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

S.A. No. 1632 OF 2003-04

(Arising out of order of the learned ACST, Koraput Range, Jeypore, in Sales Tax Appeal No. AA (KOII)337/2002-03 disposed of on dated 30.09.2003)

Present: Shri R.K. Pattanaik, Chairman,
Shri A.K. Dalbehera, 1st Judicial Member, and
Shri P.C. Pathy, Accounts Member-I

M/s. J.K. Paper Limited,
At/Po- Jaykaypur,
Dist. Rayagada ... Appellant

-Versus-

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

For the Appellant : Sri P.K. Jena, Advocate
For the Respondent : Sri D. Behura, Standing Counsel (CT)

Date of hearing: 26.11.2020 ***** Date of order: 29.01.2021

O R D E R

The dealer assessee has preferred the instant appeal in terms of Section 23(3) of the Odisha Sales Tax Act, 1947 (hereinafter referred to as 'the Act') which is directed against the impugned order dated 30.09.2003 promulgated in Appeal No. AA(KOII) 337/2002-03 by the learned Assistant Commissioner of Sales Tax, Koraput Range, Jeypore (in short, 'FAA'), who dismissed the appeal and confirmed the order of assessment dated 20.07.2002 passed under Section 12(8) of the Act vis-a-vis the dealer assessee for the tax period 1997-98 on the grounds

inter alia it is palpably wrong, ex facie illegal and thus, deserves to be set aside in the interest of justice.

2. As is revealed from the record, the dealer assessee is a limited company duly incorporated under the Companies Act, 1956. It is further revealed that an adverse report was received from IST, Kalahandi Circle, Bhawanipatna regarding discrepancies noticed during transportation of goods on interception of the vehicles carrying it, whereafter, on a prima facie satisfaction, the AA initiated an action under Section 12(8) of the Act and finally, raised additional demand of ₹15,81,213.00 payable by the dealer assessee which included penalty. Against the above order, the dealer assessee approached in appeal but then, the FAA shared the same view as of the AA and resultantly, it led to confirmation of the assessment. On being unsuccessful, the dealer assessee knocked the doors of the Tribunal and contended that the additional demand raised for the assessment period 1997-98 is arbitrary, excessive and bad in law.

3. Per contra, State justified the action of the authorities below with regard to suppression of sales which was established on verification of documents. It is contended that there was ample evidence which revealed the alleged sales suppression in the hands of the dealer assessee. The contention of the dealer assessee to the effect that only a single chalan was by mistake mentioned in the way bills on both the occasions was strongly objected to by the State on the ground that it could not have been a mere coincidence or a mistake

by inadvertence, especially, when responsibility is on the dealer who carries the way bills to satisfy that the goods are being transported as per the consignments.

4. In fact the dealer assessee moved the Tribunal to cause production of the assessment record vis-a-vis the dealer assessee for the period 1997-98 and challenged the very initiation of the action under Section 12(8) of the Act on the ground that the AA proceeded to reopen assessment without fulfilling the condition precedent. The assessment record was produced before the Tribunal. The learned Counsel for the dealer assessee brought to the notice of the Tribunal with regard to the marginal note of order sheet while issuing notice for reassessment under Section 12(8) of the Act in order to convince that there was no basis for the alleged action. It is contended that merely by accepting an adverse report, the AA, by order dated 28.02.2002, without examining it, straight away proceeded and issued notice under Section 12(8) of the Act which does not fulfil the essential conditions to reopen an assessment already accomplished under Section 12(4) of the Act. On perusal of the assessment record, it is not revealed as to if the dealer assessee ever challenged the initiation of the reassessment by the AA. Of course, it is made to understand that a notice was issued on 28.02.2002 and then, the case was posted to 20.03.2002 and 11.07.2002 and finally, on 20.07.2002, the dealer assessee entered appearance and on the very same day, the order of assessment was passed by the AA. It is alleged by the learned Counsel for the dealer assessee that the proceeding was hurriedly and abruptly concluded on 20.07.2002 and there was no opportunity to challenge the impugned action.

Nevertheless, on 20.07.2002, the dealer assessee appeared and the adverse report was confronted to it. No doubt, in a very unusual manner, the AA on the day of appearance of the dealer assessee itself disposed of the case and passed the order of assessment dated 20.07.2002. Whatever may be reason, the dealer assessee did not challenge the action of the AA and participated in appeal filed before the FAA, who is an extended authority of assessment. If the action was without complying the conditions of Section 12(8) of the Act, the dealer assessee could have instantly challenged it instead of proceeding to file an appeal before the FAA. A preliminary objection as to maintainability of the proceeding under Section 12(8) of the Act could have been asked for and demanded by the dealer assessee during and in course of appeal or challenged it otherwise. Having participated all along, now the dealer assessee cannot be permitted to question the legality of the order of assessment dated 20.07.2002. It is no doubt that reassessment is only to be initiated subject to satisfaction arrived at with compliance of all the conditions envisaged in Section 12(8) of the Act. But, at this distant point of time, to challenge the reassessment on the ground that there was no basis cannot be entertained. The dealer assessee was, in fact, required to challenge issuance of notice under Section 12(8) of the Act at its very threshold. After the case has travelled so long, the dealer assessee cannot be permitted to put the clock back and turn around and allege actions of the authority of the AA for reassessment under Section 12(8) of the Act. It is not a case that the AA did not have jurisdiction to go for reassessment. The satisfaction of the AA and the basis for reassessment is indeed

