BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

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

S.A. No. 390 (V) of 2014-15

(Arising out of order of the learned Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar, in First Appeal Case No. AA106111211000213/BH-I/12-13, disposed of on dated 08.10.2014)

M/s. Rainbow Offset Pvt. Ltd.,
Brahmeswarpatna, Bhubaneswar. ... Appellant

-Versus-

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

S.A. No. 300 (V) of 2018

(Arising out of order of the learned Joint Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar, in First Appeal Case No. AA-106221522000152(VAT), disposed of on dated 08.08.2018)

M/s. Rainbow Offset Pvt. Ltd.,
Brahmeswarpatna, Bhubaneswar. ... Appellant

-Versus-

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

For the Appellant : Sri Mukesh Agarwal, Advocate
For the Respondent : Sri D. Behura, S.C. (CT) &
Sri M.S. Raman, Addl.SC (CT)

Date of hearing:05.10.2021 *** Date of order: 21.10.2021

O R D E R

Both the above second appeals are heard analogously and disposed of by this common order as the facts and circumstances of both the case are similar.

2. The dealer-appellant preferred S.A. No.390(V) of 2014-15 challenging the order of remand dtd.08.10.2014 passed in First Appeal Case No. AA106111211000213/BH-I/12-13 by the learned Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar (hereinafter called as 'first appellate authority') thereby setting aside the order of assessment dtd.22.07.2012 passed by the Sales Tax Officer, Bhubaneswar I Circle, Bhubaneswar raising tax demand of Rs.42,46,131.00 including penalty of Rs.28,30,754.00 for the tax period 01.05.2007 to 31.03.2011 and remanding the matter back to the learned Sales Tax Officer, Bhubaneswar I Circle, Bhubaneswar (in short, 'assessing authority') for reassessment. The dealer-appellant also preferred S.A. No.300(V) of 2018 challenging the order dtd.08.08.2018 passed in First Appeal Case No. AA-106221522000152(VAT) by the

learned Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar (hereinafter called as 'first appellate authority') confirming the order of reassessment dtd.13.07.2015, wherein the learned Sales Tax Officer, Bhubaneswar I Circle, Bhubaneswar (in short, 'assessing authority') directed refund of Rs.70,287.00 towards excess payment of tax.

3. The facts of the circumstances of the case giving rise to the present appeal are that the dealer-appellant is a private limited company which is running a printing press and its nature of business is basically printing, stitching, binding and also trading papers and art boards. Upon receipt of the Audit Visit Report (in short, the AVR) a proceeding u/s.42(4) of the Odisha Value Added Tax Act, 2004 (in short, 'OVAT Act') was initiated and statutory notice in form VAT-306 was issued to the dealer-appellant alongwith a copy of the AVR which was duly served on it. In the AVR following discrepancies were observed by the STO, Audit-

(i) The company was engaged in trading of confidential papers and refused to show any agreements in this regard.

(ii) The company has no additional place of business. It dispatched goods to outside the State of Odisha from Cuttack worth of Rs.65,44,500.00 whereas goods dispatched

from Bhubaneswar was Rs.8,77,000.00. This raises suspicion about the business activity of the company.

(iii) In order to evade tax, the company was engaged in trading of papers only which was taxed @ 4% and carried printing as job work which is tax exempted instead of selling printing materials which are taxable as a result the Government lost tax on value addition in case of such activity.

The dealer-appellant was confronted with the above allegations in the AVR to which he explained that the nature of business of the dealer is mainly job work of printing, re-selling of paper and making of art boards. Beside this, the company also carried its business of binding and stitching works. In the period under assessment, the dealer-assessee has printed the confidential documents against which there is no work order/agreement. In course of audit, the audit team has not detected any discrepancies in the books of account in regular course of business.

4. The assessing officer on examining the allegations made in the AVR and the written explanation submitted by the dealer-appellant opined that:-

(a) The dealer-appellant was essentially running a printing press and selling printed materials. He

deliberately avoided to disclose a detail transaction and claimed those materials as confidential documents. The materials printed for sale may be confidential documents, requiring top secrecy on the part of the dealer but that does not prevent the dealer from divulging the transaction details or the important features of the transaction for deciding the tax implication. Confidentiality or secrecy, may be in respect of matters or the substance but not in respect of business transaction.

