BEFORE THE ODISHA SALES TAX TRIBUNAL: CUTTACK
(Full Bench)
S.A. Nos.111 & 112 of 2010-11

(Arising out of order of the learned JCCT, Bhubaneswar Range, Bhubaneswar in First Appeal Case No. AA-40/BHII/08-09 disposed of on dated 02.03.2010)

Present: Shri R.K. Pattanaik, Chairman,
Shri A.K. Dalbehera, 1st Judicial Member, and
Shri R.K. Pattnaik, Accounts Member-III

S.A. Nos.111 of 2010-11

M/s. Suryo Udyog Ltd.,
Nayapalli, Bhubaneswar ... Appellant

-Versus-

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

S.A. Nos.112 of 2010-11

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

-Versus-

M/s. Suryo Udyog Ltd.,
Nayapalli, Bhubaneswar ... Respondent

For the Dealer : Sri R.K.Kar, Advocate
For the State : Sri M.S. Raman, ASC (CT)

Date of hearing: 10.11.2020 ***** Date of order: 12.01.2021

O R D E R

As the parties are same and common questions of law are involved, both the above appeals stand clubbed together and disposed of by the following order.

S.A.No.111 of 2010-11:

2. Present appeal under Section 23(3) of the Odisha Sales Tax Act,1947 (in short, 'the Act') is at the instance of the dealer assessee and is directed against the impugned order dated 02.03.2010 promulgated in Appeal Case No.AA-40/BH-II/2008-09 by the learned Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar (in short, 'FAA'), who partly allowed the appeal but deleted the penalty and reduced the tax demand for an amount of ₹95,16,261.00 as against the assessment dated 08.01.2008 on the principal ground that the very initiation of reassessment proceeding under Section 12(8) of the Act (in short, 'the Act') without conviction is bad in law in the facts and circumstances of the case, more particularly when, no irregularity was noticed during and in course of the original assessment held for the year 2001-02 and therefore, it is liable to be interfered with.

S.A.No.112 of 2010-11:

3. The aforesaid appeal under Section 23(3) of the Act is filed by the State as against the impugned order dated 02.03.2010 promulgated by the FAA challenging the legality of the order of assessment dated 08.01.2008 of the AA only with respect to the exemption of tax allowed in favour of the dealer assessee in terms of Section 5(3) of the Central Sales Tax Act, 1956 (in short, 'the CST Act') on the sole ground that the stock sold to the foreign buyers was in pursuance of the purchase orders received later to 01.04.2001, as such, assumed not to have been effected in compliance of any such agreement/purchase orders of the

concerned buyers and therefore, it is partly to be set aside for being not tenable in law.

4. In so far as S.A.No.111 of 2010-11 is concerned, the dealer assessee outrightly questioned the very initiation of the reassessment proceeding under Section 12(8) of the Act on the ground that the AA did not record reasons for the said action and simply advanced the objection of the audit which is bad in law and as a consequence, the additional demand so reduced to the tune of ₹95,16,261.00 cannot be sustained. With regard to the non-compliance of Section 5(3) of the CST Act, it is contended by the dealer assessee that the export sales were never disputed at the time of original assessment and for that, purchase tax on the goods could not have been levied in view of the interdiction as envisaged in Article 286(1)(b) of the Constitution of India, 1950. The State filed cross-objection and justified the initiation of reassessment under Section 12(8) of the Act and with the cross appeal i.e. S.A.No.112 of 2010-11, it is urged that there has been due compliance of Section 5(3) of the Act, however, the FAA erroneously allowed exemption of tax despite the fact that the opening stock of the exported goods, such as, prawn as on 01.04.2001 was sold to the foreign buyers without any such agreement or purchase orders. According to the State, the reassessment under Section 12(8) of the Act is in accordance with law and thus, it cannot be invalidated for any such non-compliance as is alleged by the dealer-assessee. Let us examine the question of maintainability of the reassessment proceeding as raised by the dealer assessee.