challenged by the dealer assessee. In the considered view of the Tribunal, it is not an issue of want of jurisdiction but a case of improper exercise of jurisdiction vested with the AA, if at all, it is assumed for the sake of argument that there was no basis for the alleged action. In any view of the matter, considering the fact that the dealer assessee maintained a stony silence till now and for the fact that there was no immediate challenge to the action under Section 12(8) of the Act and as such, when it is not a case of lack of inherent jurisdiction, the Tribunal reaches at a decision that on such a ground, the action of reassessment and its maintainability cannot be allowed to be challenged. The State objected to the said contention of the dealer assessee on account of long and inordinate delay. Such an objection is justified for the reasons already discussed hereinabove. Thus, the contention of the dealer assessee in this regard has to be rejected outrightly,

5. One more contention is advanced by the dealer assessee which is to the effect that that the AA in a hot haste concluded the assessment on the date of its appearance i.e. 20.07.2002 in order to avoid limitation as it was to be accomplished within one year from the date of commencement by virtue of an amendment to Section 12(8) of the Act. A copy of the Gazette Notification dated 19.07.2001 with respect to the Odisha Sales Tax (Amendment) Rules, 2001 was brought to the notice of the Tribunal, while contending so. Admittedly, as per Rule 28(2) of the Odisha Sales Tax (Amendment) Rules, 2001, sub-Section (8) of Section 12 of the Act was amended which required disposal of the pending cases within one year from the date of its commencement. The learned Counsel for the dealer

assessee alleged that the AA in order to avoid the action to be barred by limitation hurriedly completed the proceeding on 20.07.2002. The learned Standing Counsel objected to the said contention and claimed that on such a ground, reassessment under Section 12(8) of the Act cannot be set at naught. It might possibly be a reason or one of the reasons which prompted closure of the reassessment proceeding on 20.07.2002 but on that very basis, it may not be right and justified to upset the impugned assessment vis-a-vis the dealer assessee. Of course, such an action under Section 12(8) of the Act could have been attended to with all promptitude but under the above circumstances and on such a ground, it would not be just and appropriate to look at the action of the AA with a tinge of suspicion.

6. An additional ground was raised by the dealer assessee to scuttle down the action under Section 12(8) of the Act on the ground that the order of assessment, prima facie, appears to be ante dated. In that respect, a petition dated 31.08.2020 was pressed into service from the side of the dealer assessee. It is contended that the order of assessment was passed on 20.07.2002 i.e. on the last day of the period of limitation and was issued to the dealer assessee vide Memo No.5201 dated 09.10.2002 and finally, served on it on 30.10.2002 and for the delay in service of a copy of order of reassessment, the dealer assessee strongly believed that the purported order was not passed on 20.07.2002 but arrived on 09.10.2002 and as such, it was time barred. It is also contended that the reassessment order dated 20.07.2002 was required to be passed and served upon

the dealer assessee within the period stipulated apart from the fact that it was ante dated. The State strongly objected to the additional ground raised by the dealer assessee and claimed that there is no time limit prescribed in the Act for service of order of assessment. Admittedly, the assessment order dated 20.07.2002 was issued on 09.10.2002 with a delay of three months approximately and served upon the dealer assessee on 20.07.2002. In absence of any concrete evidence that the said order was ante dated, merely on a belief of the dealer assessee, it cannot be held so. Any assumption without any basis to the fact that the order was ante dated would be unjustified and a gross error on the part of the Tribunal. In this connection, the learned Counsel for the dealer assessee cited a decision in a case of Chandrika Sao Vrs. Sales Tax Officer, Balasore Range, Balasore and Another reported in 2015 81 VST 86 (Orissa) on the point of limitation. Due to want of clear and convincing evidence that the order of assessment dated 20.07.2002 to be ante dated, it cannot be said that the action under Section 12(8) of the Act was time barred. In the case supra, the assessment order was passed after six months without obtaining permission for extension of time as is required under Section 42 (6) of the OVAT Act. In the instant case, at the face value and prima facie, order of reassessment under Section 12(8) of the Act appears to be within time. Hence, in that case, the said decision of the Hon'ble Court would be inapplicable. One more case is relied upon by the dealer assessee in the case of M/s. Sagar Mal Agarwalla Vrs. Commissioner of Sales Tax, Odisha, Cuttack and Others reported in 2018(I) OLR 647, wherein, on a similar point it was held and observed that exercising a

