BEFORE THE ODISHA SALES TAX TRIBUNAL (FULL BENCH), CUTTACK

S.A.No. 1617/2006-07

P R E S E N T :

Smt. S. Misra, Chairman — Sri S. Mohanty, 2nd Judicial Member — & — Sri R.K. Rout, Accounts Member-II

(From the order of the ld.ACST, Sambalpur Range, Sambalpur, in Appeal No. AA.492 (SAII) of 05-06, dtd.10.10.2006, confirming the assessment order of the Assessing Officer)

M/s. Pramod Kumar Sahu,
Ambapali, Dist. Bargarh. … Appellant

-Versus –

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

(Assessment Year : 2004-05)

Appearance :
For the Appellant … Mr. B.B. Panda, Advocate
For the Respondent … Mr. M.S. Raman, A.S.C. (CT)

Date of Hearing: 22.11.2018 Date of Order: 29.11.2018

ORDER

This second appeal is preferred by the dealer against a confirming order of the learned First Appellate Authority/Asst. Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, FAA/ACST) whereby the tax liability assessed by Sales Tax Officer/Assessing Authority, Sambalpur-II Circle, Bargarh (in short, STO/AA) the Assessing Officer determined in an assessment u/s.12(4) of the Odisha Sales Tax Act, 1947 (in short, OST Act) by applying provision under Rule 90-AA of the OST Rule in place of and instead of applying provision u/s.5(1) of the OST Act is confirmed.

2. Backdrop of the case giving rise to this appeal are :

The appellant herein was a manufacturer and seller of outstill liquor and was subjected to assessment u/s.12(4) of the OST Act for the period 2003-04. The AA on application of the provision u/r.19-AA of the OST Rules, determined the tax liability and in the result, the balance tax due of the dealer after adjusting the tax already paid was determined at Rs.5,20,422/-. It was an ex-parte order of assessment. The dealer being aggrieved preferred appeal before the ld.ACST/FAA who in turn, also took the same view and confirmed the order of assessment with the finding that, assessment of tax by applying provision u/r.90AA is mandatory and the dealer has no choice to opt for usual method of assessment as per Sec.5(1) of the OST Act. The order of the appellate authority was also an ex-parte order, since the appellant-dealer did not appear before the authority. Thereafter the dealer preferred this second appeal challenging the sustainability of the order of confirming order of FAA. It is contended by the dealer that, the authorities below have gone wrong by applying provision of Rule 90--AA of the OST Rules in stead of Sec.5(1) of the Act and thereby raised demand of extra tax. It is the dealer at his choice opt for method of calculation of the tax liability i.e. either Rule 90-AA or usual method of assessment u/s.5. Such choice is at the option of the dealer, the mandatory application of Rule 90 by the AA is illegal. It is further contended that, both the fora below has not given proper opportunity of being heard to the dealer by passing ex-parte order which is violative of principle of natural justice.

3. The questions required to be decided in this appeal are, as to whether as held by the learned Authority below, a dealer who carries on business in outstill liquor has no option to be assessed in the usual manner under Odisha Sales Tax Act but has to pay a sum by way of compound leave in accordance with Rule 90-A of the Odisha

Sales Tax Rules and if the Ex-parte order is violative of principle of natural justice.

Findings :

4. To substantiate the plea of the dealer, learned Counsel for the dealer Mr. B. Panda placed his reliance on the Circular issued by Commercial Taxes, Orissa vide No. V(I) 14/2003 12534/CT, Dated, the 20/6.2003 and the authorities like **Commissioner of Sales Tax, U.P. Vrs. Indra Industries, (2001) 122 STC P.100 (S.C.)** and in **Binani Industries Limited Vr. Asstt. Commercial Taxes & Others (2003) 129 STC P.199 (Krnt.)** and argued that, keeping view the ratio in the decisions above, the circular has binding nature on the taxing authority and as per the circular it is the option of the dealer to be assessed either compounding the tax or by usual method of assessment. Learned Counsel also placed reliance on two of the decisions of this Tribunal passed by Full Bench on earlier occasion dealing the same issue relating to this dealer for period of assessment in S.A.No.2168/2004-05 dtd.19.03.2007 and for the period 2005-06 in S.A.No.1616/2006-07 and argued that, in both the cases the Full Bench of this Tribunal has decided the issue in favour of the dealer and the dealer was permitted to adopt the usual method of assessment.

