

2. Being aggrieved by the impugned order of the Id. FAA, the State has preferred second appeal before this Tribunal assailing the order of the forum below as unjust, illegal, arbitrary and not maintainable. The main contentions in the grounds appended to the memorandum of appeal are as follows:

“i. That the appellant dealer carries business of agarbati, edible oil, plastic goods, aluminum foils and grocery goods on wholesale as well as retail basis.

ii. That Id. ACST has not made specific threadbare discussion which ones he accepted and which ones rejected for what reason to arrive at actual sales to Rs.67,48,371.60 as against Rs.1,09,09,198.00 made by Id. STO for which it cannot be accepted.

iii. That Id. ACST has accepted all the deductions as allowed by Id. STO which does not seem to have well examined the sales details.

iv. That order of Id. ACST should be quashed and that order of Id. STO restored.”

3. The brief fact of the case is that the instant dealer-respondent carries on business in Agarbati, Edible oil, plastic goods, aluminum foils and grocery goods on wholesale-cum-retail basis. The original assessment U/s.12(4) of the OST Act for the self-same period was completed on 05.11.2004 by the LAO determining the gross turnover and taxable turnover at Rs.58,58,903.60 and Rs.24,78,213.31 respectively. But, consequent upon receipt of a fraud case report bearing no.41 dtd.30.05.2005 received from the STO, Intelligence Unit,

Bhubaneswar wherein suppression of sales and purchases relating to the year 2000-2001 to 2003-2004 were alleged, the case was reopened U/s.12(8) of the OST Act for the impugned year 2001-02. At assessment stage, the LAO observed that out of 33 numbers of registers recovered by the Intelligence Wing, 11 registers namely 5, 6, 8, 9, 11, 13, 14, 18, 23, 24 and 30 relate to the present case. On thorough examination and cross verification, the LAO found unaccounted for sale valued Rs.1,09,39,198.00 from the registers bearing No.5, 6, 9, 11, 13 and 18. Accordingly, he determined the unaccounted for sale at Rs.1,09,39,198.00 from which he allowed deductions of Rs.58,58,903.60 as already assessed U/s.12(4), thereby determining the net escaped turnover at Rs.50,50,294.40. However, he took the entire amount of Rs.1,09,39,198.00 as the GTO and allowed deductions accordingly thereby raised a total demand of Rs.11,11,065.00 including surcharge and penalty which was challenged by the dealer-respondent before the Id. FAA in first appeal.

4. At first appeal, the Id. FAA reduced the demand to Rs.1,03,625.00 with his following observation:-

“At the forum of appeal the books of account produced were examined by me in detail with the entries made in the seized registers. It is seen that in most of the cases the entries related to stock position of a particular day, collections made by various sales man, debit and credit notings, household expenses, expenses of loading and unloading, profit and loss calculations etc, in addition to sales transaction made by the

appellant. On detail verification of the entries, the aggregate of actual sales transaction made by the appellant during the year worked out at Rs.67,48,371.60 as against the sales turnover determined in original assessment at Rs.58,58,371.60, thereby resulting sale suppression of Rs.8,49,468.00 during the year 2001-02. As the seized documents reflected the sales transactions of the entire year, it is felt reasonable and just to add the differential amount of Rs.8,89,468.00 to the gross and taxable turnover as determined U/s.12(4) of the Act to meet the ends of justice in this case.”

5. Being aggrieved by the aforesaid first appeal order, the State has now come up and filed the second appeal before this Tribunal as per main grounds stated supra.

6. However, when the matter was called on for hearing, none appeared on behalf of the dealer-respondent in spite of valid service of notice. Moreover, since, the instant case relates to the year 2001-02, which is more than 21 years, it was taken up for ex-parte hearing in the presence of Id. Standing Counsel (C.T.) representing the State.