revisional power, as per Rule 80 of the OST Rules, 1947, the authority concerned is required to pass the order within a period of three years. Again, said ruling is not applicable since in the present case, the AA passed the order of assessment within time stipulated under Section 12(8) of the Act and ante dated is not established. In another case, the Hon'ble Court reported in (2019) 64 GSTR 288 (Odisha) held an assessment under the Act as time barred for having the orders being passed beyond the period of limitation i.e. one year. All the above rulings are to the effect that the impugned orders, if passed beyond the limitation prescribed, it shall be without jurisdiction. As to the dealer assessee's case, the order of assessment was passed on 20.07.2002 which was well within the period of limitation, as the Tribunal disbelieved or is not inclined to believe that said order to be ante dated. In fact, there is no limitation prescribed in service of reassessment order or that the order must have to be served upon the dealer assessee within the period of limitation prescribed for the disposal of the pending cases. A copy of an order dated 17.07.2019 in OJC No.11099 of 2001 is produced which is again on the point of limitation, wherein, the order of assessment was held to be ante dated. However, the claim of the dealer assessee in that case was considered and the Hon'ble Court, in the peculiar facts and circumstances of the case, quashed the order as time barred. The learned Counsel for the dealer assessee further relied upon a ruling of the Hon'ble Apex Court in the case of State of Andhra Pradesh Vrs. M. Ramakishtaiah and Co. reported in (1994) 93 STC 406 (SC), while alleging that the action of the AA is time barred since the order of reassessment is believed to be

ante dated. In the said case, it was noticed that the order was passed on 06.01.1973 and came to be served after the expiry of four years from the date of assessment and with a delay of ten and half months from the order revised by the higher authority and in absence of any explanation, it was presumed that the order was not made on the date it purported to have been passed and that it could have been made after the expiry of the period of four years for passing such an order in revision. Such is not the case of the dealer assessee. In fact, there is no substantial delay and if at all there was a delay, it was of couple of months. In case of long and unexplainable delay, such an assumption would be justified. So far as the case of the dealer assessee is concerned, the order of reassessment is apparently within time and in absence of any concrete evidence to the contrary, it has to be held that the order was not ante dated. Having held so, the Tribunal is of the conclusion that the belief of the dealer assessee that the action was beyond time and the order of the reassessment purportedly ante dated cannot be sustained for the discussions made, as above.

7. As regards the allegation that there were discrepancies pointed out with respect to the way bills, it is contended that it was on account of clerical error or by inadvertence and no deliberate action and should not have been treated as sales suppression. It is also contended that if at all suppression of sales was alleged, estimation of the turnover @0.5% of the total production of the finished goods for the year 1997-98 was illegal, arbitrary, excessive and bad in law. It is also contended that the enhancement was without having any nexus with the

concealment and not supported by any sufficient material, rather, is based on surmises and conjectures which is against the settled position of law in view of the decisions reported in (1972) 29 STC 484 (Orissa); (1972) 30 STC 558 (Orissa); (1973) 32 STC 98 (Orissa); (1985) 58 STC 77 (Orissa); and 2001 121 STC 1 (SC) besides (2004) 135 STC 77 (SC) of the Hon'ble Apex Court. That apart, the quantum of penalty is also challenged as excessive. The learned Counsel for the dealer assessee made a valiant attempt to show that there was no discrepancy at all as the other chalans were inadvertently not shown or mentioned but supported by other materials. The estimation of suppressed turnover and such other aspects of the case depend on the proof of sales suppression as has been alleged against the dealer assessee. If the chalans were left out inadvertently or any mistake was committed, in the considered view of the Tribunal, the same is required to be looked into and all the connected documents verified and for that, a fresh opportunity should be provided to the dealer assessee. At this stage, it would not be proper on the part of the Tribunal to thrash out the materials whatever available to find out as to the truthfulness in the claim of the dealer assessee. In other words, verification of documents with opportunity being provided to the dealer assessee at the level of the AA would be wise and justified.

8. Hence, it is ordered.

9. In the result, the appeal stands allowed in part. As a logical sequitur, the impugned order dated 30.09.2003 passed in Appeal No. AA(KOII) 337/2002-03 vis-a-vis the dealer assessee for the relevant period is hereby set

aside to the extent indicated above. Consequently, the matter is remitted back to the AA with a direction to consider the materials on record vis-a-vis the contention of the dealer assessee, as to if there were discrepancies with regard to despatch of goods or not and to pass appropriate order in that respect after scrutinizing and verifying all the connected documents and providing a reasonable opportunity of hearing to the dealer assessee in respect thereof and then to pass appropriate order on all such aspects raised, preferably, within a period of three months from the date of receipt of the above order.

Dictated & Corrected by me

Sd/-
(R.K. Pattanaik)
Chairman

Sd/-
(R.K. Pattanaik)
Chairman

I agree, Sd/-
(Sri A.K. Dalbehera)
1st Judicial Member

I agree Sd/-
(P.C. Pathy)
Accounts Member-I