

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

S.A. No. 1811 OF 2006-07

(Arising out of order of the learned ACST, Appellate Unit,
Bhubaneswar in First Appeal Case No. AA. 244/BHII/05-06,
disposed of on dated 20.04.2006)

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

M/s. Avtar Trading Suppliers and Liasioners,
21, Forest Park, Bhubaneswar ... Appellant

-Versus-

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

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

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

ORDER

Instant appeal under Section 23 of the Odisha Sales Tax Act, 1947 (hereinafter called as 'the Act') assails impugned order dated 20.04.2006 promulgated in First Appeal Case No. AA. 244/BHII/2005-06 by the Assistant Commissioner of Sales Tax, Appellate Unit, Bhubaneswar (in short, 'the FAA') who confirmed the assessment made under Section 12(4) of the Act of the Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar (in short 'the AA') for the assessment year 2003-04 on the grounds inter alia that it is wrong, illegal and arbitrary and, therefore, liable to be annulled.

2. The appellant contends that the enhancement of Taxable Turnover (in short, 'TTO') figure has been arrived at without any material basis; that the FAA after being satisfied on proper verification of the books of account and related documents, confirmed the demand, which is against the natural justice; that the FAA simply dismissed the appeal on the ground that the AA has judiciously computed TTO and completed the assessment which needs no interference which is per se bad in law. Lastly, it is contended that the order of assessment of the AA is unlawful, unwarranted, arbitrary and liable to be set aside.

3. The State contends that the appellant, who is a dealer, suppressed the returns with regard to a transaction in the assessment year 2003-04 which could be unearthed subsequent to a fraud case report furnished by the Investigation Unit referring which the AA enhanced the sales turnover 10 times of the suppression to the tune of ₹11,78,542.00 which is absolutely proper and perfectly justified. It is contended that the AA took cognizance of all the materials on record and then, arrived at such a conclusion with an enhanced estimate which has been confirmed by the FAA and, therefore, there is no good ground does really exist to intervene and interfere with the impugned order dated 20.04.2006 and thus, it is to be affirmed.

4. The appellant is absent. From the record it is revealed that the appellant was noticed by the Tribunal which is proved to be served upon him on 23.11.2019. As per order No. 13 dated 11.12.2019, the notice having been served upon the appellant, the Tribunal declared it to be sufficient, on receipt of the AD which has been kept in record and then, proceeded to hear the appeal to ensure

its disposal on merit. In other words, the appeal is to be disposed of in the appellant's absentia. However, the State participated and opposed the grounds of appeal and claimed its dismissal.

5. The assessment record is perused. On its perusal, the Tribunal finds the Tax Evasion Report (in short, 'TER') prepared and submitted by the Sales Tax Officer, Investigation Unit, Bhubaneswar apparently suggested to be the cause of action for enhancement as to the TTO considering the suppression made by the appellant with regard to the transaction in the assessment year of 2003-04. As per the TER, the appellant is alleged of filing 'NIL' returns for the impugned period which was found to be false, fabricated and intended for tax evasion. The AA considered the TER and arrived at a logical conclusion with reference to the aforesaid assessment year and then, having regard to the alleged suppression, enhanced the sales turnover 10 times and directed the appellant to pay the tax and surcharge combined at ₹15,55,675.00 in terms of the demand notice. The said decision of the AA has been questioned by the appellant in the present appeal on the stated grounds, which have been discussed earlier.

6. The learned Additional Standing Counsel (CT) strongly contended that for the suppression in question which is with respect to the payment received by the appellant from the Executive Engineer, GED No.1, Bhubaneswar towards supply of electrical goods amounting to ₹11,78,542.00 during the year 2003-04, the AA rightly and correctly enhanced the sales turnover to 10 times and issued the demand notice for payment of ₹15,55,675.00 which is absolutely just and proper in the eye of law.