7. During the course of hearing, Mr. M.L. Agarwal, Id. S.C. (C.T.) vehemently argued against the appeal order passed by the Id. FAA claiming it as unjust, inappropriate and not in accordance with the provisions of statute. He argued that out of 11 registers seized by the Intelligence Wing, in six registers bearing No.5, 6, 9, 11, 13 and 18, they have unearthed unaccounted for sale of Rs.1,09,39,198.00 whereas, both the forums have wrongly allowed deductions of the

assessed GTO figure U/s. 12(4) of the OST Act and not taking into account the unaccounted for sale of Rs.1,09,39,198.43 as escaped turnover. He further pointed out that the ld. FAA in its finding at para 4 of the order, reduced the demand from Rs.11,11,064.00 to Rs.1,03,625.00 holding that as per the seized registers of 5,6,8,9,11 and 13, the unaccounted for sales work out at Rs.67,48,371.60 without assigning any cogent reasons in the order. He further argued that the ld. FAA has taken the registers bearing Sl. No. 5, 6, 8, 9, 11 and 13 into consideration for arriving at the GTO determined but the figures of register Sl. No.18 amounting to Rs.7,87,906.00 has not been taken into consideration and not added to the GTO so determined by him. He averred that the entire unaccounted for sale at Rs.1,09,39,198.43 should have been taken as escaped turnover which have been found after verification of the regular books of account and the same is over and above the assessed amount of Rs.58,58,903.60 made U/s. 12(4) of the OST Act for the self-same period. In this connection, he drew our attention to a judgment of Hon'ble Orissa High Court in case of Bherodhan Jethmal (P) Ltd. V. State of Orissa (1970) 26 STC 536 (Ori) in which it is held that once the department is in possession of entire secret accounts of a dealer and such accounts are found to be genuine, correct and exhaustive, there is no scope for making further estimates beyond what is found from those accounts, whereas, in the present case, the seized accounts are unaccounted sales which are over and

above the returned figures. Therefore, the deduction/allowance made by the forums below, being wrong, is to be corrected.

We, now, felt necessitated to address the main grounds taken by the State as appended in appeal memorandum taking into consideration the information available in this record.

It is profitable to quote the relevant provision of the statute in order to correctly ascertain as to whether both the forums are correct in allowing deductions of assessed amount made U/s. 12(4) of the OST Act for the self-same period from the gross escaped turnover of Rs.1,09,39,198.00.

“Section 12(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 permissible under this Act and the Rules made there-under] 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.]”

On a plain reading of the above provision, we observe that re-assessment U/s.12(8) of the OST Act can only be made on the escaped turnover and moreover if the suppression is without any reasonable cause or has been made knowingly, intentionally, deliberately or willfully, the statute provides to impose penalty a sum equal to one and a half times of the said tax so assessed. In the instant case, we find from the orders of the forums below that there is an unaccounted for sale of Rs.1,09,39,198.00 that is revealed from the registers bearing No.5, 6, 9, 11, 13 and 18 as seized documents by the Intelligence Wing. However, under what circumstances both the forums below have allowed deduction of Rs.58,58,903.60 from the escaped turnover reported by the Intelligence Wing is not revealing in the absence of books of account and records of forums below. In the absence of such documents, we cannot fairly make an opinion as to whether the deductions of GTO determined U/s.12(4) of the OST Act is allowable from the GTO determined U/s.12(8) of the said Act as the provision only speaks of making assessment U/s.12(8) of the OST Act on the escaped turnover. The LAO is to re-examine this aspect of the issue in order to correctly determine the actual escaped turnover.

8. Accordingly, it is ordered.

The appeal filed by the State is allowed in part and the order passed by the FAA is set-aside with a direction to the LAO to re-

examine the books of account of the dealer-respondent vis-à-vis allegations made in the aforesaid fraud case report in order to ascertain the actual escaped turnover for making re-assessment of the dealer relating to the impugned year. Such exercise should be completed preferably within three months from the date of receipt of this order, giving reasonable opportunity to the dealer-respondent of being heard.

Dictated and corrected by me.

Sd/-
(Srichandan Mishra)
Accounts Member-II

Sd/-
(Srichandan Mishra)
Accounts Member-II

I agree,

Sd/-
(A.K. Das)
Chairman

I agree,

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