5. As per the contention, it is alleged by the dealer assessee that the AA did not have the conviction and initiated the proceeding under Section 12(8) of the Act simply by voicing the audit objection which is, therefore, legally not sustainable. It is also contended that such reassessment resulted in change of opinion rendered on the self same material without any fresh evidence and hence, liable to be quashed. According to the dealer assessee, the FAA miserably failed to appreciate the ratio of the Hon'ble Court in the case of Bindlish Chemical and Pharmaceutical Works Vrs. Commissioner of Sales Tax, Odisha reported in (1993) 89 STC 102. It is alleged that the AA did not assign any reasons in the notice, while initiating action under Section 12(8) of the Act which is the mandate of law. The learned Counsel for the dealer assessee cited the rulings reported in AIR 1958 SC 667; AIR 1969 SC 48; AIR 1970 SC 1896; and AIR 1989 SC 1997 of the Hon'ble Apex Court and a decision of the Hon'ble Court in the case of Indure Limited Vrs. Commissioner of Sales Tax, Cuttack , Odisha, and Others reported (2006) 148 STC 61 (Orissa) and contended that there was no valid ground shown while directing reassessment under Section 12(8) of the Act, inasmuch as, notice issued in respect thereof to the dealer assessee did not disclose the basis or ground upon which such action was initiated and that apart, reassessment was invalid, as it was set in motion on audit objection without independent application of mind. In fact, as per Section 12(8) of the Act, reassessment is permitted, if for any reason, the turnover of a dealer for any period has escaped assessment or has been under assessed as per the exigencies mentioned therein. In Indure Ltd. case ibid, the Hon'ble Court

observed that independent application of mind, if found to be absent, while initiating an action under Section 12(8) of the Act and the proceeding is shown to have been initiated solely on audit objection and there is want of reason to believe for the assessing authority to the effect that action thereunder to be necessary on account of facts or material brought on record, a notice in that respect, since does not disclose the basis therefor cannot stand scrutiny of law and hence, liable to be quashed. The learned Additional Standing Counsel for the State contended that there is indeed no requirement in law to record reasons in the notice issued to a dealer in terms of Section 12(8) of the Act, as is claimed by the dealer assessee, which is also the settled position of law as enunciated by the Hon'ble Apex Court in the case of Sales Tax Officer, Ganjam and another Vrs. Uttareswari Rice Mills reported in (1972) Vol.30 SC 567. It is further contended that a prima facie satisfaction is only to be arrived at while issuing notice for reassessment under Section 12(8) of the Act. In Indure Ltd. case supra, the dealer questioned the notice for reassessment by filing a writ petition, wherein, the Hon'ble Court in absence of any basis to initiate the action and on the ground that the assessing authority later on assigned the reasons, held the proceeding as invalid and not in accordance with law. In other words, the dealer immediately on receiving the notice, without responding on it and participating in the reassessment proceeding, challenged its validity for non-compliance of the conditions stipulated in sub-Section 8 of Section 12 of the Act. But then, if read and understood properly, the law as expounded in the decision supra, is that, an action under Section 12(8) of the Act can only be

resorted to provided the assessing authority finds the reason to believe and indicates the foundation for it in the notice issued to the dealer since such a proceeding depends on the satisfaction or independent application of mind of the authority concerned without in any manner being influenced by the audit objection. Here, in the case in hand, the situation is different to the extent that the dealer assessee did challenge the notice on the ground that it does not disclose any basis and simply persuaded by the audit objection only after fully and wholeheartedly participating in the reassessment proceeding. There is no denial to the fact that in Bindlish Chemical case ibid, the question whether reassessment could be commenced under Section 12(8) of the Act on the basis of observation made in the audit report was not specifically dealt with and answered. However, on a bare perusal of the aforesaid decision, it is made to understand that the Hon'ble Court with reference to Section 26 of the Bihar Agricultural Income Tax Act declined to invalidate reassessment under Section 12(8) of the Act when it was based on the observation made in the audit report and a question of law was involved, inasmuch as, the assessing authority erroneously exempted a goods that was sold as distilled water. The Hon'ble Court, however, in Indure Ltd. case supra, declined to approve the decision in Bindlish Chemical where the jurisdiction of the assessing authority under Section 12(8) of the Act was held wide and expansive in juxtaposition to the fact that reassessment must be based on a reason to believe with adequate and fresh materials on record on the ground that it runs counter to the ruling of Hon'ble Apex Court in Uttareswari Rice Mills case ibid. Having regard

