BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK

S.A. No. 1152 of 2004-05

(Arising out of order of the learned ACST, Cuttack-II Range, Cuttack in First Appeal Nos. AA- 555/CU-II/03-04, disposed of on dated 26.02.2004)

Present: **Shri A.K. Das, Chairman**
Shri S.K. Rout, 2nd Judicial Member
&
Shri M. Harichandan, Accounts Member-I

M/s. Dhanesh Poly & Allied Chemicals,
Plot No. 109, I.E. (New), Jagatpur,
Cuttack ... Appellant

-Versus-

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

For the Appellant : Sri J.J. Pradhan, Advocate
For the Respondent : Sri M.L. Agarwal, S.C. (CT)

Date of hearing: 05.09.2022 *** Date of order: 07.09.2022

O R D E R

Instant appeal at the behest of the dealer-assessee is directed against the order dated 26.02.2004 passed by the learned Asst. Commissioner of Sales Tax, Cuttack II Range, Cuttack (hereinafter referred as 'first appellate authority') in Appeal Case No. AA- 555/CU-II/03-04 thereby confirming the order dated 31.03.2003 passed by

the Sales Tax Officer, Cuttack II Circle, Cuttack (in short, 'assessing authority') raising demand of ₹4,98,115.00 for the year 1999-2000 in the assessment framed u/s.12(4) of the Orissa Sales Tax Act, 1947 (in short, 'OST Act').

2. The facts and circumstances of the case giving rise to the present appeal are that the dealer-assessee carries on business in manufacturing and sale of detergent powder and maintains required books of account to that effect. The dealer-Company is a Small Scale Industrial (SSI) Unit having PMT Registration Certificate No.15/16/00358 dated 07.08.1997 for manufacturing of acid, slurry, detergent acid etc. The Unit started fixed capital investment on or after 01.12.1989 and had gone into commercial production on 01.08.1997. The Unit being a new SSI Unit as defined in IPR, 1989 is eligible for exemption from payment of sales tax on sale of finished products for a period of seven years from the date of commercial production subject to some restrictions and conditions as laid down in Finance Department Notification No. SRO 789/90 dated 16.08.1990, SRO 1012/90 dated 12.11.1990 and SRO 1013/90 dated 11.12.1990 as amended from to time. The dealer-assessee was eligible for exemption during the period from

01.04.1999 to 31.07.1999 as per the eligibility certificate issued by DIC, Jagatpur.

2(a). The dealer-assessee in response to the notice issued u/s. 12(4) of the OST Act, produced the books of account such as purchase register, purchase invoices, sale accounts supported by sale register and sale invoices. The assessing authority on examination of the books of account found that the dealer during the year under assessment purchased raw materials worth ₹67,52,419.14 and returned his sales at ₹57,08,538.00. It claimed the entire sale as exempted sale as per entry No. 30FFF of the tax free schedule under IPR, 1989. The assessing authority on account of failure of the dealer-assessee to produce eligibility certificate from the concerned DIC after withdrawal of the IPR benefit w.e.f. 01.08.1989, the sale turnover was determined as GTO and after allowing deduction of ₹9,24,812.00 towards exempted sales and ₹10,129.00 towards collection of ET, the TTO was determined at ₹37,73,597.00 on which tax was levied @ 12% which on calculation came to ₹4,52,831.64 and surcharge of ₹45,283.16 was levied. So, the tax and surcharge together calculated at ₹4,98,115.00.

2(b). The dealer-assessee challenging the aforesaid demand raised by the assessing authority for the assessment year 1999-2000 filed first appeal bearing Appeal Case No. AA- 555/CU-II/03-04 before the first appellate authority on different grounds. The first appellate authority on going through the assessment order, grounds taken in the memorandum of appeal and the materials on record confirmed the order of assessment holding that in view of the judgment of the Hon'ble High Court in the case of **Shivani Vanaspati Vrs. State of Orissa, reported in 127 STC 168**, the State Government is empowered to withdraw the incentives given to the SSI Unit and after withdrawal such benefit given in the IPR w.e.f. 01.08.1999, the dealer-assessee is not entitled to claim IPR benefit.