(b) The provisions of Section 61(2) of the OVAT Act and Rule 67(2) of the OVAT Rules mandate detail verification of all the documents and records in relation to the business transaction. The dealer failed to produce or cause production of the accounts and other related required documents for examining the terms and conditions of the transaction which violates the mandate of the OVAT law.

(c) Splitting of transactions and raising separate bills for sale of paper printing, stitching, binding and finally packing are simply not seen or experienced in the general trade of printing. People in sell and printing trade generally

printed materials and raised bills to the customer.

(d) The ratio of cost factor i.e. the cost of paper, the cost of printing, the cost of stitching, the cost of binding and the cost of packing look quite unreasonable and irrational. Even if the details of split have not been furnished, it was ascertained from the audit members that the bills raised for printing, stitching and binding charges are very high and do not commensurate with the cost of paper.

(e) The dealer has dispatched the printed materials to outside the State parties by using Government of Odisha way bill but no tax has been levied and no CST return has been filed for such business activity.

(f) The dealer operates from the same premises where another concern operates in the name of M/s. Graftek Pvt. Ltd., which is doing almost similar business and in the similar style. In fact both the companies are managed by two brothers of the same family. Sri Brajananda Mishra is the Managing Director of M/s. Graftek Pvt. Ltd. and Sri Shyamananda Mishra is the Managing Director of M/s. Rainbow Offset Pvt. Ltd. In both the concern, similar modus operandi is adopted which is nothing but a

colourable device to evade tax by understating the taxable turnover.

5. The assessing officer taking into consideration the allegations made in the AVR and the materials on record, determined the GTO/TTO of the dealer-appellant at Rs.4,91,44,005.00 and the output VAT for the period under assessment at Rs.19,83,760.00. After adjustment of ITC of Rs.3,73,067.00 against the output tax the balance tax payable was determined at Rs.16,10,693.00. The dealer-appellant having paid Rs.1,95,317.00 with the returns filed was to pay balance tax of Rs.14,15,376.00 on which the assessing officer also imposed penalty of Rs.28,30,754.00. Accordingly, the dealer-appellant was required to pay tax together with penalty of Rs.42,46,131.00 as per the terms and conditions of the demand notice in form VAT-313.

6. The dealer-appellant being dissatisfied with the aforesaid tax demand raised by the assessing officer preferred first appeal before the First Appellate Authority who also by its order dtd.08.10.2014 remanded the matter to the assessing officer for reassessment on the following finding:-

The appellant runs a printing press and carries on business of selling paper as well as undertakes job works of printing confidential papers (question paper) of the customers. Thus, the activities of the appellant

involves selling of paper to the customers who offers job work of printing and job work of printing papers. A close analysis of the activities of the job work reveals the customers approaches the appellant for printing the matter under the ownership of the customer. The customer supplies the papers to the appellant for printing the matter as per their desire and specification. The appellant only engages its skill knowledge and labour for performing the job work. The main ingredients of printing the paper which is supplied by the customer. Besides the main ingredients, consumables such as ink, plate and other related ingredients are also used in course of printing. The outcome of materials is delivered to the customer.

The above activity is in nature of works contract as property in the goods in the form of consumables such as ink, plate and other related ingredients are transferred to the customers although the main ingredients i.e. paper is supplied by the customer. The printing activities of the appellant constitutes works contract and levy of VAT is possible on the value of the materials involved in execution of works contract notwithstanding that the value represents a small percentage of amount paid for the execution of the works contract.

7. Examining the books of account reveals that the dealer-appellant also sells paper to the customers which

are ultimately used in printing of the matters for the identified customers. In such cases, the dealer-appellant has collected VAT on sale of papers and discharged VAT liability after setting off the input tax credit on purchase of such paper.

The assessment of the turnover treating the activity as trading of printing materials is not justified. The activity has the ingredients of works contract. The dealer-appellant being a LTU dealer, the assessing authority being a STO is competent enough to assess the appellant. The assessment is not barred by limitation.

