BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No. 123(C)/2007-08

(Arising out of the order of the learned ACST, Sundargarh Range, Rourkela in first appeal Case No. AA 71(RL-II)C/2006-07 disposed of on 28.06.2007)

Present :- Shri A.K. Dalbehera, 1st Judicial Member Smt. Sweta Mishra, 2nd Judicial Member & Shri S. Mishra, Accounts Member-II.

M/s Lotus Chrome & Chemicals (P) Ltd.,
San Nuagaon, Beldihi, Dist-Sundargarh. ..... Appellant.

-Vrs.-

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

For the Appellant: : Mr. B.B. Panda, Ld. Advocate.
For the Respondent: : Mr. D. Behura, ld. S.C.(C.T.)

Date of Hearing : 07.04.2021 * Date of Order : 19.05.2021**

O R D E R

The present appeal of the dealer-appellant has been directed against the impugned appeal order of learned Assistant Commissioner of Sales Tax, Sundargarh Range, Rourkela (hereinafter referred to as ld. FAA) passed on 28.06.2007 in Sales Tax Appeal No.AA71(RL-II C) 2006-07 confirming the extra demand of Rs.5,92,998.00 (tax with surcharge) raised by learned Sales Tax Officer, Rourkela-II Circle, Panposh (hereinafter referred to as LAO) in his assessment order passed on 31.03.2006 framed u/r. 12(4) CST (O) Rules for the year 2002-03.

2. Being aggrieved by the impugned order of ld. FAA, the dealer appellant has preferred second appeal before the Tribunal contending

that the first appeal order is illegal, arbitrary and bad in law. He challenged the aforesaid order on the following grounds:-

"(a) For That, the order of assessment of and the order of the 1st Appellate authority is bad in law and liable to be set aside in as much as the orders suffer from non application of mind to the fact that the Assessment order was passed exparte in violation of principles of natural justice. Similarly, the 1st Appellate authority disposed of the appeal without giving opportunity or hearing to the appellant.

(b) For that the Appellate Authority did not consider the cause of absence of the appellant on the date of the Assessment and confirmed the order mechanically, on the contrary, should have set aside the exparte order to give reasonable opportunity to the appellant for participating in the assessment.

(c) For that the basis for extra demand is on account of non submission of declaration Form. It is humbly submitted that in the fact and circumstances of this Case it cannot be inferred that the non submission of declaration Forms was intentional and on account of deliberate planning which is to the advantage of the petitioner and detrimental to the interest of the Revenue. The appellate authority failed to appreciate that said observation is based on presumption.

(d) for that in spite of best efforts, the petitioner could not obtain the declaration Forms from its purchasing dealers and furnish the same before the prescribed authority within the prescribed time for which the assessing officer as well as the appellate authority should have allowed time to the appellant.

(e) For that on sincere efforts the petitioner has been able to collect declarations in Form-C from its purchasing dealers covering substantial part of the sale which shall be produced at the time of hearing. It is humbly submitted that on acceptance of this declaration Forms the demand will be reduced substantially.

(f) For that the appellant had filed a memo before the STO., Circle-II Rourkela on dated 12.05.1999 regarding the amendment of R.C. under CST, Orissa Act vide its reference No.LO/STO/074/1999-2000 which cover the item of Chromic Acid sold by the Appellant. Hence the claim of tax deduction by the appellant is correct and in accordance with law and the allegation of

the assessing officer was baseless which was not appreciated by the appellate authority.

(g) For that the order of assessment and the order of the appellate authority are otherwise bad in law and are liable to be set aside."

He also submitted the following additional grounds of appeal:-

"h(i) For that, the order of assessment has been passed within the period of ,imitation as reflected in overwriting the date of order without having any initial. And the date of issue was 23.05.2006 and served on the appellant on 12.02.2007. Therefore, as per the order of the Hon'ble Apex Court and Hon'ble High Court is the delay was not properly explained it shall be presumed that there was no order has been made within the period of limitation i.e. three years.

h(ii) For that, the learned assessing officer was not empowered to pass order of based judgment assessment under Rule 12(4) of the CST(O) Rules where a registered dealer has furnished the returns for the purpose of assessment. Therefore, issuing notice and subsequent assessment order was want of statutory jurisdiction.

h(iii) For that, the dealer has furnished a substantial amount of original Form-C before the assessing officer which was not considered by the learned First Appellate Authority.

H(iv) For that, the appellant may this issue as per the judgment of the Hon'ble High Court in case of State of Orissa and Others Vrs. D.K. Construction and Others reported in (2017) Vol.100 VST at page 24 (Orissa) held that:

"Appeal to the Appellate Tribunal-Question of law or fact can be *raised at any time- No question of limitation."*

Moreover, he also submitted a detailed notes of submission during the course of second appeal.

3. The brief fact of the case is as follows:-

i. That, in the instant case, the dealer-appellant is a private limited company engaged in manufacturing of sodium dichromate and sodium sulphate and sale thereon.