2(c). The dealer-assessee being further aggrieved with the order passed by the first appellate authority confirming the order of assessment filed the present second appeal on different grounds.

No cross objection has been filed by the State.

3. In course of hearing of the second appeal, the learned Counsel for the dealer-assessee challenged the

impugned orders of the forums below only on the ground that the assessment order was barred by time for which the same was not enforceable even though many other grounds were raised in the memorandum of appeal. He strenuously argued that the assessment order though purported to have been passed on 31.03.2003, the same was not actually passed on that day and the assessing authority antedated the same in order to bring it within the period of limitation. The assessment order purported to have been passed on 31.03.2003 was issued vide diary No.5289 dated 25.11.2003 after eight months of the assessment order and no explanation was offered for such unreasonable delay in issuing the assessment order. He forcefully contended that this Tribunal in case of M/s. Oriclean Private Limited Vs. State of Orissa in S.A. No.1129 of 2004-05 decided on 31.01.2017 relying on the judgment of the Hon'ble High Court of Orissa in Delhi Footwear's case set aside the order of assessment on account of delay of nine months and eighteen days in issuing the assessment order and demand notice holding that the order was antedated and the reason for delay in issuing such assessment order was not explained. He further argued that in the case at hand there

being delay of more than eight months in issuing the assessment order, adverse inference should be drawn against the revenue for causing such delay in issuing the assessment order and the assessment order should be quashed being barred by time.

4. Per contra, Mr. Agarwal, learned Standing Counsel (CT) for the revenue supporting the impugned order of the forums below vehemently urged that no adverse inference can be drawn against the revenue in the peculiar facts and circumstances of the case as the delay in issuing the assessment order has been explained properly. He submitted that the assessing authority in the impugned order has clearly directed for service of demand notice in question only after vacation of the order dated 12.09.2000 passed by the Hon'ble High Court of Orissa in OJC No. 8514/2000 directing therein not to take any coercive action against the dealer. In view of such specific direction, the demand notice was not issued so also the assessment order was also not served on the dealer. The explanation offered by the revenue for delay in issuing the assessment order is just, proper and reasonable which should be accepted. The impugned order of the forums below should be examined on

merit. He further argued that the daily collection register filed by the dealer-assessee clearly indicates that the assessment order for the year 1999-2000 was passed on 31.03.2003 as the date of order has been reflected as 31.03.2003 in the said register. So, the allegation of antedating the assessment order passed by the assessing authority is baseless and unfounded and the contention raised by the learned Counsel for the dealer-assessee must be thrown to the ground. He submitted to dismiss the appeal by confirming the order of assessment.

5. We have heard the learned Counsel for the parties, gone through the grounds raised in the memorandum of appeal vis-a-vis the impugned orders of the forums below and the materials on record. The short question that falls for consideration in the present second appeal is whether the assessment order passed by the assessing authority was barred by time for delay in issuance and service of the assessment order on the dealer-assessee? To address the issue involved in the present second appeal, it is profitable to refer to some relevant facts for effective adjudication of the dispute. The assessment record reveals that the assessing proceeding u/s. 12(4) of the OST Act was

initiated on 14.07.2000 and notice was issued to the dealer-assessee in statutory form fixing the date to 29.07.2000. The dealer-assessee received the said notice on 28.07.2000 and appeared before the assessing authority on the date fixed, i.e. on 29.07.2000, by filing an application for time. After several adjournments, the assessing authority concluded the assessment on 31.03.2003 and assessed the dealer-assessee raising tax demand of ₹4,98,114.00. The assessment order passed by the assessing authority was issued on 25.11.2003 vide diary No. 5289. On this factual background, learned Counsel for the dealer-assessee vehemently urged relying on the decision of this Tribunal in case of M/s. Oriclean Private Limited Vs. State of Odisha, in S.A. No. 1129 of 2004-05 that there being delay of about eight months in issuing the assessment order, adverse inference should be drawn against the revenue for antedating the assessment order in order to bring it within the period of limitation. On the other hand, learned Standing Counsel (CT) for the revenue countering the argument forcefully argued that allegation of antedating assessment order is baseless and unfounded.

