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

S.A. No. 92 of 2014-15

(Arising out of the order of the learned JCST, Cuttack-I Range, Cuttack in first appeal Case No. AA-I/CUIW/2014-15 disposed of on 29.11.2014)

Present :- Shri A.K. Das, Chairman **Shri.S.K. Rout, 2nd Judicial Member** **& Shri S. Mishra, Accounts Member-II.**

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

-Vrs.-

M/s. Jyoti Agencies, Balu Bazar, Cuttack. ... Respondent.

For the Appellant: :Mr.Natabar Panda, Advocate.
:Mr. P.K. Pattnaik, Advocate.

For the Respondent: :Mr. D. Behura, Standing Counsel (C.T.)
:Mr. S.K. Pradhan. Addl. S.C.(C.T.)

Date of Hearing : 07.06.2022 * Date of Order : 29.06.2022**

O R D E R

This second appeal has been filed by the Revenue against the order dtd.29.11.2014 passed by the learned Joint Commissioner of Sales Tax, Cuttack-I Range, Cuttack (in short, ld. FAA) in Sales Tax Appeal No. AA-1/CUIW/2014-15, allowing the appeal in full thereby reducing the demand to Rs.nil from Rs.22,21,794.00 raised by the Sales Tax Officer, Cuttack-I West Circle, Cuttack (in short, LAO) in the order of penalty passed U/s.9B(3)(a) of the Odisha Sales Tax Act (in short, OST Act) relating to the year 1996-97.

2. Being aggrieved by the aforesaid order of the ld. FAA, the Revenue has preferred second appeal before this Tribunal challenging the said order as bereft of consideration of material facts with the provisions of law for which the impugned order is illegal and bad in law liable to be quashed and that of the order of LAO be restored.

3. The brief fact of the case is that the dealer-assessee in the instant case is engaged in trading of medicines, tinned food and cosmetics. It purchases goods from both outside and inside the State and sells accordingly. One of the IST of Cuttack-I West Circle, during his visit to the business premises of one M/s. Surya Pharma, Banka Bazar, Cuttack bearing R.C. No.CUIW-3765 on 11.03.1997, recorded a statement from the POA holder regarding levy of OST and Octroi by this assessee on first point tax paid goods. Accordingly, the said IST submitted a fraud case Report bearing No.28/96-97 dtd.29.03.97 against this assessee. The allegations made in the said fraud Report was confronted to the assessee at regular assessment made under section 12(4) of the OST Act and after due examination vis-à-vis books of account and other relevant documents produced, the LAO raised a demand of Rs.22,21,794.00 towards penalty U/s.9B(3)(a) of OST Act by his assessment order dtd.29.03.2000 which was challenged by the assessee in first appeal before the ld. FAA who set-aside the order by his appeal order dtd.23.11.2000 with a direction to allow reasonable opportunity of hearing to the assessee before passing the order. Being

aggrieved by aforesaid order, the assessee filed second appeal before this Tribunal that confirmed the order of ld. FAA by their order dtd.21.09.2013 in S.A. No.1466 of 2000-01 with the following observation:-

".....we find absolutely no infirmity or illegality in the impugned order of the ld. ACST in so far as, assessment is concerned. But in so far as the proceeding u/s. 9B(3) of the OST Act is concerned, a separate proceeding is required to be instituted and a separate order is required to be passed as it is a distinct proceeding having no relationship with the assessment u/s.12(4) of the OST Act. .....

In the result, the appeal is allowed in part and the case is remitted back to the ld. STO to proceed as per the instruction given in the preceding paragraph and complete the assessment within three months from the date of receipt of this order."

Accordingly, the LAO issued a show-cause notice bearing No.994 dtd.21.04.2014 asking the assessee as to why penalty U/s.9B(3)(a) of the OST Act will not be imposed. During the course of hearing and on verification of record for the year 1996-97, he observed that the assessee has collected 0.5% towards Octroi and 6% sales tax on sale value of the goods from the customers in cases where the goods have already been suffered tax at the first point of sale in a series of sales inside the State of Orissa. Since, it contravened the relevant provisions of the OST Act, he imposed penalty of

Rs.22,21,794.00 U/s.9B(3)(a) of the OST Act which was challenged by the assessee before the ld. FAA in first appeal. At first appeal, the ld. FAA after examining the case in detail with reference to the books of account, relevant documents and grounds of appeal filed, reduced the demand to Rupees nil by applying the ratio of judgment of Hon'ble Apex Court in case of Central Wines Vs. Special Commercial Tax Officer reported in (1987) 65 STC 48. Being aggrieved by this order, now the State has now come up in second appeal before this Tribunal.

