

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

S.A. No. 8 (C) of 2015-16  
S.A. No. 9 (C) of 2015-16  
&  
S.A. No. 3 (C) of 2016-17

(Arising out of orders of the learned Additional CST (Appeal), Central Zone, Odisha, Cuttack in Appeal Case No. AA. KJ/391/DCST/2011-12, disposed of on dated 23.02.2015 & of the learned JCST, Jajpur Range, Jajpur Road in First Appeal Case No. AA. 550- KJB (C) of 2014-15, disposed of on dated 30.01.2016 respectively)

Present: Shri R.K. Pattanaik, Chairman,  
Smt. S. Mishra, 2<sup>nd</sup> Judicial Member, and  
Shri P.C. Pathy, Accounts Member-I

S.A. No. 8 (C) of 2015-16  
&  
S.A. No. 3 (C) of 2016-17

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

-Versus-

M/s. AMCD Transport & Minerals Pvt. Ltd.,  
Bhadrasahi, Barbil, Keonjhar ... Respondent

S.A. No. 9 (C) of 2015-16

M/s. AMCD Transport & Minerals Pvt. Ltd.,  
Bhadrasahi, Barbil, Keonjhar ... Appellant

-Versus-

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

For the State : Sri M.L. Agarwal, Standing Counsel (CT)  
For the Dealer : Sri B.B. Panda, Advocate

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Date of hearing: 25.06.2020 \*\*\*\*\* Date of order: 17.07.2020  
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## ORDER

In S.A. No. 8 (C) of 2016-17, State has preferred the appeal vis-a-vis the provisional order of assessment dated 09.11.2011 relating to the tax period 01.10.2010 to 31.12.2010 to the extent of liability to pay compensatory interest and penalty by the dealer solely on the ground that the required declaration form having not been furnished, it was obligatory on the part of the learned Additional Commissioner of Sales Tax (Appeal), Central Zone, Cuttack (in short, 'FAA') to direct such payment in accordance with law. As to S.A. No. 9 (C) of 2016-17, it is at the instance of the dealer with respect to the impugned order dated 23.02.2015 on the ground that reasonable opportunity was not extended to it by the learned Deputy Commissioner of Sales Tax, Barbil Circle, Barbil (in short, 'AA') for collection and submission of Form 'H' and by FAA for having not accepted 'H' form not being in original when it had been produced at the time of reassessment under Rule 12(4) of the Central Sales Tax (Odisha) Rules, 1957 (in short, 'the Rules').

2. In S.A. No. 3 (C) of 2016-17, the challenge is at the behest of the State against the impugned order dated 30.01.2016 which is concerning the provisional assessment for the period 01.04.2011 to 30.06.2011 on the ground that annulment of assessment for want of valid notice to be unjustified, inasmuch as, the

dealer had questioned the legality and judicial propriety of the alleged assessment without proper notice as per law.

3. As the parties are same, the Tribunal deems it proper and expedient to dispose of all the above appeals by the following common order.

4. The sole question which is involved in S.A. No. 9 (C) of 2015-16 is about the submission of Form 'H'. In fact, as revealed from the record, the dealer failed to furnish Form 'H' despite opportunity being provided by the AA and subsequently, when it was filed, the FAA did not accept the same for not being the original. According to the dealer, certain defects were pointed out and also on the ground that the original 'H' form could not be furnished, the FAA fully knowing the fact that the original had been produced during the time of reassessment for the tax period 01.04.2009 and 31.03.2012 under Rule 12(4) of the Rules and having been cancelled, declined to consider the same and thus, disallowed the exemption which is bad in law. The State justified the impugned order dated 23.02.2015 and urged that as per Rule 12(7) of the Central Sales Tax (Registration & Turnover) Rules, 1957 (in short, 'Rules, 1957), no further filing of statutory forms should ordinarily be accepted and as such, there is no merit in the claim of the dealer and thus, it is not sustainable in the eye of law. The Tribunal is to consider, whether, the impugned order dated 23.02.2015 is justified for having not accepted the contention of the dealer vis-a-vis 'H' form.

5. The learned Counsel for the dealer produced a copy of the reassessment order under Rule 12(4) of the Rules for the tax period 01.04.2009 to

31.03.2012 and contended that during the above said escaped turnover assessment, 'H' form in original was produced and therefore, it could be submitted before the FAA and that apart, when some defects were noticed, a reasonable opportunity could have been provided to remedy the same. It is further contended that when FAA was aware of the aforesaid fact with respect to the escaped turnover assessment order dated 23.03.2015, it was not proper to insist upon production of original 'H' form which had already been cancelled by the AA. As revealed from the impugned order dated 23.02.2015, a copy of 'H' form (No. 21H-12000007065) was produced before the FAA covering an amount of ₹3,83,09,230.00 but since the original was not submitted, it was not accepted and acted upon. That apart, as per the FAA, looking at the copy of 'H' form, there were certain defects especially with reference to Certificate No I besides the schedule part thereof for not being duly filled up. The show cause notice appears to have been issued on 14.01.2013 as per which a date on 28.01.2013 was fixed for reply by the dealer, the date on which there was no compliance and then, it was posted to 23.02.2015 and again on that date, neither there was appearance nor any reply was submitted. The question is, whether, the dealer was provided due opportunity to remedy the defects in 'H' form and if FAA was right and justified not to rely upon and accept a copy of 'H' form, when it had already been filed during the time of escaped turnover assessment for the period between 01.04.2009 and 31.03.2012? Admittedly, 'H' form in original failed to be produced by the dealer in time and a copy thereof could only be submitted before the FAA which was not accepted for