Delving into the case in hand, the order of the learned ACST categorically reflects that in spite of opportunity given, the appellant-dealer had chosen not to participate in the hearing of the appeal. Needless to say that sufficient opportunity of hearing though required to be given in an appeal but the same does not extend to the extent that till a person does not make his submission the appeal should kept pending. Extending the principle of natural justice to such an extent would frustrate the ends of justice and also contrary to the principle and would give a scope to recalcitrant litigant who in a designed manner never participate in the proceeding and thereby fettered the

authority to decide a matter. In such circumstances, we cannot agree with the submission of the learned Counsel that the order of the learned ACST is unsustainable as the same was passed without giving him an opportunity of hearing. The statute also authorize the first appellate authority to decide an appeal on merit which has ripen for hearing on merit even in the absence of the party filing the same if in spite of opportunity, the appellant does not appear. The memo of appeal is adduced or proved to justify the allegation that principle of natural justice is violated as such the same is turned down as baseless.

5. Since in this case the dealer disputes the stand of the Revenue to assess him under Rule 90-AA of the OST Rules in the absence of any written option, it would be profitable to quote the relevant provisions of the statute in this regard. Sec.5(1) of the OST Act which deals with the rate of tax and provision of compounding. The relevant portion are quoted hereunder :-

> **"5. Rate of tax –**
> (1) The tax payable by a dealer under this Act shall be levied on his taxable turnover at such rate, (not exceeding seventy-five percent in case of liquor and twenty-five per cent in case of other goods), and subject to such conditions as the State Government may, from time to time, by notification, specify.
>
> Provided that the State Government may direct that in such circumstances, and under such conditions and for such period as may be prescribed, a dealer shall pay in lieu of the tax assessable on his taxable turnover, a sum fixed in such manner as may be prescribed and in such a case the tax shall be deemed to have been compounded. Provided further that a dealer, who is subject to payment of a sum fixed as aforesaid, may, by a written application to the prescribed authority made within the prescribed period, opt to being assessed in the usual manner under the provisions of this Act in respect of the year in which such option is exercised".

The State Government in exercise of power conferred in the 1st proviso, in respect of outstill liquor dealer provided a provision for compounding by inserting Rule 90-AA in the OST Rules which reads as thus :-

> **"90-AA Compounding of tax on outstill liquor :**
>
> A dealer who carries on business in outstill liquor and who is liable to pay tax under the provisions of the Act shall, with effect from the year 2002-03, pay in lieu of the tax assessable on his taxable turnover under the provisions of the Act, a sum equal to twenty per cent of one and one half times of the consideration money payable to Government in the Excise Department for obtaining the exclusive privilege to vend such commodities".

6. It is well settled that, proviso appended to a section is a rider on the section and it has got guiding force while interpreting the section. The first proviso to Sec.5 empowers the appropriate State Governments to prescribe rule and in accordance to that Rule 90-AA as engrafted in the tax book has got binding effect, which is mandatory in nature as contemplated in express terms. But nevertheless, such binding nature of proviso 1, Proviso 2 to the section gives a choice to opt for assessment in the usual manner by a written application to the prescribed authority. Thus, a harmonious reading of the Sec.5 of the OST Act and Rule 90-AA of the OST Rule, it may be concluded as follows :

Compounding tax on outstill liquor as per the Rule 90-AA is mandatory, since the date it has came into force. However, the dealer has the option to opt for assessment in regular manner only on written application to the authority made within the prescribed period.

