BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. Nos. 1702 to 1704 of 2004-05
&
S.A. Nos. 94(C) to 96(C) of 2004-05

(Arising out of orders of the learned ACST, Sundargarh Range, Rourkela in First Appeal Nos. AA- 1, 2 & 3 (RL-II)/2004-05 & AA- 1, 2 & 3 (RL-II-C)/2004-05, disposed of on dated 13.07.2004)

Present: **Shri A.K. Das, Chairman**
Shri S.K. Rout, 2nd Judicial Member
&
Shri S. Mishra, Accounts Member-II

M/s. Rama Laminators (P) Ltd.,
B/19, Industrial Estate, Rourkela ... 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 D. Behura, S.C. (CT)

Date of hearing: 04.04.2022 *** Date of order: 25.04.2022

O R D E R

All these second appeals filed by the dealer-assessee though relate to different periods involve common question of facts and law and have been filed challenging the impugned orders on common grounds, for which they are taken up together for hearing and are disposed of by this common order for the sake of convenience.

2. The dealer-appellant filed S.A. Nos. 1702 to 1704 of 2004-05 challenging the common order dated 13.07.2004 passed by the learned Asst. Commissioner of Sales Tax, Sundargarh Range, Rourkela (hereinafter called as 'first appellate authority') in Appeal Nos. AA- 1, 2 & 3 (RL-II)/ 2004-05 thereby setting aside the orders of assessment passed by the Sales Tax Officer, Rourkela-II Circle, Panposh (in short, 'assessing authority') raising tax demands of ₹7,79,648.00, ₹17,29,624.00 and ₹11,18,374.00 for the years 1998-99, 1999-2000 and 2000-01 respectively in the assessment framed u/s. 12(8) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act').

3. S.A. Nos. 94(C) to 96(C) 2004-05 are directed against the common order dated 13.07.2004 passed by the same first appellate authority in Appeal Nos. AA- 1, 2 & 3 (RL-II-C)/ 2004-05 setting aside the orders of assessment raising tax demands of ₹7,01,752.00, ₹3,20,636.00 and ₹1,27,870.00 for the years 1998-99, 1999-2000 and 2000-01 respectively of the same assessing authority in exercise of powers u/r. 10 of the Central Sales Tax (Odisha) Rules, 1957 (in short, 'CST (O) Rules').

4. The factual matrix of the case leading to filing of the present second appeals are that the dealer-

assessee is an Industrial Unit set up at Industrial Estate, Rourkela to manufacture HDPE laminated and un-laminated fabrics, woven sacks and packs and polythene sheets. It avails exemption on purchase of raw materials and sale of finished products under IPR, 1992 policy. The Industrial Unit was eligible for exemption of sales tax on purchase of raw materials and sale of finished products upto 60% of the fixed capital investment of ₹58,54,580.00, calculated at ₹35,12,748.00 or five years whichever is earlier. The Unit started its commercial production on 22.06.1995 and its assessments for the years 1998-99, 1999-2000 and 2000-01 were completed allowing the entire purchases and sales as exempted from payment of tax and calculating the notional tax benefit on application of 4% tax against Form-IV. When it came to the notice of the assessing authority that there was under assessment in view of crossing of 60% limit, it reopened the assessments and raised tax demands of ₹7,79,648.00, ₹17,29,624.00 and ₹11,18,374.00 for the years 1998-99, 1999-2000 and 2000-01 respectively u/s. 12(8) of the OST Act and it also raised tax demands of 7,01,752.00, ₹3,20,636.00 and ₹1,27,870.00 u/r. 10 of the CST (O) Rules for the years 1998-99, 1999-2000 and 2000-01 respectively.