8. The dealer-appellant being further aggrieved with the order dtd.08.10.2014 passed by the First Appellate Authority, preferred S.A. No.390(V) of 2014-15 before this forum. It is pertinent to mention here that during pendency of this second appeal before the Tribunal, the assessing officer proceeded with the reassessment order in view of direction of the first appellate authority remanding the matter back to it for reassessment and passed a fresh order on 13.07.2015 against which the dealer-appellant preferred First Appeal Case No. AA-106221522000152(VAT) before the First Appellate Authority which was disposed of on 08.08.2018 confirming the order of reassessment against which the dealer-appellant preferred S.A. No.300(V) of 2018.

9. In the memorandum of appeal the dealer-appellant though took several grounds, it basically harped on the question of limitation. It was vehemently urged by the learned Counsel for the dealer-appellant that the assessing officer passed the impugned order of assessment dtd.22.07.2012 after expiry of the statutory period of limitation for which the said order was nullity in the eye of law. He strongly argued that notice for audit assessment was served on the dealer-appellant on 10.12.2011 and the limitation of completion of assessment expired on 09.06.2012. The assessing officer should have completed the assessment by that date but the assessing officer completed the assessment on 22.07.2012 which is after expiry of the statutory period of six months. Commissioner of Sales Tax had also no jurisdiction to extend the time after expiry of the period of limitation in view of judgment of the Hon'ble High Court in case of Goled Colour Lab & Studio Vrs. Commissioner of Commercial Taxes and another, wherein the Hon'ble Court has categorically held that power conferred on the Commissioner to extend time can only be exercised before expiry of the period of limitation and not after that. So, the extension for time granted by the Commissioner of Sales Tax vide its letter No.VII(Rev)20/2012 11903/CT, dated 07.07.2012 till 09.12.2012 does not save the limitation in passing the assessment order. He submitted to set aside the order of both the forums on that ground.

10. Per contra, the learned Addl. Standing Counsel (CT) representing the State vehemently urged in terms of the cross objection filed by it that after remand, the dealer-appellant, though preferred S.A. No.390(V) of 2014-15 before this Tribunal, did not pray for stay of the assessment proceeding before the Sales Tax Officer and when second appeal was subjudice, the reassessment proceeding was completed by the assessing officer in which the dealer-appellant fully participated and being further aggrieved with the reassessment order preferred first appeal before the first appellate authority and on confirmation of the order of assessment by the first appellate authority, the dealer-appellant again preferred another second appeal vide S.A. No.300(V) of 2018. When after remand the reassessment proceeding was completed in which the dealer-appellant fully participated, the S.A. No.390(V) of 2014-15 become infructuous for which the same cannot be adjudicated. He, relying upon the order dtd.21.10.2000 passed by this Tribunal in S.A. No.1852-55 of 1999-2000, argued that though there is no statutory provision for granting stay of the further proceeding of the matter pending before the lower forum, the Tribunal has got inherent power to pass all such orders which is necessary in the interest of justice. This Tribunal in case of M/s. Indo Flogates Ltd. Vrs. State of Orissa granted stay of further proceeding and stay of operation of the order of the learned ACST. So, the appellant should have

filed application before this Tribunal for stay of the reassessment proceeding but he did not do so. Hence, the earlier order passed by the first appellate authority merged with the later order passed by it after completion of the reassessment proceeding. The order of remand passed by the first appellate authority having been given effect to by the assessing officer and the order not being in existence any more, the appellant's right to challenge the order of remand as well as the order of assessing officer on the question of limitation does not exist anymore. He submits to dismiss both the second appeals and confirm the order of the first appellate authority.

11. We have heard the learned counsels for both the parties, gone through the grounds of appeal, order of assessing officer as well as the first appellate authority vis-a-vis the materials on record. In view of the rival contentions of the parties, the question that arises for consideration in the present second appeal is (i) whether the order of assessment dtd.22.07.2012 passed by the assessing officer was barred by limitation for non-compliance of mandatory provisions of Sec.42(6) and (7) of the OVAT Act? (ii) whether the S.A. No.390(V) of 2014-15 becomes infructuous in view of the fact that the appellant did not stay the further proceeding of the reassessment before the assessing officer and during the pendency of

this second appeal the assessing officer gave effect to the order of remand and dispose of the matter on merit?