4. During the course of hearing, Mr.D.Behura, ld. Standing Counsel for the Revenue vehemently argued against the appeal order passed by the ld. FAA being unjust, illegal, improper, arbitrary and bad in law as the ld. FAA has wrongly applied the ratio of judgment of Apex Court noted supra in allowing the first appeal filed by the assessee in full thereby reducing the demand to Rupees nil. He emphasized that the decision rendered in Central Wines case revolve around as to whether collection of tax not authorized by law would form part of the turnover for levy of tax or not. The said decision rather goes in favour of the Revenue as the judgment has clearly spelt out that when the dealer has no legal obligation to collect tax but collect the same from the customers that would form part of the sale price for levy of tax. Referring to the definition of 'sale price' and 'turnover of sales' as contemplated in the statute with reference to the provision contained in Section 9B(3)(a) of the OST Act, he argued that the ld.

FAA has grossly erred in his decision by allowing the appeal in full, thereby reducing the demand to Rupees nil.

5. Per contra, by its cross objection filed, the ld. Counsel for the dealer-respondent argued that at no point of time it has been alleged that the dealer is collecting sales tax separately on subsequent sales. Moreover, the ld. FAA has rightly decided the case referring to case laws reported in (1987) 65 STC 48 (SC) and (1996) 100 STC 344 (Assam) which are squarely applicable to the facts of the present case. Further, he argued that the ld. Sales Tax Tribunal in their order dtd.21.09.2013 in S.A. No.1466 of 2000-2001 has not directed specifically to start fresh penal proceeding and hence the proceeding started is time barred as per the decision reported in (1988) 71 STC 226 (SC). He pointed out to the fact that this is the solitary case in which penalty u/s. 9B(3) of the OST Act has been imposed. Neither for the preceding years nor the years after 1996-97, such penalty has been imposed though there is no change in the method of accounting and medicine dealers are governed by Drugs (price control) order, 1987 and Drugs (price control) order, 1995 and the assessee has not violated the provisions contained in the aforesaid Central Govt. orders. Whatever the assessee has realized from the subsequent purchasing dealers are the exact amount paid as tax at the first point and that was infact a reimbursement of the said tax at the first point by different sellers in-between i.e. intermediary or the last seller or the

retailer though the amount shown was not a tax but only a reimbursement by way of incidental charges which is permitted under the Drugs (price control) order, 1987 and 1995. Lastly, he argued that proceeding drawn against the assessee has already been barred by limitation as per Article 137 of the Limitation Act.

6. From the rival contentions of both the parties, the moot questions involved in the present appeal are as follows:

i. Whether, in the facts and circumstances of the case, the tax collected by the assessee on the body of the bills as alleged by the LAO and negativated by the assessee stating as reimbursement of tax on first point tax paid goods attracts penal action U/s.9B(3) of the OST Act?

ii. Whether, the proceeding drawn U/s.9B(3) of OST Act has been barred by limitation?

In order to properly address query i. above, it is profitable to refer to the relevant provision to the OST Act:-

Section 2(h)

"Sale Price" means the amount payable to a dealer as consideration for the sale or supply of any goods, less any sum allowed as cash discount according to ordinary trade practice, but including any sum charged for anything done by the dealer in respect of the goods at the time of, or before, delivery thereof"

"Turnover of Sales" means the aggregate of the amounts of sale prices and tax, if any, received and receivable by a dealer in respect of sale or supply of goods [other than those declared under section 3-B effected or made during a given period."

Section 9B(3)(a)

"where any person—

i. xxx xxx

ii. being a registered dealer realizes any amount by way of tax in excess of the amount payable by him as taxed under this Act,

the Commissioner may, notwithstanding anything contained in this Act, direct that such person shall pay in the prescribed manner by way of penalty, a sum not exceeding thrice the amount so realized by the person." It is apparent from the above provision that the realization must be by the dealer of the amount as tax where tax was legally payable or in excess of the amount of tax legally payable under the Act. In this scenario, it is to be examined as to whether any tax was payable by the assessee in selling the medicines which were already suffered tax at first point of such sale in a series of sales inside the State of Orissa. We observe that the goods dealt in by the assessee are subject to tax at first point of sale in a series of sales inside the State and as such tax or excess amount of tax is not legally payable by the assessee and what we observe that the assessee

has realized from the subsequent dealer is a price and not tax as per Section 2(h) of the OST Act. Penalty is leviable for excess realization of tax and therefore realization for the amount should be as tax. Moreover, the excess should be over and above the amount of tax legally payable. We further observe that during the material period the assessee was governed by Drugs (price control) order 1987 and Drugs (price control) order 1995 which are Central Regulations that have put certain parameters regarding sale of the goods and the price to be charged. The aforesaid orders were issued under the provisions of Section 3 of the Essential Commodities Act, which is a central legislation. The clause 14 and 15 of the Drugs (price Control) order 1987 don't permit anybody to sell the goods beyond the price mentioned on the packages that includes the sales tax under the sales Tax laws. Under the new order of 1995, the maximum retail price printed on the packages can only be realized as packages containing the following words 'inclusive of all taxes'. As such, the retailer is prevented from passing on any burden to the customer. If subsequent to the first sale, other sale takes place and if an amount equal to the tax amount is charged in cash memo/bill, the same cannot be construed as realization of any tax but the same must be treated as reimbursement of the amount paid by the intermediary or the retailer. The entire