7. The FAA is found correct in his decision and interpretation of the statute to this extent, whereas we are in respectful disagreement with the decision relied by the dealer in

S.A.No.2168/2004-05 of this Tribunal holding thereby that : despite of specific provision the dealer can't be deprived of statutory option available U/s.5 of the Act or in view of the above, absence of the specific provision in Rule 90-AA making available to the dealers of outstill liquor an option for being assessed in the usual manner is not material. Despite absence of the specific provision the dealers cannot be deprived of the statutory option available u/s.5 of the Act. The provision being new, failure to exercise option being assessed in usual manner by written application should not be held to be willful for non-exercise of the option on the part of the appellant.

In all the statute of sales tax of different States compounding provision has been made optional at the option of the dealer. In the case of **State of Kerala and another Vrs. Builders Association of India & Others (1997) 104 STC 134,** the ratio therein was that whether it was within the legislative competency of the legislature to make a provision of compounding of tax. In the case of **Bhima Jewellery Vrs. Asst. Commissioner (Assessment)** reported in **(2003) 129 STC 90**, the issue was that whether a compounding dealer is liable to pay additional sales tax after compounding of the Sales Tax. In the case **Balwant Rai Kaushal Vrs. State of Haryana and Others (2992) 86 STC 480,** the Punjab and Haryana High Court when the provision of compounding was made compulsory against the mandate of the statute therein by a rule the same was struck off. So also, in the case of **Venkateshwara Theatre Vrs. State of Andhra Pradesh (2005) 96 STC 130,** their Lordships in Andhra Pradesh High Court analyzing the provision of Andhra Pradesh General Sales Tax Act since the dealer was given an option for compounding he could not be heard of complaining that since the scheme does not provide corresponding provision of reduction of tax, the same was unsustainable. In the case of **Mycon Construction Ltd. Vrs. State of Karnataka (2002) 127 STC 103**, Hon'ble Supreme Court which also

contend a provision of compounding on the option of the dealers and was given retrospectively when a direction was given that option already exercised were not to be affected held the same to be not equitable. Nowhere in the aforesaid cases their Lordships have held that compounding of the tax can only be made at the option of the dealer. In our statute when a provision of compounding is brought the second proviso mandates the dealer to exercise option in writing to be assessed in regular manner and in the absence of the same the provisions of compounding is made obligatory. So, the assessment assailed on the ground that in the absence of any option to be assessed u/r.90-AA of the OST Rules, no assessment can be made by the STO, is devoid of merit for the reasons stated earlier.

Now coming to the next ground i.e. here in this appeal the Counsel for the appellant strenuously urged before us that since he had filed his return in the assessment year in question it can very well be said that he had not opted to be assessed under the compounding provision u/r.90-AA of the OST Rules. In such circumstances, his assessment made by the STO u/r.90-AA of the OST Rules as such is unsustainable. He, in this regard drawn our notice to the Ciruclar of the Finance Department No.V(I)14/2003 12534/CT., Dated, the 20/06.2003, the relevant portion of the Circular reads as follows :

"You are, therefore, instructed to take adequate care to see that dealers of outstill liquor who opt to pay tax in accordance with Rule 90-AA do not avail themselves of set off provisions of Sl.No.24 simultaneously. You are also instructed to examine properly the books of accounts of a dealer who is paying tax as per Sl.No.24 and thereby availing set off provisions and to ensure collection of tax on his actual sale turnover, after deducting the tax paid on mohua flower. Any deviations shall be viewed seriously by the Commissioner of Commercial Taxes, Orissa.

Yours faithfully,

Asst.Commissioner of Commercial Taxes".