to the requirement of law for reassessment as stipulated in Section 12(8) of the Act and on a sincere reading of the decisions discussed hereinabove, the Tribunal is of the considered view that action for reassessment depends on independent application of mind of the assessing authority after considering all such materials including the audit objection and a decision in that respect with a notice issued directing the dealer to show cause. The law is also very clear that there is absolutely no need for the assessing authority to record reasons in the notice which is issued to the dealer in terms of Section 12(8) of the Act but at the same time, existence of a cause of action with the foundational basis should be made apparent and disclosed in view of the authority of the Hon'ble Apex Court in Uttareswari Rice Mills case. In so far as the present case is concerned, the learned Counsel for the dealer assessee made the Tribunal to go through the orders of the AA starting from 24.03.2006 to 08.01.2008 and the reasons for the reassessment under Section 12(8) of the Act vide Annexures-3 to 5 of the written note of submission dated 10.11.2020 in order to satisfy and convince that there was no independent application of mind exerted by the AA who proceeded to reassess under Section 12(8) of the Act on the self same material and that too simply on the strength of audit objection. On perusal of Annexure–3 to 5 (as no objection was raised from the side of the State as to its authenticity), the AA appeared to have issued notice on 24.03.2006 on the basis of audit report and then, intimating the dealer assessee the reasons for re-opening of the case on 07.06.2007. According to the learned Counsel for the dealer assessee, while issuing notice, no

reasons were shown and the action was practically based on the audit objection and later on i.e. on 07.07.2007, the reasons for reassessment were made known is contrary to law as was the case in Indure Ltd. Referring to the other bunch of decisions of the Hon'ble Apex Court cited earlier, it is also contended by the learned Counsel for the dealer assessee that an action of the AA under Section 12(8) of the Act cannot be justified since it is clearly and conspicuously shown to have been influenced by the audit objection. It is alleged that even the reasons indicated in the order dated 07.06.2007 of the AA are in verbatim the observation of audit which does not elicit any independent application of mind in support of reassessment. In other words, according to the dealer assessee, the AA simply voiced the objection of the audit while stating the reasons for re-opening of the case under Section 12(8) of the Act. The order of AA dated 24.03.2006 is a cryptic one and the reason for re-opening of the case surfaced much after i.e. on 07.06.2007. But, a pertinent question which hinges the most is that when the AA had the authority for reassessment under Section 12(8) of the Act, can an action thereunder be invalidated on the ground so raised by the dealer assessee when the notice in respect thereof was not challenged at the inception? If, at all, the dealer assessee can be allowed to discredit the action of AA initiated under Section 12(8) of the Act long after issuance of notice and fully participating in the reassessment proceeding without any grumble? If an authority does not have jurisdiction or lacked jurisdiction or possessed of no jurisdiction under law, any action by it cannot be countenanced. But, when a power duly possessed by the

authority is not properly exercised, it may be declared as an illegality or irregularity curable in nature depending on the law where under it has been exercised. In the present case, the AA is undoubtedly having the authority to re-open a case under Section 12(8) of the Act and on receipt of the audit report, proceeded to issue notice to the dealer assessee and later assigned the reasons for reassessment and quite curiously enough, without any serious objection being raised, it participated therein wholeheartedly and under such circumstances, in absence of any legal bar invalidating the action from its threshold, the Tribunal is of the considered view that the entire proceeding cannot be thrown overboard and rejected. In any case, the dealer assessee, if not at the earliest but at a later point of time was intimated as to the basis for reassessment. Since, the dealer assessee did not challenge the notice and participated in the assessment proceeding, it may as well be held that it had the knowledge as to the foundation upon which action under Section 12(8) of the Act had been initiated. Of course, the mandate of law cannot be diluted in any manner whatsoever with the above excuses but having regard to the conduct of the dealer assessee to the effect that it did not question the validity of notice at the very beginning and went on to participate in the reassessment proceeding, notwithstanding certain departures made by the AA in following the legal requirements and for the fact that there is no law explicitly indicating that such an action to be incurable in nature, the Tribunal, with all humility and respect, arrives at a definite conclusion that reassessment so initiated against the dealer assessee cannot be declared as invalid. In other words, the objection raised by the dealer

assessee as to the validity of the reassessment proceeding for the reasons discussed hereinbefore cannot be sustained.