5(a). Now, it is to be seen whether in the aforesaid factual backdrop of the case, the assessing authority passed

the assessment order after expiry of the period prescribed for such purpose or it was passed on the date mentioned in the assessment order. The provisions contained in Section 12(7) of the OST Act provides that –

> "(7) Any assessment made under this Section shall be without prejudice to any prosecution instituted for an offence under this Act :
>
> Provided that when the Commissioner has imposed a penalty in addition to the amount assessed under this Section, and where the amount due on account of tax and penalty has been paid, no criminal proceedings shall be taken against the dealer :
>
> Provided further that no order assessing the amount of tax due from a dealer in respect of any year or part thereof shall be passed later than thirty-six months from the expiry of the year :
>
> Provided further that the period of limitation fixed in the proviso immediately preceding shall not apply to assessment under sub-section (5) or sub-section (8) of this Section or to enhancement of assessment or order of fresh assessment made or passed under Section 23."

A cursory look at the above provision makes it abundantly clear that no assessment order can be passed by the assessing authority after expiry of thirty six months from the expiry of the year. In the case at hand, the assessment order as well as the record reveals that it was

passed on 31st March, 2003, which is the last date for passing of the order within the period prescribed in the statute and such assessment order was issued on 25.11.2003 after expiry of about eight months. Now question arises whether for such delay in issuance of assessment order, adverse inference would be drawn against the revenue for antedating the same. At this juncture, we think it proper to refer to the judgment of the Hon'ble Apex court in case of **State Of Andhra Pradesh Vs. M. Ramakishtaiah & Co., [1994] 93 STC 406 (SC),** wherein the Hon'ble Apex Court held as follows :

> "... We are of the opinion that this appeal has to be dismissed on the ground urged by the assessee himself. As stated above, the order of the Deputy Commissioner is said to have been made on January 6, 1973, but it was served upon the assessee on November 21, 1973, i.e., precisely 10½ months later. There is no explanation from the Deputy Commissioner why it was so delayed. If there had been a proper explanation, it would have been a different matter. But, in the absence of any explanation whatsoever, we must presume that the order was not made on the date it purports to have been made. It would have been made after the expiry of the prescribed four years' period. The civil appeal is accordingly dismissed."

5(b). Similarly in case of **M/s. Delhi Footwear, Cuttack Vs. Sales Tax Officer, Vigilance, Cuttack and others, reported in [2015] 77 VST 146 (Ori.),** the Hon'ble Court observed as under :-

> "In the instant case, there is no explanation for inordinate delay of 24 months caused in issuing the assessment order to the petitioner. Therefore, we have no hesitation to hold that the order of assessment under annexure 1 was not made on the date it was purported to have been made. In order to bring the assessment within the period of limitation, the order of assessment bears the date January 12, 2007, whereas it has been passed much after that."

The Full Bench of this Tribunal also in case of **M/s. Oriclean Private Limited Vs. State of Odisha in S.A. No. 1129 of 2004-05 disposed of on 31.01.2017,** in similar facts and circumstances relying on the judgment of the Hon'ble Court in case of M/s. Delhi Footwear (supra) quashed the assessment order holding that there being no explanation for delay caused in issuance of assessment order, the same was not passed on the date it purported to have been passed. Further, **in case of M/s. Dhanalaxmi Traders Vs. State of Odisha in S.A. No. 174/2010-11 disposed of on 15.09.2021 and in case of M/s. Oritrade**

Private Ltd. Vs. State of Odisha in S.A. No. 906 of 2005-06 decided on 30.09.2021, the Full Bench of this Tribunal took the same view by quashing the assessment order. It is the consistent view of this forum as well as the Hon'ble Court that if there is delay in issuance of assessment order, the same must have be properly explained by the revenue or else the adverse inference would be drawn against it for not passing the assessment order on the date it purported to have been passed.