4(a). The dealer-assessee challenging the aforesaid demands raised by the assessing authority for the assessments made for the years 1998-99, 1999-2000 and 2000-01 under the OST Act filed three separate appeals and other three appeals for the assessments made for the year 1998-99, 1999-2000 and 2000-01 under the CST Act mainly on the grounds that initiation of reassessment proceedings u/s. 12(8) of the OST Act and u/r. 10 of the CST (O) Rules was illegal and bad in law; that levying tax on sale amount of HDPE fabrics, which was tax free product, was contrary to law; and that denial of exemption of tax under IPR, 1992 on purchase of raw materials and sale of finished products was against the materials on record. Learned first appellate authority on hearing the dealer-assessee and examining the materials on record set aside the impugned orders of assessment and remitted the matters back to the assessing authority for reassessment on the following findings :

(i) There is no illegality in the action of the assessing authority in reopening the assessments u/s. 12(8) of the OST Act and u/r. 10 of the CST (O) Rules and passing fresh orders. Simultaneous claim of tax exemption and tax concession cannot go hand in hand as the appellant cannot ask for a concession from a zero. Therefore, the action of

the assessing authority in calculating the tax @ 12% on purchase of raw materials on notional basis to arrive at the exemption limit is correct requiring no intervention;

(ii) The appellant enjoyed sales tax exemption both on purchase and sale to the extent of ₹37,68,369.92, which is in excess of the eligible limit of ₹35,12,748.00 by the end of 1996-97. Therefore, the Industrial Unit becomes a free industrial unit having no tax exemption for the entire period subject matter of appeal; and

(iii) The revenue cannot take away the rightful privilege of the industrialist as granted under the statute for availing concessional rate of tax in respect of sales to the manufactures against Form-IV and to outside dealers against Form-C. Therefore, the dealer-assessee should be given an opportunity to produce Form-IV and Form-C for claiming concessional rate of tax.

4(b). The dealer-assessee being aggrieved with the aforesaid findings arrived at by the first appellate authority on scrutiny of the materials on record, filed the above second appeals mainly on the grounds that initiation of reassessment proceedings u/s. 12(8) of the OST Act and u/r. 10 of the CST (O) Rules was illegal and bad in law; that levying tax on sale amount of HDPE fabrics, which was tax free product, was contrary to law; and that denial of

exemption of tax under IPR, 1992 on purchase of raw materials and sale of finished products was against the material on record.

5. When the appeals were called for hearing on 04.04.2022, none appeared on behalf of the dealer-assessee despite valid service of notice. This being an year old matter of 2004-05, the Tribunal was left with no other option except proceeding with the hearing of the second appeals in the absence of the appellant and in presence of the learned Standing Counsel (CT) for the State.

6. The learned Standing Counsel for the State supporting the impugned orders vehemently urged that the authorities below on thorough scrutiny of the materials on record have categorically opined that the appellant enjoyed sales tax exemption both on purchases and sales to the extent of 60% of the fixed capital investment by the end of 1996-97. Therefore, they rightly negatived the claim of the dealer-assessee made for the years 1998-99, 1999-2000 and 2000-01. The dealer could not produce any material to satisfy this Tribunal that the calculation made by the forums below regarding tax exemption enjoyed by the dealer-assessee both on purchases and sales upto 60% of the fixed capital investment was wrong. So, in the absence of

any material, the findings rendered by both the forums below cannot be interfered with. Similarly, they have also correctly levied tax on sale of HDPE fabrics basing on the judgment of the Hon'ble High Court of Orissa in the case of M/s. Soosree Plastic Industry (P) Ltd. and others Vs. Union of India in O.J.C. No. 2755, 3096 to 3098 of 1988. The dealer-assessee could not cite any contrary decision to justify its claim that HDPE fabric was an exempted goods and was not liable for taxation under the OST Act. He submitted that such contention raised by the dealer-assessee must be thrown away. It was further argued by the learned Standing Counsel (CT) for the revenue that the assessing authority initiated the reassessment proceeding u/s. 12(8) of the OST Act strictly in accordance with law and there is nothing wrong in reopening the earlier assessment when it was satisfied and had reasonable belief that the turnover of the dealer-assessee has escaped assessment. After initiation of reassessment proceeding, the appellant was given ample opportunity to have its say in the matter. So it was not prejudiced in any manner. Moreover the assessing authority having raised tax demand basing on the materials on record and there being no illegality or impropriety in the impugned orders, the same do not

warrant interference of this Tribunal. The orders passed by the forums below are just, proper and reasonable and according to the norms of the statute. He submitted to dismiss all the second appeals filed by the dealer-assessee and confirm the orders of the first appellate authority.