6. Furthermore, the learned Counsel for the dealer assessee cited a decision of the Hon'ble Apex Court in the case of State of U.P. and others Vs. Aryaverth Chawl Udyog and others reported in (2016) 91 VST 1 (SC) and contended that on the self same material since the AA proceeded to reassess under Section 12(8) of the Act, it amounted to change of opinion. In the case supra, the Hon'ble Apex Court held and observed that reassessment placing reliance on subsequent circular clarifying position of law and without more is impermissible, as it results in change of opinion since the decision is based on self same material. There is no gainsaying the fact that reassessment is not permitted without any additional facts or material which can well be thrashed out from the evidence already before the assessing authority that escaped attention. If material is there on record but it has escaped the notice of the assessing authority which was later on pointed out or revealed and then, on that basis reassessment is initiated and a conclusion is otherwise drawn, in the humble view of the Tribunal, it would not amount to change of opinion. If the authority, with any additional information, or facts or material which are already on record but escaped its attention during original assessment and on being informed can very well be the foundation for reassessment and any decision so rendered at the end cannot be branded as a change of opinion. If the assessing authority on its own or suo motu initiates reassessment on the self same material without any direction being

received or informed in that respect would definitely result in review of the earlier decision rendered in original assessment which is clearly prohibited under law. In the present case, as it is made to appear, the AA proceeded to reassess later to the receipt of audit report which highlighted upon the material that escaped attention at the time of original assessment and basing on that, the reassessment was commenced, in the considered opinion of the Tribunal, is not a case of change of opinion as is contended by the learned Counsel for the dealer assessee by referring to the ruling of the Hon'ble Apex Court in Aryaverth Chawl Udyog case. In any ways, despite certain irregularities noticed by the Tribunal, while issuing notice to the dealer assessee, nevertheless, for the discussions held hereinbefore, the reassessment proceeding, for the wholehearted participation of the dealer assessee, cannot and could not have been declared as invalid.

7. As to the ground of challenge in S.A.No.112 of 2010-11, it is claimed by the State that the opening stock in respect of sea food i.e. prawn as on 01.04.2001 was sold to the foreign buyers without purchase orders in hand which were received much later to the said date and thus, could not be exempted from tax in terms of Section 5(3) of the CST Act. The learned Counsel for the dealer assessee simply stated the fact that there was no discrepancy noticed in that respect during the original assessment. The contention of the State is confined to be stock of prawn as on 01.04.2001 sold to the foreign buyers effected without purchase orders which were received later to 01.04.2001. On a bare perusal of the impugned order dated 02.03.2010, it is clearly evident that the FAA did able to

segregate the purchase orders received prior to 01.04.2001 and concluded that export of 12,252 kgs. of finished goods was supported by purchase orders, as against 7118.400 kgs. determined by the AA and accordingly, deducted it from the closing balance of 3,43,213 kgs and then, arrived at a decision that the balance amount i.e. 330961 kgs. was indeed lacked prior purchase orders. Resultantly, the additional demand was reduced to the extent, it was held permissible. Besides that, the AA deleted the penalty in absence of any evidence as to suppression of turnover or concealment of any particulars before the AA. The learned Counsel for the dealer assessee did not make any attempt to produce the purchase orders with the support of which exemption under Section 5(3) of the CST Act in respect of the entire goods was claimed. The FAA apparently found to have scrutinised the assessment record vis-a-vis the bulk purchase orders filed with a statement by none other than the dealer assessee itself and finally arrived at the above conclusion allowing exemption in respect of the export to the extent of 12,252 kgs. The Tribunal does not find any wrong or error committed by the FAA in excluding said quantity of finished goods from the tax net allowing exemption on export in terms of Section 5(3) of the CST Act. Thus, ultimately, the Tribunal arrives at an inescapable conclusion that the reassessment proceeding under Section 12(8) of the Act, after full participation of the dealer assessee, cannot be invalidated and that apart, the claim of the State disputing exemption under Section 5(3) of the CST Act in respect of the stock as on 01.04.2001 vis-a-vis the finished goods cannot be entertained and thus, deserves to be rejected.

8. Hence, it is ordered.

9. In the result, the appeals stand dismissed. The cross-objection in S.A.No.111 of 2010-11 is accordingly disposed of. As a logical sequitur, the impugned order dated 02.03.2010 promulgated in Appeal Case No.AA-40/BH.II/08-09 for the period of assessment 2001-02 vis-a-vis the dealer assessee is hereby confirmed for the reasons indicated above.

Dictated & Corrected by me

(R.K. Pattanaik)
Chairman

(R.K. Pattanaik)
Chairman

I agree,

(A.K.Dalbehera)
1st Judicial Member

I agree

(R.K. Pattnaik)
Accounts Member-III