not being the original. The FAA, as is revealed from the impugned order dated 23.02.2015, does not appear to have provided the dealer a fair amount of opportunity to meet the deficiencies in 'H' form. It is not known, whether, such a fact of filing of original 'H' form before the assessing authority during the time of reassessment under Rule 12(4) of the Rules had, in fact, been brought to the immediate notice of FAA since there is no mention about it in the impugned order dated 23.02.2015. So far as the objection of the State is concerned, it has referred to Rule 12(7) of the Rules, 1957, according to which, a time limit has been prescribed for filing of declaration forms 'C' or 'F' and certificates in Form E-I or E-II with a proviso to receive such forms after the stipulated time subject to the satisfaction that such filing was prevented by sufficient cause. In the considered opinion of the Tribunal, it cannot be a ground not to accept 'H' form later on when it was sought to be produced before the FAA. If the original 'H' form was earlier produced during the escaped turnover assessment and was allegedly cancelled, as is contended by the learned Counsel for the dealer, then definitely it could not have been furnished before the FAA. According to the Tribunal, such a fact was to be duly considered by the FAA and if at all some deficiencies were pointed out or discernible in 'H' form on production of a copy thereof, then, in that case, the dealer ought to have been provided a good amount of opportunity to rectify the same. But, as it appears, no such exercise was sincerely exerted to.

6. Regarding the compensatory interest and penalty which is claimed by the State in S.A. No. 8 (C) of 2016-17, admittedly, there is no such order by the

AA so also FAA. According to the learned Standing Counsel (CT), since the declaration in 'H' form was not furnished and prima facie, dealer failed to discharge the payment of consequential tax, it was liable to pay the compensatory interest and penalty in terms of the Rules. In this connection, the dealer claims that the original 'H' form was procured and subsequently filed, although, it could not be submitted at the time of provisional assessment and then, a copy of such form was laid before the FAA and as such, there was no malafide which can be attributed to it, while opposing the contention of the State with respect to liability to pay compensatory interest and penalty. Under what circumstances original 'H' form could not be furnished at the time of provisional assessment and only a copy of which was submitted before the FAA, as described herein before, by referring to the contention of the learned Counsel for the dealer, could probably weigh upon fixing the liability vis-a-vis the compensatory interest and penalty. In the humble opinion and considered view of the Tribunal, such a question besides the acceptability of 'H' form with an opportunity to the dealer to remedy the defects ought to be considered afresh by providing due opportunity in respect thereof. In other words, it would be justified to direct the AA to consider the aforesaid aspects raised by the State as well as the dealer regarding the acceptability of 'H' form with the defects therein being rectified and then, to consider, if at all having regard to the conduct of the dealer any compensatory interest and penalty can really be levied or not.

7. . With respect to S.A. No. 3 (C) of 2016-17, the solitary ground upon which the impugned order dated 30.01.2016 is challenged is on the annulment of provisional assessment order by the FAA. On a bare perusal of the impugned order dated 30.01.2016, it seems that the FAA, by placing reliance on a decision of the Hon'ble Apex Court in the case of Commissioner of Sales Tax Vs. Subhash & Co. reported in (2003) 130 STC 97 (SC), arrived at a conclusion that the assessment was bad in law and a nullity for having no valid notice being served upon the dealer. According to the dealer, no reasonable opportunity was provided for filing of declaration form or rectification of defects and therefore, when there was gross violation of the provisions of law, the FAA was fully justified in annulling the provisional assessment for the period 01.04.2011 to 30.06.2011. While contending so, a reference has been made to a decision of the Hon'ble Court in the case of M/s. Chandrika Sao Vs. Sales Tax Officer, Balasore Range reported in 2015 (II) ILR Cuttack 228 which is to the effect that if the assessment was not completed within the time stipulated and the order of assessment is ante dated, permission of the Commissioner for completion of assessment was to be obtained under Section 42(6) (proviso) of the OVAT Act, 2004. Now, the question is, whether, the impugned dated 30.01.2016 can really be sustained and justified in law?

