

escaped turnover determined by the assessing authority on the basis of A.G. Audit report is mechanical and faulty?

- (ii) Whether the very initiation of the reassessment proceeding is bad in law as it amounts to mere change of opinion being swayed away by the audit report only?

2. The assessee-dealer M/s. Mazda Concrete Products (P) Ltd. is a manufacturer and seller of PSC sleepers. It was subjected to audit assessment u/s.42 of the OVAT Act for the tax period from 01.05.2010 to 31.05.2012. But, in a later period, on the basis of objection report from the A.G., Odisha, Bhubaneswar proceeding u/s.43 of the OVAT Act was initiated for the self-same period with the allegation of sale suppression of scrap for Rs.69,80,109.00 and non-levy of tax on rental income for Rs.18,89,688.00. However, the learned assessing authority dropped the charge like non-levy of tax on rental against transfer of right to use, but it has found the dealer guilty of sale suppression and reduced the amount to Rs.11,69,151.00 only. In the result, the assessing authority raised demand towards tax and penalty of Rs.1,40,298.00.

3. Felt aggrieved, the dealer carried the matter in appeal before the first appellate authority. Learned Addl. Commissioner of Sales Tax (Appeal), South Zone, Berhampur as first appellate authority in the impugned assessment order, found the findings of the assessing authority on the question of suppression/escaped turnover is without any detailed basis. So, he remanded the matter to the assessing authority for determination of escaped turnover afresh.

4. On this backdrop, the assessee-dealer by not finding the order of first appellate authority up to his satisfaction knocked the door of this Tribunal.

5. It is contended by the appellant that, the initiation of reassessment is illegal. The reopening of assessment is mechanical on

the basis of report of A.G. team which is not tenable in law. It is further contended that, the escaped turnover determined is without any basis, the A.G. Audit report is biased as it acted upon the consolidated composite C.A. report of the dealer's unit is in the State of Karnataka. It is claimed, if the details of audited balance sheet of the dealer relating to the trade activities in Odisha if considered, no suppression will be found. It is also contended that, in the regular audit assessment the taxing authority has taken consideration of the audited balance sheet, books of account and connected documents. So, the A.G. Audit report is based on surmises and conjectures. It is prayed for dropping of the reassessment proceeding as bad both in law and fact.

6. The Revenue in the Cross Objection challenged the grounds of appeal was not sustainable in law and thus supported the assessment of learned assessing authority.

7. Learned Counsel for the dealer Mr. Joshi vehemently argued that, the reopening of the audit assessment on the basis of report of the A.G. team by the assessing authority is purely mechanical. The assessing authority has not formed any opinion while reopening the assessment. Learned Counsel for the dealer placed reliance on many of the judicial pronouncements in this regard, wherein and whereby the Hon'ble Court and Apex Court have laid down the principles to be followed for reopening in necessary case.

8. It is pertinent to mention here that, the plea regarding maintainability of the proceeding is not dealt with by the fora below.

A forum cannot be denied to a litigant. So, there is no reason before this Tribunal to decide this appeal on merit as the impugned order does not contain any finding with reasons on the question of law and fact.

9. From the discussion above, it is believed that, the matter should be remitted back to the first appellate authority who in turn will

decide the question in accordance to the ratio laid down by the authorities time to time.

10. The next question raised by the dealer is, the determination of escaped turnover is based on surmises and conjectural report of the A.G. report. The A.G. Audit team and thereafter the assessing authority both have acted the combined C.A. report of the dealer which includes the transactions in Odisha as well as the dealer's other unit in Karnataka.

11. Learned Counsel for the dealer vehemently submitted that, the balance sheet for Odisha was duly presented in the audit assessment and it was accepted on due verification by the taxing authority. Nothing new has been brought into the record to show that, the dealer is involved in any kind of clandestine business transaction. The determination of escaped turnover on the basis of combined C.A. report reflecting the miscellaneous income as escaped turnover is erroneous. There is no point of disagreement with the learned Counsel for the dealer that, the determination of escaped turnover by the assessing authority is a whimsical and not a detailed one. On the other hand, the learned first appellate authority who in law can be termed as an extended forum of assessment is also found to have de-reelected from his duty under law by not deciding this question of fact in the circumstance discussed above.

12. No man can be a judge of his own cause, so it will be wrong to remand the matter to the assessing authority so far as the determination of maintainability of the reassessment proceeds as discussed above. Thereafter, when the question is the reopening of assessment is wrong then it is to be determined by the first appellate authority. Consequently, the other questions also should be determined by the first appellate authority. Hence it is held as follows.

The impugned order suffers from illegality as discussed above, hence set aside. The matter is remitted back to the first appellate authority who will do well to decide the question of maintainability and then the escaped turnover if any, afresh. Further, learned first appellate authority will extend proper opportunity to the dealer to explain the facts relating to the discrepancies reported by A.G. audit comparing with C.A. report depicting miscellaneous expenses, by a reasoned order.

The appeal is disposed of accordingly.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

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