7. We have heard the learned Standing Counsel (CT) for the revenue, gone through the grounds of appeal vis-a-vis the impugned orders and the materials on record. It is seen from the memorandum of appeal filed by the dealer-assessee that it has raised several grounds challenging the impugned orders of the forums below, but the grounds which are relevant for adjudication of the present second appeals are narrated hereunder.

(i) Whether learned assessing authority was correct in its approach in reopening the assessments invoking power u/s. 12(8) of the OST Act and such initiation is in accordance with the provisions of the Act ?

(ii) Whether the forums below were justified in disallowing the exemption on purchase of raw materials and sale of finished products under IPR, 1992 holding that the appellant exhausted ceiling limit of exemption granted to it under the said policy ? and

(iii) Whether the forums below were correct in their approach in calculating tax @ 12% on sale of HDPE fabrics or it is a tax free item under the OST Act ?

8. The first important issue, which was raised by the dealer-assessee in the grounds of memorandum of appeal, is that the assessing authority was wrong in its approach in reopening the assessments u/s. 12(8) of the OST Act without recording the reasons for initiation of such proceeding. Before addressing on this issue, it is profitable to narrate some undisputed facts for effective adjudication of the matter. The dealer-assessee is an Industrial unit set up under IPR, 1992 for manufacture of HDPE fabrics and woven sacks and was eligible to avail sales tax exemption on purchase of raw materials and sale of finished products for a period of five years with ceiling limit of 60% of fixed capital investment. The original assessments in respect of the dealer-assessee were completed on 24.07.2001. When the assessment orders passed by the assessing authority were objected by the A.G. (Audit) on the ground that tax benefit under IPR, 1992 was illegally allowed to the dealer-assessee and no tax was levied on sale of HDPE fabrics, the assessing authority on receipt of such objection of A.G. (Audit), reopened the assessments invoking power u/s. 12(8) of the OST Act and issued notice to the dealer-assessee for reassessment. The dealer-assessee responding to such notice, submitted its written explanation on 24.01.2004

challenging the initiation of proceedings u/s. 12(8) of the OST Act. In this factual backdrop of the case, the question whether the assessing authority was correct in its approach in reopening the assessments u/s. 12(8) of the OST Act is to be examined. To adjudicate this issue and understand the law relating to reopening of assessment, the provisions contained u/s. 12(8) of the OST Act are reproduced below :-

> "(8) If for any reason the turnover of a dealer for any period to which this Act applies has escaped assessment or has been under assessed or where tax has been compounded when composition is not permission under this Act and the Rules made thereunder, the Commissioner may at any time within five years from the expiry of the year to which that period relates call for return under sub-section (1) of Section 11 and may proceed to assess the amount of tax due from the dealer in the manner laid down in sub-section (5) of this Section and may also direct, in cases where such escapement or under assessment or composition is due to the dealer having concealed particulars of his turnover or having without sufficient cause has furnished incorrect particulars thereof, that the dealer shall pay, by way of penalty, in addition to the tax assessed under this sub-section, a sum equal to one and a half times of the said tax so assessed."

9. A cursory look at the provision makes it clear that the Commissioner may at any time within a period of five years proceed to assess the amount of tax due to the dealer in the manner laid down in sub-section (5) of the said section where for any reason the turnover of the dealer for any period to which this Act applies has escaped assessment or has been under assessed or has been compounded when the composition is not permissible under the Act and the Rules made thereunder. The Hon'ble Court in the case of **M/s. D. Ch. Guruvalu Son & Co. Vs. Sales Tax Officer, Koraput-II Circle, reported in [2008] 14 VST 509 (Ori.)** in para-18 of the judgment interpreting the provision U/s. 12(8) of OST Act observed that the assessing officer must record reasons in some form before initiation of proceeding u/s. 12(8) of the Act. He must at least indicate the basis for prima facie conclusion that there has been escapement or under assessment. In absence of such finding, initiation of proceeding u/s. 12(8) of the Act is not sustainable in the eye of law. In the aforesaid judgment reliance was placed on the decisions reported in [1993] 90 STC 280 (Ori.) in the case of Suburban Industries Kalinga Pvt. Ltd. Vs. Sales Tax Officer, Bhubaneswar; [2006] 148 STC 61 (Ori.) in the case of Indure Ltd. Vs. Commissioner of Sales Tax; and in [1993] 91 STC