8. For having no proper notice, or valid notice, no assessment to be permissible and on the aforesaid ground and referring to the ruling of the Hon'ble Apex Court in Subhash & Co. case (ibid), the FAA seems to have annulled the provisional assessment for the tax period 01.04.2011 to 30.06.2011. At this juncture,

the learned Standing Counsel (CT) vehemently urged that the impugned order dated 30.01.2016 is untenable in law for the fact that if there was no proper or valid notice, it could not have resulted in annulment of the assessment, which the AA was otherwise authorized. It is contended that the FAA at the best could have set aside the assessment instead of annulling it, when proper or valid notice was found wanting. In this regard, the learned Standing Counsel (CT) further contended that the FAA misread and misinterpreted the ratio of the Hon'ble Apex Court laid down in Subhash & Co. case, wherein, it has been observed that non-issue or mistake, or defect in issue or service of notice, as the case may be, does not affect the jurisdiction of the assessing authority, if otherwise reasonable opportunity of being heard has been provided; issue of notice as prescribed in the Rules constitutes a part of reasonable opportunity of being heard; if prejudice has been caused either in non-issue or invalid or irregular service of notice, it would not render the proceeding invalid, more so, if assessee by its conduct renders service impracticable and impossible; and in a given case, when principles of natural justice have been violated or infringed. It is claimed by the State that FAA had no jurisdiction to annul the provisional assessment due to want of proper and valid notice when initiation of the proceeding was well within the jurisdiction of the AA. In that respect, a decision of the Hon'ble Apex Court in the case of Deepak Agro Foods Vs. State of Rajasthan: (2008) 16 VST 454 (SC) has been referred to. Again by citing a decision of the Hon'ble Court in the case of Commercial Enterprisers Vs. State of Orissa: (1991) 81 STC 84 (Orissa), it is contended that annulment of an

assessment is only permissible when the taxing authority would have no jurisdiction to assess, but in all other cases, where there is jurisdiction to assess, the assessment order may be set aside if there is any error which requires further enquiry. At this juncture, it would be profitable to quote Section 98 of the OVAT Act, 2004 which envisages that no return, assessment, etc. or other proceedings in pursuance of any provisions of the Act shall be invalid or deemed to be invalid merely by reason of any mistake, defect or omission in respect thereof, if they are in substance and effect in conformity with or according to the intents, purposes and requirements of the Act. In legal parlance, as is understood, annulment does treat a thing as though it never existed and in fact, the key distinction of an annulment is that the thing was not legal or legitimate to begin with. Normally, annulment is directed in case of any fraud or misrepresentation or concealment is noticed or revealed. It would be appropriate to claim that in absence of any of the above circumstances, there can be no annulment, especially when, the assessing authority, in so far as the present context is concerned, has the jurisdiction to make the assessment. In the instant case, as it seems, the FAA completely lost sight of the relevant provisions of the Act and totally misdirected itself in applying the ratio of the Hon'ble Apex Court in Subhash & Co. case (ibid) and thus, it could not have annulled the provisional assessment on the ground of improper or invalid notice. On the validity, the learned Counsel for the dealer produced copies of the notice dated 03.11.2014 and a corrigendum dated 11.12.2014 without indicating the future date while calling upon to furnish the wanting declaration forms/certificates and to make good the

deficiencies in such forms. It is, thus, apparent that notice was though issued on 03.11.2014 calling upon the dealer to furnish the wanting forms/certificates, whatever, on the date fixed i.e. 11.11.2014, but thereafter, released a corrigendum to rectify a mistake so as to read 'sale of goods in course of inter-State trade or commerce' as appearing in the notice dated 03.11.2014 as 'sale in course of export out of India' without fixing a date. Thus, considering the above materials furnished by the learned Counsel for the dealer, it can fairly be said that proper notice was not served upon. Though the learned Standing Counsel (CT) contended that a notice can as well be served on the dealer via a corrigendum, in the considered view of the Tribunal, that was not sufficient to justify the service of notice in proper form, more particularly, when no future date was mentioned in the corrigendum dated 11.12.2014, when it had been released later to the earlier date fixed i.e. 11.11.2014. However, it would be absolutely just and proper to conclude that an order of annulment by the FAA would be grossly untenable in absence of proper and valid notice when the AA had the jurisdiction under law to go for the provisional assessment.

9. Hence, it is ordered.

10. In the result, appeals under Section 78 of the OVAT Act, 2004 read with Rule 22 of the Rules in S.A. Nos. 8 (C) of and 9 (C) of 2015-16 and S.A. No. 3 (C) of 2016-17 stand allowed. As a necessary corollary, the impugned orders dated 23.02.2015 and 30.01.2016 are hereby set aside. Consequently, the AA is directed to consider filing of 'H' form (21H-12000007065) and its acceptance with the defects

therein rectified and thereafter to pass appropriate order vis-a-vis the compensatory interest and penalty in accordance with law if really justify; and also to take up fresh assessment with respect to the tax period 01.04.2011 to 30.06.2011 as per the Rules by providing an opportunity to the dealer and all the aforesaid exercise to be completed preferably within a period of three months from the date of receipt of the above order. Accordingly, respective cross-objections are disposed of.

Dictated & Corrected by me

Sd/-  
(R.K. Pattanaik)  
Chairman

Sd/-  
(R.K. Pattanaik)  
Chairman

I agree,

Sd/-  
(Smt. S. Mishra)  
2<sup>nd</sup> Judicial Member

I agree,

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