

the dealer was originally assessed u/s.12(4) of the OST Act, but in a latter period on the strength of AG Audit report dtd.14.02.2003, the assessment was re-opened u/s.12(8) of the OST Act. Since the dealer did not choose to appear before the Assessing Authority/Sales Tax Officer, Sambalpur-I Circle, Sambalpur (in short, AA/STO), the re-assessment proceeding was proceeded ex-parte and the AA applied best judgment principle to determine the GTO of the dealer basing the Audit report. In the end, the AA accepted the suggestion for enhancement given by the Audit team. Allowing deduction of S.T.C. of Rs.16,52,619.49, TTO was arrived at Rs.8,78,29,214.45 upon which OST @4% was calculated at Rs.35,13,168.58. Further deduction in tax amounting to Rs.20,44,674.58 on equivalent tax on paddy was given. Surcharge of Rs.525.29 on sale of Bran was added. Thus, the total tax due was calculated at Rs.20,45,199.87. The dealer had paid tax of Rs.13,55,008/-, thus balance tax due was calculated at Rs.6,90,191.87. Interest at Rs.5,299/- was added to it and thereafter from the total tax due and interest, the tax due and interest calculated in the regular assessment u/s.12(4) of the OST Act was deducted and then the rest tax due was raised at Rs.6,61,502.87 with penalty of Rs.9,92,253/-.

3. The matter was carried before the FAA by the dealer, who in turn, deleted the penalty and thereafter on re-calculation, determined the tax liability at Rs.6,61,502.87. On this backdrop the dealer has preferred this appeal.

4. The contention of the dealer is, the assessment is barred by limitation since the order was not passed in time and it has been antedated by the AA, the report of the Audit team regarding purchase price, which is lesser than the minimum support price is not correct and is not sustainable for the reason that, the dealer has reflected the actual purchase price since the paddy purchased by the dealer is of low quality like paddy used for preparation of liquor called as 'Kusna'. Such

paddy called as 'Kuliha' paddy are always less in price in comparison to FAQ paddy.

5. The appeal is heard without cross objection from the side of the Revenue.

6. The question struck for decision in this appeal are : (i) Whether the order of assessment was passed beyond the period of limitation and thereby the entire re-assessment proceeding is vitiated ? (ii) Whether the fora below is wrong in accepting the purchase price of the paddy as suggested by the Audit team and thereby the tax due calculated is not sustainable ?

Findings :

7. So far as the Question No.1 above, it is strenuously argued by the learned Counsel Mr. Uttam Behera that, the assessment is barred by limitation. ***Per contra***, learned Addl. Standing Counsel, Mr. Pradhan argued that, this question cannot be raised in this second appeal stage. Question of limitation being a point of law, can be raised at any time including the second appeal. Reliance can be placed in the case of **National Thermal Power Co. Ltd. Vrs. Commissioner of Income Tax**, reported in **(1998) 229 ITR 383 (SC)**.

It is vehemently argued by the learned Counsel that, the dealer had raised this plea like that the order of the AA is an ante-dated one. On scrutiny of the impugned order it is found that, the FAA has discussed this question but has not given any finding perhaps for the reason that he has otherwise annulled the proceeding. However, while answering to this question when the assessment record is perused it is found that, the order was purported to have prepared on 30.06.2005 and dispatched on 20.01.2006. On the other hand, as it revealed from the LCR, the order was received by the dealer on 24.01.2006. The delay in between passing of order and dispatch or service of order on dealer remained unexplained by the State. In the case of **State of Andhra Pradesh Vrs. Ramakishtaiyah & Co. in Civil Appeal No.491 of 1977**

and in **State of Andhra Pradesh Vrs. Khetmal Parekh** in **Civil Appeal No.1014 of 1977**, it is held as follows :

“We are of the opinion that the theory evolved by the High Court may not be really called for in the circumstances of the case. 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 10 ½ 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 could have been made after the expiry of the prescribed four years’ period. The civil appeal is accordingly dismissed. No costs.

Though the dates are different in this case, the facts are substantially similar. Indeed, the delay in communication in this case is more than one year and five months. For the reasons given in Civil Appeal No.491 of 1977, this appeal too is dismissed. No costs.]

Reliance can also be placed in **Chandrika Sao Vrs. STO, Balasore and another (2015) 81 CST 86 (Orissa)**. Being guided by the authority above in the case in hand, it can be said that, the Assessing Authority while trying to save the period of limitation has shown to have proceeded the order within the period. Therefore, in all likelihood, the Assessment order when found not passed within the time period is consequently rendered invalid in the eye of law.

8. The next contention of the dealer is, the AA has mechanically accepted the suggestion of the AG Audit team. The dealer has purchased low quality paddy called ‘Kuliha’ paddy, which is only meant for preparation of liquor and the price of that low quality paddy should not be compared with the FAQ paddy. On the other hand, learned Addl. Standing Counsel Mr. Pradhan vehemently argued that,

the F.C.I. while taking delivery of rice never produced rice from 'Kuliha' paddy as it is a sub-standard paddy. So, Minimum Support Price as fixed by Government from time to time should not be considered while fixing the purchase price for the purpose of calculation of GTO. Learned Counsel placed reliance on a decision by Full Bench of this Tribunal on earlier occasion relating to different dealer dealing with identical question in S.A.No.1793/2004-05. Minimum Support Price is a price fixed by the Government from time to time to protect the interest of the former from the exploitation in the hands of unscrupulous dealer. No doubt when the dealer is found guilty of purchasing paddy at lesser price than the MSP in that case, he is liable to be proceeded under Essential Commodities Act. In respectful disagreement with the view of this Tribunal taken on earlier occasion to which I was also a member, it is believed that, the dealer has been granted with Registration Certificate for purchase of paddy. He is not bound or even not authorized to purchase anything other than the paddy and Government has fixed minimum support price of paddy. There is no such classification of paddy so far as the MSP is concerned. Because one paddy is of low quality and a dealer takes delivery of said low quality paddy in less price, it does not mean the dealer will be scot free on the plea by saying that, he has purchased that variety of paddy at a lesser rate. Similarly, because the dealer has not been prosecuted under Essential Commodities Act for any reason whatsoever that does not *ipso facto* exonerate the dealer from paying the correct price of paddy as fixed by the Government and most importantly when it is to protect the interest of the former from being exploited in the hands of dealer. So, the explanation of the dealer that, he had purchased low quality of paddy in lesser price is of no avail. In that case, it can safely be said that, the dealer was under-assessed during the regular assessment u/s.12(4) of the OST Act and there was bona-fide reason before the AA to re-open the assessment invoking Sec.12(8) of the OST Act. But due to

the negligence and mischief of the AA, who has not completed the assessment within the stipulated time, the dealer cannot be held liable as the whole proceeding vitiated being barred by limitation. Accordingly, it is ordered.

The appeal is allowed on contest. The impugned order is reversed. The assessment is barred by limitation.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
2nd Judicial Member

Sd/-
(S. Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Sri A.K. Panda)
1st Judicial Member

I agree,

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