6. Learned Standing Counsel (CT) for the revenue conceding to the above legal position vehemently urged that in the peculiar facts and circumstances of the present case the delay in issuance of assessment order seemed to have been properly explained and no adverse inference should be drawn against the revenue. He submitted that the assessment order could not be issued to the dealer-assessee on account of direction of the Hon'ble High Court of Orissa in O.J.C. No. 8514 of 2000 for not taking any coercive action against the dealer. He further argued that the assessing authority in assessment order specifically observed not to issue demand notice till the order dated 12.09.2000 is vacated. There is delay of eight

months in issuance of the assessment order on this factual background. So, the explanation offered by the revenue should be accepted and it should be held that the assessment order was passed on 31.03.2003, the date mentioned in the order.

7. It is true that that the assessing authority in the assessment order dated 31.03.2003 has specifically directed not to issue demand notice till the order passed by the Hon'ble Court in O.J.C. No. 8514 of 2000 is vacated. But, this direction did not preclude the revenue from serving the assessment order on the dealer-assessee. The assessing authority did not issue any direction for not serving the assessment order on the dealer-assessee because of the order dated 12.09.2000 passed by the Hon'ble Court in O.J.C. No. 8514 of 2000. Service of assessment order on the dealer cannot be said to be coercive action for realization of the tax dues. The explanation offered by the revenue for delay in issuance of the assessment order is not believable and acceptable to us. The assessment record does not reveal that the assessment order could not be served on the dealer-assessee because of the direction of the assessing authority in the assessment order not to issue the demand notice.

Service of assessment order on the dealer and service of demand notice on it are two different things and both actions cannot be equated with. When the former action is meant for letting the assessee know about the assessment order and the later action is for paying the demand raised in the assessment order. The contention raised by the learned Standing Counsel (CT) for the revenue that the assessment order could not be served on the dealer-assessee immediately after passing of the same because of prohibition contained in the assessment order is not factually and legally correct and tenable. There is unreasonable delay in service of the assessment order on the dealer-assessee for which adverse inference should be drawn against the revenue. Learned Standing Counsel (CT) for the revenue further took the plea that after passing the assessment order, the role of assessing authority is over and it is the office to carry out the consequential action, i.e. service of assessment order on the dealer-assessee. The assessing authority has no role in issuance and service of the assessment order. Therefore, no adverse inference should be drawn against it regarding antedating the assessment order. Of course, the assessing authority does not have any role in

issuance of the assessment order and it is the office to perform the said work. But, the assessing authority cannot be exonerated from the liability of service of the assessment order immediately after passing the same on the dealer-assessee as it is the look out of the assessing authority to see whether its direction is carried out by the office promptly after passing of the assessment order or not. It cannot sleep over the matter throwing blame on other staff for delay in service of the assessment order. If there is delay in service of assessment order, the assessing authority would be held responsible and answerable for such delay. In present case, it having failed to explain the delay in service of the assessment order on the dealer-assessee with satisfactory explanation, the only inference is that the assessment order was not passed on 31.03.2003 on the date it purported to have been passed and it was passed subsequently putting the date as 31.03.2003 in order to bring it within the period of limitation. The daily collection register produced by the revenue showing date of assessment order as 31.03.2003 is not sufficient to hold that order was passed on that date. The assessment order having been passed after the period

prescribed in the statute, the same is barred by limitation and is unsustainable in the eyes of law.

8. In view of the foregoing analysis and discussion, we are of the unanimous view that the assessment order was not passed on 31.03.2003 as mentioned in the order and, therefore, it was barred by limitation. Accordingly, the appeal filed by the dealer-assessee is allowed and the impugned orders of the forums below are hereby set aside.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member

I agree,

Sd/-
(M. Harichandan)
Accounts Member-I