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

S.A. No.54 (C) of 2013-14

(From the order of the ld.Addl. CST, Central Zone, Odisha, Cuttack in Appeal Case No. AA-JR-217/12-13, Disposed of on dtd.29.05.2013)

Present: Smt. Suchismita Misra, Chairman,
Sri Subrata Mohanty, 2nd Judicial Member
&
Sri P.C. Pathy, Accounts Member-I

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

- V e r s u s -

M/s. Rungta Sons (P) Ltd., At/P.O.- Main Road, Barbil, Dist.- Keonjhar. ... Respondent

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M/s. Rungta Sons (P) Ltd., At/P.O.- Main Road, Barbil, Dist.- Keonjhar. ... Respondent

For the Appellant : Mr. M.L. Agarwal, S.C.
For the Respondent : Mr. K. Kurmy, Advocate

Date of Hearing: 31.01.2019 ******** Date of Order: 31.01.2019

O R D E R

The legal sustainability of a reversing order of the First Appellate Authority/Addl. Commissioner of Sales Tax, Central Zone, Odisha, Cuttack (in short, FAA) dtd.29.05.2013, whereby and wherein the assessment and demand raised by assessing authority in an reassessment u/r.12(4) of the CST(O) Rules, 1957 relating to the assessee-dealer is in question in this second appeal by the Revenue on following two contentions- (a)The first appellate authority has gone wrong in holding that the reopening of the assessment as per Rule 12(4) of the CST(O) Rules in the case in hand is nothing but a change of opinion which is not sustainable in law and (b) the first appellate authority has committed wrong both in law and fact while extending the benefit of the exemption as per sec.5(3) of the CST Act to the dealer when the export sale of the dealer contravenes the mandates of the provision u/s.5(3) of the CST Act.

Since both the appeals above involve common issue based on same set of facts for consecutive assessment periods relating to the dealer, both are taken up together and decided in this common order for sake of convenience and to avoid conflicting judicial opinion, if any.

Facts in S.A. No.54 (C) of 2013-14

2. The dealer was originally subjected to regular assessment u/r.12(3) of the CST(O) Rules for the assessment period 01.07.2006 to 31.03.2007 on the question of penlaty. The assessing authority during tax audit had accepted the contentions of the dealer on verification of the documents like form 'H' and others and allowed exemption for such export sale u/s.5(3) of the Act. However, in a later period basing the A.G. objection the assessment was reopened invoking provision u/r.12(4) of the CST(O) Rules and the assessing authority during reassessment proceeding found the penultimate sales took place movement of goods out of the territory of the country followed by the documentations i.e. in contravention to the mandate of provision u/s.5(3) of the CST Act and because there is no inseverable link between the local sale/purchase of goods and export, the dealer was denied exemption u/s.5(3). Resultantly, the balance/additional

tax demand on the dealer was determined at Rs.59,86,655.00. In addition to the tax due, penalty i.e. twice of the tax due calculated to Rs.1,19,73,310.00 was also imposed invoking provision u /r.12(4)(c) of the CST(O) Rules. Thus, the penalty together calculated at Rs.1,79,59,965.00. The assessment and the tax and penalty as demanded was called in question by the dealer before the first appellate authority. The learned Addl. Commission of Sales Tax, Central Zone, Odisha as first appellate authority reversed the findings of the assessing authority on both counts i.e. the reopening of the assessment is nothing but change of opinion which is not lawful in view of the plethora of decision of Hon'ble Court and Apex Court as cited in the impugned order vis-à-vis the export sales/purchases in dispute was treated as good following due procedure laid u/s.5(3) read with rule 6D(1) of the CST(O) Rules.

Facts in S.A. No.55 (C) of 2013-14

3. In a similar fashion, for the assessment period 01.04.2007 to 31.03.2008 the dealer was denied 5(3) sale and the total tax due and penalty was raised at Rs.2,24,98,869.00. In appeal, the first appellate authority deleted the demand with the findings that, the reopening is not sustainable being a mere change of opinion.

4. On this backdrop, felt aggrieved with the reversal order of first appellate authority, Revenue has preferred these two appeals contending thereby the findings of the first appellate authority is bad both in law and fact. Learned Standing Counsel, Mr. M.L. Agarwal advancing argument for the taxing authority submitted that, in the case in hand reopening of the assessment is not a change of opinion. It is the assessing authority in regular audit assessment had not taken consideration of the procedure to be followed in case of a concession or exemption to be available to the dealer u/s.5(3) of the Act. So, it was a wrong interpretation of the provision under the Act by the assessing authority in the regular assessment which was detected at a later period during the A.G. Audit and following the detection the reopening of the assessment was made which is not a change of opinion. It is argued that, there is no estoppel on statute is the rule. So when statute required a thing to be done in a particular manner if it is not done then it should be treated as violation of the statute and any finding by the authority

which is not in accordance to statute is always open for revisit. Per contra, learned counsel for the dealer, Mr. K. Kurmy strenuously argued that, the first appellate authority has taken consideration of the details of the issues involved, both fact and law, and in consideration of the authorities like Hon'ble Court and Apex Court has rightly observed that in the case in hand reopening is nothing but a mere change of opinion. He has argued that no fresh material were brought to record for reopening of assessment. All the materials which were placed before the assessing authority were reconsidered by the audit team and by the assessing authority in the reassessment proceeding. So, it is nothing but a change of view only and if it is allowed, it will be an ongoing process. Every assessment can be reopened in an endless manner if this argument of the Revenue will be accepted.