   At the time of assessment, the LAO observed that in spite of statutory notice and subsequent intimations issued to him, the dealer failed to appear in his assessment proceedings without

any reasonable cause. Since, the case was going to be barred by limitation, he completed the assessment on exparte basing on the materials available on record. He observed on verification of the returns filed that the dealer has shown finished goods worth of Rs.41,40,124.00 in interstate transaction and claimed 1% taxable sales. However, he could not find any material on record to substantiate to the above claim which he disallowed and taxed him at appropriate rate. He further observed that there is a Circle Fraud Case Report relating to the material period wherein it is alleged that the dealer has sold Chomic worth of Rs.44,90,409.00 in interstate transaction and collected 1% tax as the unit has claimed to be an SSI Unit. But, on verification of Registration Certificate and PMT Certificate issued in favour of dealer, he found that the above item is not covered in such certificates. Accordingly, he determined both the GTO and TTO at Rs.46,83,628.00 and imposed tax with surcharge @13.5% thereon that arrives at Rs.6,18,239.00 against which that the dealer has already paid a sum of Rs.25,241.00. Hence, he demanded the balance tax with surcharge due of Rs.5,92,998.00 in his assessment order passed on exparte.

4. Being aggrieved by the order of assessment, the dealer preferred first appeal before the ld. FAA and argued to quash the said assessment order as per his grounds of appeal. However, since the dealer didn't appear in his appeal proceeding in spite of reasonable opportunity availed, he completed the said proceeding on exparte and confirmed the assessment order passed by the LAO.

5. Being further aggrieved, the dealer-appellant has come up before the Tribunal assailing the order of ld. FAA as bad in law liable to be set-aside.

6. From the rival submissions made at the time of hearing by both the Counsels of the appellant-dealer and respondent-State and materials available on record, the following issues are raised in the present case:

(i) **The order passed by the LAO has been ante-dated**.

During the course of hearing the ld. Counsel for the dealer argued that the order of assessment has been passed within the period of limitation of three years as reflected in overwriting the date of order without having any initial and the date of issue was 23.05.2006 and served on the appellant on 12.02.2007. In this connection he cited few judgments as enumerated in his written notes of submission and claimed that the said order has been ante-dated.

However, on this issue, the Tribunal relied on the judgment passed by the Hon'ble Orissa High Court on 17.03.2021 in W.P.(C). No.8847/2007 which is reproduced below:-

"06. 17.03.2021 1. Heard Mr. Ray, learned counsel for the Petitioner and Mr. Debadutta Beura, learned Additional Standing Counsel for the Opposite Parties.

2. There are two issues raised by learned counsel for the Petitioner-assessee to assail the impugned demand. The order dated 11th September, 2007 of this Courts reflects the first issue raised, viz.., whether the original order of assessment (annexure-5 to the writ petition) is indeed dated 9th November, 2006 or, as contended continued by the Petitioner, has been antedated?

3.Having perused the original file produced today by the Opposite Parties, this Court is not satisfied that there has been any tampering with the date of the assessment order, and that it is indeed dated 9th November, 2006.

4. It is then contended by the learned counsel for the Petitioner relying on the judgments in ***State of Andhra Pradesh v. Khetmal Parekh, (1994) 93 STC 406 and Jindal Stainless Ltd. V. State of Orissa, (2012) 54 VST 1 (Orissa)*** that the very fact of the assessment order was served late on the Petitioner should lead to an inference that it was antedated.

5. In the present case, the assessment order was dispatched on 19th December, 2006 as is reflected in the original record. It was actually delivered to the Petitioner on 24th May, 2007. The delay, in the considered view of this Court in serving the assessment order on the Petitioner, is not so substantial as to lead to an inference that somehow the assessment order was deliberately antedated or tempered with.

4. Lastly, it is submitted by learned counsel for the Petitioner that the assessment order is based on an audit report, which according to him, was prepared on 31st May, 2006 itself, but forwarded to the Sales Tax Officer only on 11th August, 2006. This according to him violates the mandatory requirement of Section 41(4) of the Orissa Value Added Tax Act, 2004 (OVAT Act). In support of this proposition, reliance is placed on the decision of this Court in ***Jindal Stainless Ltd. V. State of Orissa (2012) 54 VST 1 (Ori),*** where the question whether non-compliance with the mandatory requirement of Section 41(4) of the OVAT Act that the audit visit report should be submitted to the assessing authority within seven days from the date of the audit, would under the assessment nonest in the eye of law, was answered in the affirmative.

5. As far as the last question is concerned, the Court is informed by the learned counsel for the Department that correctness of the aforementioned decision of the Division Bench of this Court in Jindal Stainless Ltd. (supra) is pending consideration before a Larger Bench of this Court.

6.Awaiting the decision of the Large Bench, this petition is, for consideration of the last mentioned ground, adjourned to 14th July, 2021."