7. The question is, whether such enhancement as to the sales turnover 10 times of the suppression amount by the AA in accordance with Section 12(4) of the Act to be justified in law? As per sub-section (4) of Section 12 of the Act, if a registered dealer does not furnish returns in respect of any period by the prescribed date, the concerned authority shall, after providing him a reasonable opportunity of being heard, assess to the best of his judgment, the amount of tax, if any, due from him. In the instant case, the suppression as to the alleged transaction of the year 2003-04 seems to have been reported through TER which is apparently influenced the AA to go for enhancement of the sales turnover with a multiplier of 10. According to the appellant, the FAA having been satisfied with the books of account and connected documents, on its proper verification, could not have confirmed the impugned demand which is clearly against the settled norms of law.

8. The Tribunal is to find out and ascertain, if at all the AA, in a justifiable manner, raised the sales turnover 10 times, considering the suppressed amount applying his best judgment, as is mandated under Section 12(4) of the Act. In fact, looking at the aforesaid provision, it conveys that there is no established procedure for the AA to follow, while making the assessment, in case of suppression alleged against a dealer. In other words, to the best of his judgment, the AA, after providing the dealer a reasonable opportunity of hearing, shall have to assess and determine, the amount of tax, after being satisfied that the returns to be unreliable and not dependent for having not been duly furnished within the prescribed date. If a suppression is alleged and prima facie proved and established,

again a question would emerge, regarding the manner and method, in which the sales turnover to be enhanced in order to fix the liability on the dealer.

9. As earlier discussed, the AA is to apply best of his judgment to assess and determine, the amount of tax, if any, leviable on the dealer. In this regard, there is a judgment legal classicus reported in the case of Commissioner Income Tax, CP Vrs. Badridas Ramrai Shop, Akola reported in [1939] 7 ITR 613 (Nagpur) wherein the Privy Council lucidly explained as to what is best of a judgment for the AA to apply, while considering a matter, with reference to Section 23(4) of the Indian Income Tax Act, which has been followed in catena of decisions. The Hon'ble Court in Bherothan Jethmal (Private) Limited Vs. State of Orissa, reported in [1970] 26 STC 536 (Orissa) held and observed that estimate of suppression must bear a reasonable nexus to the materials available and merely because a dealer or assessee is found to have made certain suppression, the assessment cannot be raised to any extent as a punitive measure. It is further held therein that the limits of the power to assess the dealer are implicit in the expression 'best of the judgment' and referring to Section 12(2)(b) of the Act concluded that the power conferred on the AA is based on judgment which do not depend on arbitrary caprice. In that, it is further concluded that the decision has to be with wisdom, truly and legally and though there is an element of guess work in a best judgment assessment, it shall not be a wild one but shall have a reasonable nexus to the available material and circumstances of each case. Ref: The State of Kerala Vs. C. Velukutty, [1966] 17 STC 465 (SC). In a subsequent decision of the Hon'ble Court in the case of M/s. Allied Dealers Vrs. State of Orissa reported in

[1972] 29 STC 484 (Orissa), the above principle was reiterated, while considering rejection of books of account vis-a-vis enhancement of turnover with a rational nexus to the available materials. The most prominent aspects of best judgment assessment have been vividly described and discussed in a decision of the Hon'ble Court in the case of *New Orissa Traders, Sambalpur Vs. State of Orissa* reported in [1975] 35 STC 335 (Orissa) wherein it is categorically held and observed that once the accounts are discarded, the AA is obliged to complete the assessment according to the best of his judgment and in such an assessment there is bound to be some amount of arbitrariness and guess work in juxtaposition to regular assessment, which is based on the accounts of the assessee. It is further elaborated by the Hon'ble Court that when for defects in account the books are rejected that foundation is no more available and the AA has, therefore, to work out a reasonable estimate and as long as the estimate has a nexus to the suppression detected, it is fair and not capricious and under such circumstances, there cannot be any scope for interference. In the case (supra), the Hon'ble Court referred to a decision of the Hon'ble Apex Court in the matter of *Commissioner of Sales Tax Vs. H.M. Esufali and H.M. Abdulali*, reported in [1973] 32 STC 77 (SC) wherein it is expounded that the assessee cannot require the AA to support his estimate by evidence. The Hon'ble Court in the aforesaid case finally concluded that in view of the ratio decidendi laid down by the Hon'ble Apex Court in the case referred to above, if the estimate is to be supported, it ceases to be a best judgment assessment and in every best judgment assessment, there is an element of arbitrariness and guess work but the AA has the obligation to work out an honest