76 in the case of State of Orissa Vs. Ugratara Bhojanalaya. It was further observed in the said judgment that if the dealer responds and participates in the proceeding, it was open to him to seek for the reasons which necessitated the reopening of the proceeding. At that stage, the assessing officer cannot take the plea that the reasons are not to be indicated. If he is in possession of the materials which he proposes to use against the dealer in the proceeding for re-assessment, he must before using the materials bring them to the notice of the dealer and give them adequate opportunity to explain and answer the case on the basis of those materials. Reliance was also placed on the decision in the case of **Sales Tax Officer, Ganjam Vs. Uttareswari Rice Mills, reported in [1972] 30 STC 567**. In view of such settled position of law as laid down by the Hon'ble Court, we are of humble opinion that the assessing authority is required to indicate the reasons in some form before initiation of the proceeding u/s. 12(8) of the OST Act. In the instant case, it is found from record that there is prima facie evidence of under assessment for not levying tax on sale turnover of HDPE fabrics and the basis of initiation of reassessment proceeding is the AG Audit objection for such under assessment. The reason assigned by the assessing

authority is good reason to reopen the proceeding u/s. 12(8) of OST Act. The A.G. Audit objection with regard to under assessment is based on the existing materials on which the initial assessment was made. No new material was taken into consideration for reassessing the dealer-appellant. So, no prejudice was caused to him as reassessment was on the basis of material on which the dealer-assessee relied on. There is clear distinction between under assessment and escapement of assessment. The case in hand is a clear case of under assessment which is apparent from the materials on record which were taken into consideration at the time of original assessment. So, the assessing authority cannot be faulted with in recording his satisfaction for reopening the case basing on the A.G. Audit objection. Therefore, the contention raised by the dealer-assessee must fall to the ground. This Tribunal also in the case of M/s. Larsen & Toubro Ltd. Vs. State of Odisha in S.A. No. 1342 of 2002-03 disposed of on 20.09.2013 while dealing with similar issue observed that the appellant was given reasonable opportunity of hearing; that he participated in the proceeding before both the forums below and that at the time of assessment, he submitted written submission and requested for exclusion of sales tax collected which had been

raised in the audit report. So, the reasons for reopening assessment were open before him at the time of assessment. Therefore, keeping in view the circumstances of the case, we feel that the dealer was given adequate opportunity and reasons for assessment were made known to him. The assessing authority so observing issued notice u/s. 12(8) of the OST Act. In view of such mention of the reason for initiation of the proceeding u/s. 12(8) of the OST Act, the assessment order cannot be said to be illegal and in contravention of the provisions contained in Section 12(8) of the OST Act. The dealer in pursuance of notice issued u/s. 12(8) of the OST Act, appeared before the assessing authority and participated in the assessment proceeding. Therefore, it cannot be said that he was not aware of the basis for initiation of proceedings u/s. 12(8) of the OST Act. The assessing authority as well as the first appellate authority did not commit any illegality in proceeding against the dealer-appellant u/s. 12(8) of the OST Act basing on A.G. audit objection. So, in view of the foregoing discussions, the first issue is answered in favour of the State and against the dealer-appellant.

10. Coming to second ground raised by the dealer-assessee in the memorandum of appeal, on perusal of

the impugned orders of the forums below, we find that the dealer-assessee availed the benefit of tax exemption upto ₹35,12,748.00, i.e. 60% of the capital investment of ₹58,54,580.00, by the end of assessment year 1996-97. So, such tax benefit granted to the dealer-assessee in the original assessment made for the years 1998-99, 1999-2000 and 2000-01 was illegal and against the policy of IPR, 1992. The dealer-assessee despite service of valid notice did not appear before this Tribunal to substantiate its claim of tax exemption under IPR, 1992 for the years 1998-99, 1999-2000 and 2000-01 on the basis of materials on record, rather we are convinced from the materials on record and the findings of the forums below that the dealer-assessee exhausted his right for tax exemption on purchase of raw materials and sale of finished products upto 60% of the fixed capital investment by the end of 1996-97. Thus, the forums below did not commit any illegality in disallowing such claim of the dealer-assessee. Accordingly, we are not inclined to interfere with the said findings of the forums below.