8. Drawing attention of the Tribunal to the aforesaid paragraph, learned Counsel for the dealer placed reliance on the decision of the Hon'ble Apex Court in the case of **Commissioner of Sales Tax, U.P. V. Indra Industries (2001) 122 STC P.100** wherein it has been held that Circular issued by the Commissioner of Sales Tax binding on the Department, it is submitted that when he had not exercised any option his assessment u/r.90-AA of the OST Rules should not have been done by the STO. It is held by the Apex Court that,

"A circular by the sales tax authorities is not binding on the courts. It is not binding on the assessee. However, the interpretation that is thereby placed by the taxing authority on the law is binding on that taxing authority. In other words, the taxing authority cannot be heard to advance an argument that is contrary to that interpretation".

Reliance also placed in the matter of :

Binani Industries Limited Vrs. Asst. Commercial Taxes & Others (2003) 129 STC P.199 (Krnt.)

9. There is no reproach that the Hon'ble Apex Court has laid down the law as aforesaid but in the Circular issued it has never been directed by the Commissioner that unless dealers are opt for assessment u/s.90-AA of the OST Act they cannot be assessed. The Circular was issued only in the context that giving set off to dealer for purchase tax paid on purchase of mahua flower who are assessed in regular manner and not to give such benefits to the dealers assessed u/s.90-AA. Furthermore, circulars even if issued by the Commissioner when the same relates to an interpretation can only be binding on the Deptt. But when the same does not relates to any interpretation and contrary to the statutory provisions the same is not binding on the assessing authority. So, the contention advanced to assail the

assessment u/s.90-AA of the OST Rules of the dealer in this regard also appears to have no force.

10. In spite of aforesaid, we are also not in a position to agree with the order passed by the learned ACST confirming the order of assessment u/s.90-AA of the OST Rules in the absence of any written option exercised by the appellant-dealer to be assessed in regular manner. In our considered opinion the order of assessment of the appellant-dealer as compounding dealer is not sustainable even in the absence of any written option. No doubt, statute empower the Govt. to make provision of compounding but simultaneously it has also been mandated in 2nd proviso to prescribe the authority and prescribed date giving option to the dealer to go for regular assessment when provision for compounding is brought. It is only when the dealer does not exercise such option, he can assessed in the manner provided in such compounding provision. After coming into on the provision of Rule 90-AA of the OST Rules it has not been brought to our notice that any prescribed authority or any prescribed period was provided to a dealer to give his option of being assessed in a regular manner. In the absence of the same, in the considered option of this Tribunal no option was left to the dealer which made the second proviso to Sec.5(1) of the OST Act redundant. The same can never be the spirit of Rule 90-AA which is also decipherable from the executive instruction of the Commissioner of Commercial Taxes quoted (supra). So, when the prescribed authority and prescribed period has not been provided to a dealer, a dealer cannot be assessed u/r.90-AA of the OST Rules holding that since he had not exercised any option in writing and authority or date has not been prescribed, he is liable to assess u/r.90-AA, more so in a case when an outstill liquor dealer has filed his return to be assessed in a regular manner. Pertinent to mention here that, above is the view of the Full Bench of this Tribunal in S.A.No.1616/2006-07 (supra). The view of this Tribunal against the self-same dealer for different tax periods

being accepted by the taxing authority time to time and when consistency and uniformity being the rule of universal application in taxation law, we are otherwise also constrained to adopt the earlier view of this Tribunal.

In the aforesaid facts and circumstances, in our considered opinion the assessment of the dealer u/r.90-AA of the OST Rules by the assessing authority is unsustainable and as such liable to be set-aside.

Hence, the impugned order of the learned ACST in upholding the order of the STO stands set aside. Consequently, the order of the assessing authority making assessment u/r.90-AA of the OST Rules also stands set-aside and the matter is remitted back to the STO to assess the dealer in the regular manner. The dealer is required to make an application in writing as per 2nd proviso of Sec.5 of the Act for assessment in usual manner. The dealer is directed to appear for regular assessment before the AA as on before 29.12.2018 and the AA is requested to conclude such assessment within a period of 4 months.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

Sd/-
(S. Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Smt. S. Misra)
Chairman

I agree,

Sd/-
(R.K. Rout)
Accounts Member-II