estimate and in a manner, which is not capricious, dishonest or vindictive; he has obviously to take the dealer's past records, local reputation, opportunities of making clandestine transactions, limitation of the business, nature of the business carried on, etc. into account and when such judgment is completed, taking the above aspects into consideration and a nexus is maintained between the estimate and the escaped turnover, interference is totally foreclosed. It is also concluded that the estimate shall have to be made by the AA which cannot be substituted. So having regard to the above principles, the Tribunal is to take a call, as to whether, the AA rightly and justly had best of his judgment in order to assess the estimate and the enhancement of the sales turnover considering the escaped amount vis-a-vis the appellant.

10. As previously indicated, the AA practically based his judgment on the TER dated 03.08.2004. The STO, who submitted the TER, considered the returns and report furnished by the Executive Engineer, GED No.1, Bhubaneswar and finally, identified the suppression of sales to the tune of ₹11,78,542.00 for the year 2003-04. The information of payment particulars and TDS of contractors for the year 2002-03 and 2003-04 was obtained by the STO, which is available in the assessment record. The AA, as it seems, was entirely dependent on the TER and the connected materials and ultimately, arrived at a decision and then, imposed the tax and surcharge on the enhanced sales turnover 10 times of the escaped amount of ₹11,78,542.00. The order of the AA does not reveal the materials upon which such an assessment was made excepting the TER so submitted by the STO. In other words, relying upon and referring the TER, the AA enhanced the sales

turnover 10 times to the suppression. The AA does not appear to have considered the appellant's past records, image and reputation in public, possibilities of him having fraudulent and clandestine transactional activities with reference to the nature and limitation of business etc. while assessing the estimate. Not a scrap of evidence is on record even to remotely suggest that any such manner, as discussed above, to have been followed by the AA before enhancing the sales turnover applying best of his judgment. As the Hon'ble Court in the cited decisions highlighted the intent and purpose and the objective in so far as best judgment assessment is concerned, the AA, without having any such due assessment made to relate a reasonable nexus with estimate of suppression, directed the appellant to pay the determined tax and surcharge to the tune of ₹15,55,675.00. Such an assessment of the AA, in the considered opinion of the Tribunal, does not confirm to the standards laid down by the Hon'ble Court in the aforesaid decisions. It is to be held that some evidence ought to have been collected by the AA bearing in mind the nature of the business and should have considered all such aspects, like reputation, opportunities to make clandestine transactions etc. with past records of the appellant before enhancing the sales turnover 10 times, which at no stretch of imagination, can be treated as a case best judgment assessment. Only the TER has been referred to and relied upon by the AA without independently holding an enquiry into the matter and collecting necessary evidence to consider, if at all there is escapement and enhancement of sales turnover with a multiplier of 10, which is again unsubstantiated with any reasonable basis. Having held so, the Tribunal further to conclude that the FAA completely lost sight of the aforesaid principles on

best judgment assessment and erroneously confirmed the enhancement so ordered by the AA vis-a-vis the appellant. That being so, in absence of any materials to consider and determine the enhancement of sales turnover and assessment as to estimate, the Tribunal has no other alternative, except to remand the case for a fresh determination by the AA.

11. Hence, it is ordered.

12. In the result, the appeal stands allowed. Consequently, the impugned order dated 20.04.2006 in First Appeal Case No. AA. 244/BHII/05-06 for the assessment year 2003-04 is hereby set aside. For the reasons aforesaid and as a necessary corollary, the case is remitted to the AA for a fresh determination with regard to the alleged escapement and the extent of enhancement as to the sales turnover vis-a-vis the appellant keeping in view the settled principles of law, as discussed herein above, and to expedite its disposal preferably within a period of three months from the date of receipt of the order, since it is a matter of almost two decades old.

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