Raghubar Mandal Harihar Mandal Vs. State of Bihar: [1957] 8 STC 770 (SC) and Commissioner of Sales Tax Vs. H. M. Esufali and H.M. Abdulali: [1973] 32 STC 77 (SC). In the decisions (supra), the Hon'ble Apex Court categorically held that all such aspects of the trade or business for a particular assessment year besides the conduct of the dealer, volume of business, nature and limitation of business and also past record and such other similar factors are to be taken into consideration to determine an estimate which shall not be arbitrary and unreasonable, though, apparently a product of guess work. In the case at hand, the basic facts necessary to enhance the estimate was found to be wanting and, therefore, further investigation was directed and thus, the Tribunal has to conclude that with such quality of evidence, the AA ought not to have proceeded to determine the GTO and TTO, which again, in the facts and circumstances of the case, does not appear to be in accordance with the aforesaid principles of law as laid down by the Hon'ble Apex Court. So the inevitable conclusion is, there has been no error or illegality committed by the FAA with a direction to seek a fresh report with vital evidence with regard to the alleged 189 consignments and then to complete the assessment afresh.

8. Hence, it is ordered.

9. In the result, the appeal stands dismissed. As a corollary, the impugned order dated 28.02.2002 in Sales Tax Appeal No. AA- 252/2001-02 is

hereby confirmed. However, it is directed that the fresh assessment for the year 1999-2000 as against the appellant is to be expedited and completed by the AA on receiving further investigation report preferably within a period of 03 months from the date of receipt of the order considering the fact that the matter being nearly two decades old.

Dictated & Corrected by me

Sd/-  
(R.K. Pattanaik)  
Chairman

Sd/-  
(R.K. Pattanaik)  
Chairman

I agree,

Sd/-  
(Sweta Mishra)  
2<sup>nd</sup> Judicial Member

I agree,

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