5. Law is no more *res integra* keeping the view many of the decisions of the Hon'ble Court and Apex Court that mere change of opinion is not sufficient to reopen the assessment which was already arrived at on conscious application of mind by the assessing officer. It is held by the Hon'ble Apex Court that the necessary sequitur is that a mere change of opinion while perusing the same material cannot be a assessment proceedings to be reopened. Reliance is placed in the case of **Binani Industries Limited, Kerala v. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore [2007] 15 SCC 435** and **A.L.A. Firm v. Commissioner of Income Tax [1991] 2 SCC 558** held that if a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion". If an assessing authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for reassessment. **Indure Limited v. Commissioner of Sales Tax, Cuttack, Orissa and others [2006] 148 STC 61 (Orissa)** relied.

6. The provision u/r.12(4) of the CST(O) Rules as it engrafted in the text book envisages the intendment of legislation for reopening of assessment in particular contingencies i.e. the dealer should be assessed

under sub-rule (1), (2) or (3) for the period and thereupon on the basis of any information if the assessing authority is of the opinion that the whole or any part of the turnover of the dealer has escaped assessment or has been under-assessed or has been assessed at a rate lower than the rate at which it is assessable or that the dealer has been allowed wrongly any deduction from his turnover or exemption under the Act or has been wrongly allowed set off of ITC excess to the amount admissible under clause (c) of sub-rule (3) of Rule 7 in that case reopening of the assessment can be made. The question of exemption under the Act is there to be considered for reopening of the assessment. In that view of the matter, the authorities like reopening can solely on the basis of escapement be made as relied by the learned counsel for the dealer is of no avail. However, when we delve into the materials on record, it is to be seen that, whether the assessing authority in regular assessment had consciously applied his mind to the fact in issue or not. Thereafter, while reopening the assessment at a subsequent period if the assessing authority has formed an opinion on due application of his judicious mind as per law or not. In the case in hand, the Revenue become unsuccessful to establish that the assessing authority at the first instance during audit assessment had not considered the relevant facts while allowing the exemption the exemption u/s.5(3) of the Act. It is found that the assessing authority has taken consideration of declaration form 'H' and connected documents and thereafter when he became sure of the fact that the local sale/purchase between the parties is inextricably linked with the export of goods and the movement of goods took place only on the basis of pre-determined contract between the exporter and foreign buyers, then the exemption as per Sec.5(3) was found to be justified even though the bills are raised at a later period which is a convenient method adopted by the dealers involving sale/purchase. From above, it can safely be said that the assessing authority had not mechanically accepted the return of the dealer but had formed an opinion independently and then allowed the exemption to the dealer in audit assessment.

On this backdrop, it is found that it is on the basis of A.G. Audit the assessment is reopened and there, the assessing authority has opined

that it was a mistake committed by the same authority in earlier occasion during audit assessment. Now, this being the facts and circumstances for reopening of the assessment, the irresistible conclusion is, the reopening is nothing but a “change of opinion”. It is not disputed that no new materials were placed before the authority for reopening. The authority has not taken consideration of any facts but only took a view that the application of the provision on the same set of facts in earlier occasion was wrong. This is nothing but a revisional or appellate jurisdiction exercised during reassessment. It is not a pure question of law and that too, not a question of failure on the part of the assessing authority in application of the provision under law but a question of interpretation of law on particular facts and circumstances in the case in hand. When the facts and circumstances remained same, then the same authority cannot change his own view time to time while interpreting the provision under law to the same set of facts. If it is allowed it will be an endless process. To sum up, it is held that the first appellate authority has duly and effectively applied the principles laid down by the authorities to the case in hand and the findings on this issue calls for no interference by the Tribunal.

7. The next contention of the dealer-Revenue is the exemption u/s.5(3) is not available to the dealer as the transactions are not made as per the procedure laid down under the Act. Learned Counsel for the dealer draws the attention of the forum to the provision u/s.5 of the CST Act as well as the Rule 6D(1) of the CST(O) Rules. It is observed that, there is no violation of the provision by the dealer to disqualify him for exemption consequent upon the decision hereinabove that the reopening of assessment in the case in hand is not sustainable, it is held that, the decision on the issue like whether the dealer is entitled to exemption or not has no legs to stand. Hence, for avoiding discussion in detail on this issue, it is held that when the authority was satisfied from the documents like form ‘H’, agreement, purchase order of foreign buyers, then only because the sale bills were issued after the movement of goods, it will no way frustrate the intention of the provision which is beneficial to the tax payer. Since the movement of goods were proceeded by existence of a foreign buyers contract,

in compliance of which the goods were sold by the dealer to exporter and the goods were ultimately exported out of the territory of India by the merchant exporter, then the requirement of the provision u/s.5(3) of the CST Act is treated to be fully complied with in consonance to Rule 6D of the CST(O) Rules which speaks of movement of goods in a sale. The meaning of the form sale is to be derived from section 2(g) of the CST Act. Reliance placed in **Consolidate Coffee Ltd. v. Coffee Board, Bangalore [1980] 164 STC 46**.

In the result, we are of the view that, the dealer is otherwise also entitled to the exemption against form 'H'. Resultantly, it is held that the finding of the fora below in the impugned orders needs no interference. Accordingly, it is ordered.

8. The appeals are dismissed on contest as of no merit.

Dictated & corrected by me,

Sd/-
(Subrata Mohanty)
2nd Judicial Member

Sd/-
(Subrata Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

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