(i) The first point that arose for consideration is whether order of assessment dtd.22.07.2012 passed by the assessing officer u/s.42(4) of the OVAT Act for the tax period 01.05.2007 to 31.03.2011 was barred by time? On perusal of the record, we find that the first appellate authority in page-9 of his order has observed that notice of audit assessment was served on the appellant on 10.12.2011. The limitation for completion of the assessment expired on 09.06.2012. The assessing officer vide letter No.3378/CT dtd.31.05.2012 sought for extension of time for completion of assessment on consideration of which the Commissioner of Sales Tax, Odisha vide letter No. VII(Rev)20/2012 11903/CT, dated 07.07.2012 extended the time till 09.12.2012 for completion of assessment. Accordingly, the assessing officer completed the assessment on 22.07.2012. Therefore, the assessment was not barred by limitation. It is clear from the above observation of the first appellate authority that the assessment order was passed beyond the statutory period of limitation and the extension of time was also granted after expiry of the

period of limitation. Sec.42(1) and 42(6) of the OVAT Act is referred hereunder for better appreciation of the issue involved in the present appeal.

"Audit Assessment.-

(1) Where the tax audit conducted under sub-section (3) of Section 41 results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit, evasion of tax or contravention of any provision of this Act affecting the tax liability of the dealer, the assessing authority may, notwithstanding the fact that the dealer may have been assessed under Section 39 or Section 40 or Section 43, serve on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report, requiring him to appear in person or though his authorized representative on a date and place specified therein and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.

(6) Notwithstanding anything contained to the contrary in any provision under this Act, an assessment under this section shall be completed within a period of six months from the date of service of notice issued under sub-section (1) along with the Audit Visit Report. (as amended w.e.f. 01.10.2010)"

On conjoint reading of both the provisions, it clearly transpires that the time limit for completion of the assessment is six months which is to be reckoned from the date of service of the notice under sub-section (1) along with the audit visit report. Undisputedly, the assessment have been completed after expiry of the period of limitation. The order of assessing officer was grossly barred by time and the extension of time granted by Commissioner of Sales Tax cannot save the time. The Hon'ble Court in case of M/s. Cobra Instalaciones Y Servicios Vrs. Commissioner of Sales Tax, Cuttack & Others in W.P.(C) No.15956 of 2013 disposed of on 29.04.2021 relying on the judgment of the Hon'ble Supreme Court in case of State of Punjab v. M/s. Shreyans Industries Ltd. (2016) 4 SCC 769 in paragraph-26 to 29 of the judgment observed as under:-

> "26. In State of Punjab v. M/s. Shreyans Industries Ltd. (2016) 4 SCC 769, the Supreme Court was interpreting Section 11(10) of the Punjab General Sales Tax Act, 1948 (PGST Act), in terms of which the Commissioner could grant a three year extension for completion of assessment after recording in writing the reasons for extending such period. The specific question considered was "whether the power to extend time is to be necessarily exercised before the normal expiry of the said period of three years run out?
> 27. The above question was answered by holding that "power to extend the time is to be

> exercised before the normal period of assessment expires.”..
> 28. In light of the legal position explained above, it was important for the Commissioner to have exercised the power to extend the period before the original period of limitation expired ....
> 29. For all of the above mentioned reasons, the Court is unable to sustain the validity of the impugned assessment order dated 15th May 2013, which on the date is was passed, was in violation of Section 42(6) of the OVAT Act. The Court further holds that the order dated 20th July, 2013 passed by the CST in terms of the proviso to Section 42(6) of the OVAT Act cannot validate such a illegal assessment order, which, on the date it was passed, was clearly time barred ....”