11. The third ground raised by the dealer-assessee challenging the impugned orders is that the authorities below committed illegality in levying tax @ 12% on sale of HDPE fabrics. The only dispute in the present

cases is whether HDPE/PP fabrics are artificial silk as held by the first appellate authority and coming under entry No. 22 of the list of goods exempted from OST. Before addressing on this issue, it would be profitable to take note of entry No. 22 of the list of goods exempted from OST.

> "22. Millmade fabrics wholly or partly of cotton, staple fibre, rayon, artificial silk or wool including processed fabrics made in the processing mills and as described in Col.3 of the first Schedule to Addl. Duties of Excise (Goods of Special Importance) Act, 1957."

Entry No.22 makes it clear that a commodity in order to be tax free under this category must be –

(a) a fabric;

(b) must be a mill-made fabric;

(c) partly or wholly of –

  (i) cotton, or

  (ii) staple fibre, or

  (iii) rayon, or

  (iv) artificial silk, or

  (v) wool;

(d) processed fabrics made in processing mills, and having one of the above five goods as raw material in part or in whole; and

(e) fabrics as described in Col.3 of the first schedule to Addl. Duties of Excise (Goods of Special Importance) Act, 1957.

'Fabric' as defined in Chamber's English Dictionary means the act of constructing texture, anything framed

by art and labour, a building, stonework etc., manufactured cloth, any system of connected parts. 'Cloth' means a woven material from which garment or coverings are made.

12. On close reading of entry No. 22 of the list of goods exempted from OST, we find that there is no mention of HDPE/PP fabrics. The Hon'ble High Court in case of M/s. Soosree Plastic Industry (P) Ltd. Vs. Union of India (OJC No. 1755/1988 and others) taking note of judgment of Apex Court and the judgments rendered by the Special Bench of CEGAT wherein it was held that HDPE fabric having been made of plastic would not be treated as textile, came to the conclusion that fabrics made of plastic would not be textile goods. In our view, the judgment of our own High Court in M/s. Soosree Plastic Industry (P) Ltd. (supra) though was rendered in different facts and circumstances, the observations made therein that the HDPE/PP fabrics being made of plastic is not textile would be applicable to the facts and circumstances of the present cases. HDPE/PP fabrics neither have been mentioned in entry No.22 of the list of goods exempted from OST nor have been mentioned in Col.3 of the first schedule to Addl. Duties of Excise (Goods of Special Importance) Act, 1957. Moreover, **in a recent**

judgment in S.A. No. 1284 of 2007-08 in case of M/s. Hena Poly Products (P) Ltd., Januganj, Balasore Vs. State of Odisha, this Tribunal came to the categorical conclusion that HDPE/PP fabrics are plastic goods which is exigible to sales tax which has not yet been challenged or set-aside.

13. It is pertinent to mention here that as per the Finance Department Notification No. 14687-CTA-37/2001 (pt)-F (SRO No. 149/2001) dated 31.03.2001 (w.e.f. 01.04.2001) and No. 1686-CTA-37/2001 (pt)-F (SRO No. 16/2002) dated 09.02.2002 (w.e.f. 01.03.2002), HDPE fabrics (the disputed commodity in the present appeals) come under the entry at Sl. No. 136 of List-C of OST Rate Chart. Since from 01.04.2001 "plastic goods" are being placed under taxable list which also got substituted by way of clarificatory notification w.e.f. 01.03.2002 to include "HDPE woven fabric". The claim of the dealer-assessee to classify it under entry No.22 of the list of goods exempted from OST is without any basis and is not legally sustainable. Hence, the impugned orders passed by the forums below levying tax @ 12% on HDPE fabrics is in accordance with law and do not warrant interference of this Tribunal.

14. For the foregoing discussions, all these second appeals filed both under the OST Act as well as CST

Act for the assessment years 1998-99, 1999-2000 and 2000-01 being devoid of any merit stand dismissed and the impugned orders of the first appellate authority are hereby confirmed.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member

I agree,

Sd/-
(S. Mishra)
Accounts Member-II