In view of above judgment, the contention taken by the ld. counsel for the appellant is rejected.

(ii) The order of assessment has been made under a wrong rule of CST(O) Rules.

Referring to relevant rules under CST(O) Rules and written note of submission, the ld. Counsel for the appellant argued that since his client has furnished all the returns for the relevant year, assessment cannot be made u/r.12(4)of CST(O) Rules. At best, the assessment could have been made u/r. 12(3) of CST(O) Rules as per provisions of the statute.

In this connection, the Tribunal referred to some of the cited case laws which are synopsised as follows:-

A) Mentioning of a wrong provision or non-mentioning of any provision of law would, by itself, be not sufficient to take away the jurisdiction of a court if it is otherwise vested it in law. While exercising its power, the court will merely consider whether it has the source to exercise such power or not. [ref: J. Kumaradarsan Nair Vrs. Iric Sohan, (2009) 12 SCC 175] : M P Steel corporation vrs. CCE (2015) 80 VST 402 (SC) = (2015) 32 GSTR 260 (SC) = (2015) 7 SC 58.

B) If an authority has a power under law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exit and can be traced to a source available in law. Quoting wrong provisions would not invalidate the order passed by the authority if it is shown that such order could be passed under the provisions of the statute .[Ref. N. Mani vrs. Sangeetha Theatre (2004) 12 SCC 278 ; Kedar Shashikant Deshpande vrs. Bhor Municipal Council (2011) 2 SCC 654; Vijaya Traders vrs. CTO (2011) 45 VST 113 (AP).]

C) It is not enough if wrong sections or provision of law is cited in a notice or order if the power to proceed is actually there under another provision ... If the assessing authority has the power to make best judgment assessment, under what section he has made the assessment is immaterial. Section 12(3) and section

12(4) are not mutually exclusive. [Titaghur Paper Mills Pvt. Ltd. Company vrs. State of Orissa (1981) 47 STC 240 (Ori).

In the light of above judgment of different Hon'ble courts, the argument taken by the ld. counsel for the appellant does not hold good and is rejected.

7. Now, coming to the factual dispute arose out of orders of both the fora below passed on exparte, the Tribunal, after examining all the information and documents available on record, observes as follows:

(a) That, the LAO taxed "chomic Acid" at appropriate rate as it is not covered in the Registration Certificate issued by the CT Department and PMT issued by concerned DIC. Whereas, in his grounds of appeal, the dealer has claimed to have filed a memo before the concerned STO, Rourkela-II circle on 12.05.1999 regarding amendment of RC under CST, Orissa Act Vide its reference no. LO/STO/074/1999-2000 that covers the item of chomic acid sold by him. Now, the LAO is directed to examine such claim and take actions accordingly for its inclusion in Registration Certificate, if in order, giving the dealer a reasonable opportunity of being heard.

(b) That, the dealer has claimed to have submitted declaration in forms 'C' for concessional rate of tax. However, such a statement appears to be not correct in view of the fact that both the assessment and first appeal orders have been passed on exparte basis. However, the LAO is now required to verify the declaration forms claimed to have been submitted, copies of which are enclosed to written notes of submission filed during the course of hearing of second appeal.

(c) That, the dealer has claimed concessional rate of tax @1% as he is said to be dealing with chemical fertilizers as an SSI Unit. Vide Finance Department Notification No.14700-CTA-37/2001 (pt)-F(SRO 160-2001) dtd.31.03.2001 w.e.f. 01.04.2001, the State Govt. have declared that tax on sale of

certain goods as per list enumerated therein including chemical fertiliser in the course of interstate trade or commerce by a dealer, having his place of business in the state of Orissa, shall be calculated @1% subject to the condition of production of declaration in form 'C' . The LAO is now directed to examine as to whether "chomic acid" as sold by the dealer falls under the category of "chemical fertiliser" or "chemical" to determine the actual rate of tax and take action accordingly.

(d) That, the LAO is directed to re-compute the GTO and TTO figures while doing fresh assessment as the figures mentioned in assessment order don't tally. Moreover, while re-computing the tax liability, he is directed to keep in mind the provisions of section 8(2) of CST Act towards levy of appropriate rate of tax after determining the nature of goods sold in interstate transaction .

(e) That, since orders of both the fora below have been passed on exparte, reasonable opportunity may be extended to him in his re-assessment.

8. In view of above observation, it is now order accordingly.

9. The appeal is allowed and the impugned order is set-aside. The matter is remitted back to the LAO with a direction to re-examine the instant case in the light of above observations of the Tribunal and complete re-assessment preferably within three months of receipt of this order after giving the dealer a reasonable opportunity of being heard.

This case is disposed of accordingly.

Dictated & Corrected by me.

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

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

I agree,

Sd/-
(A.K. Dalbehera)

1st Judicial Member.

I agree,

Sd/-
(Sweta Mishra)

2nd Judicial