In view of the above settled position of law of the Hon’ble Court, the only irrestible conclusion is that the Commissioner of Sales Tax has no jurisdiction to extend time after expiry of the period of limitation. In the instant case, the application for extension of time was sent before the expiry of the period of limitation, but the same was considered only after expiry of period of limitation. The provisions contained in the proviso to Sec.42(6) of the OVAT Act does not empower the Commissioner to extend the time after expiry of the period of limitation. The Hon’ble Court has also categorically observed that power to extend time by the Commissioner can be exercised only before the expiry of the period of limitation. So, in view of the foregoing discussions, we are of the consensus view

that the assessment order dtd.22.07.2012 passed by the assessing officer was barred by time. Consequently, the order passed by the first appellate authority remanding the matter back to the assessing officer was also without jurisdiction.

12. Now, the second issue raised in the present second appeal as to whether the S.A. No.300(V) of 2014-15 will be infructuous because of the fact that the order of remand passed by the first appellate authority was given effect to by the assessing officer and the reassessment proceeding was completed when the second appeal was subjudiced? There is no dispute at bar that order of lower forum merges with the order passed by the higher forum. In the present case, the assessment order passed by the assessing officer merged with the order passed by the first appellate authority and the order passed by the first appellate authority will merge with the order to be passed in the present second appeal. The contention raised by the learned Counsel for the revenue-respondent that the second appeal No.390(V) of 2014-15 becomes infructuous after disposal of the reassessment proceeding before the assessing officer does not sound good and must fall to the ground. Once the S.A. No.390(V) of 2014-15 is disposed of on merit, the order passed by the assessing officer after remand becomes nonest in the eye of law. Merely because, the dealer-appellant participated in the reassessment

proceeding, his right to pursue the second appeal which was filed challenging the order of remand is not taken away. The question of limitation is a mixed question of fact and law which can be raised at any stage of the proceeding. The dealer-appellant raised the question of limitation before the first appellate authority in First Appeal Case No. AA106111211000213/BH-I/12-13 and the learned first appellate authority under misconception of law decided the question of limitation against the dealer-appellant and while passing such order he did not take note of the law laid down by the Hon'ble Court in different judicial pronouncement. Therefore, the order of the first appellate authority cannot sustain in the eye of law. The learned Counsel for the Revenue relying on the judgment reported in (1994) 95 STC 216 in case of Lipton India Ltd. V. Asst. Commissioner (CT), Penguine Paper Plast (P) Ltd. V. Commissioner of Commercial Taxes in W.P.(C) No.20514/2010 dtd.0301.2011 argued that the dealer-appellant not having obtained the stay order from this Tribunal and the assessing authority having disposed of the reassessment proceeding on merit with full participation by the dealer-appellant he is precluded from raising question of limitation in S.A. No.390(V) of 2014-15 which has become infructuous. This court has inherent power to grant stay of further proceeding of mater pending before the assessing officer is not in dispute as observed in the preceding paragraphs. The right of the dealer-

appellant cannot be taken away to pursue the S.A. No.390(V) of 2014-15 merely because the order of remand passed by the first appellate authority was given effect to and reassessment proceeding was completed with full participation by the dealer-appellant as he has not abandoned his right of pursuing the earlier second appeal filed by him before this Tribunal. Whatever order has been passed by the assessing officer in reassessment proceeding pursuant to the order of remand by the first appellate authority will merge with the order to be passed by this Tribunal in S.A. No.390(V) of 2014-15. So the contention raised by the learned Counsel for the respondent is legally unsustainable.

13. For the foregoing discussions, we are of the considered opinion that the order of assessment dtd.22.07.2012 passed by the assessing officer was squarely barred by time, hence without jurisdiction. Accordingly, the impugned orders of both the forums below are hereby set aside. The order of assessment passed by the assessing officer being barred by time and nonest in the eye of law, the subsequent order passed by it after remand is also nonest in the eye of law. Accordingly, the order dtd.13.07.2015 passed by the assessing officer which was confirmed by the first appellate authority in its order dtd.08.08.2018 being nonest in the eye of law are hereby set aside. Cross

objections filed by the State-respondent in both the second appeals are accordingly disposed of in view of the discussions made above.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(Sweta Mishra)
2nd Judicial Member

I agree,

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