burden of tax which is paid on the first point will fall on the last seller, if the seller is unable to realize the amount from the customer. At this point, we refer to the principle of law laid down by the Hon'ble Supreme Court in case of Central Wines Vs. Special Commercial Tax Officer reported in (1987) 65 STC 48 that says what the retailer is trying to realize from the customers is the exact amount paid as tax at the first point and that is in fact a reimbursement of the said tax at the first point by different sellers in between. The Hon'ble Apex Court in the aforesaid case has held as under:-

"Sales tax charged by a dealer as "tax" in his bill to the purchaser but shown separately is part of the "turnover" within the meaning of definition of "turnover" in section 2(s) of the A.P. General Sales Tax Act, 1957. The sales tax component of the sale price charged by the dealer to the purchaser is not collected by him as an agent of the State. Even if, therefore, the bill or the voucher issued to the purchaser indicates the amount of sales tax separately what is collected by the dealer from the purchaser is not tax but is merely a part of the sale price charges by the dealer to the purchaser. So far as the statute is concerned it does not cast any obligation on the purchaser of the goods to pay any tax and therefore what is collected by the dealer from the purchaser by way of consideration for passing the property in the goods to the

purchaser is the price charged by him and not tax collected by him from the purchaser. The amount of money which goes from the pocket of the purchaser to the pocket of the dealer as a condition or consideration for the passing of the property in the goods is thus the sale price and not the tax. It is the amount, but for the payment of which, the dealer would not transmit his title to the goods in favour of the purchaser, and not any amount paid by the purchaser towards any tax liability incurred by him on making the purchase of the goods. Nothing turns on whether the bill or voucher issued to the purchaser is so made out to show that the sales tax is charged separately. The consideration obtained by the dealer from the purchaser would in the eye of the law be the sale price regardless of what nomenclature is given to a part of the price charges by him.

Includibility of sales tax charged by the dealer from the purchaser turns on the question whether or not the tax is recoverable from the purchaser under a statutory obligation.

Even where the sales tax is not included in the bill but is collected simultaneously and kept in a suspense account by the dealer, the amount collected would be part of the "turnover" as defined in section 2(s). The amount includible in the turnover on a true interpretation of section 2(s) cannot become excludible merely by

reason of the accountancy device adopted by the dealer concerned.

Decision of the Andhra Pradesh High Court in Central Wines *V.* Special Commercial Tax Officer [1982] 49 STC 83 *affirmed."*

We further refer to the judgment of Hon'ble Gauhati High Court in case of Assam Drug Dealers Association Vs. Commissioner of Taxes, Assam, Gauhati and Others reported in (1996) 100 STC 344 as cited by the assessee in his grounds of appeal. In the above case, the Hon'ble Court has held as under:

"There is no bar under the sales tax law whereby the seller, i.e., the intermediary and retailer of medicines, taxable in Assam at the point of first sale, cannot realize the amount of tax paid by it from its immediate purchaser or consumers. The provisions of the Drugs (Price Control) Orders of 1987 and 1995 issued under the Essential Commodities Act, 1955, specifically permit the realization of local tax if paid. This tax which is realized by the intermediary or the retailer is in fact only by way of reimbursement of taxes already paid at the first point and the said amount by way of tax is realized by the sales tax authorities at the first point. As such the question of further levy of tax on the retailers or intermediary does not arise.

[The court accordingly quashed the notification issued by the Commissioner declaring the realization of tax an offence.]"

Further,the principle of levy of penalty has been laid down by the Hon'ble Apex Court in Mool Chand case. In Commissioner of Sales Tax, UP, Lucknow Vs. Mool Chand Shyam Lal reported in (1988) 71 STC 226, it is held as under:

"*… affirming the decision of the High Court, that the fact that the respondent realized from the purchasers ore money by itself would not attract the penal provisions of section 15-A(1)(qq). Penalty could be levied or was leviable for realization of excess of tax legally payable and not for contravention of section 8-A(2((b). Realization of excess amount was not impermissible but what was not permissible was realization of excess amount as tax. By way of price the respondent realized more than what it was entitled to under the notification issued under the Price Control order and the department had not found that Rs.5 per quintal were realized in excess of tax payable under the Act. The High Court was, therefore, right in its decision that the provisions of section 15-A(1)(qq) were not applicable.*

The imposition of a penalty under the U.P. Sales Tax Act, 1948 is quasi criminal and unless strictly proved the assessee is not liable to penalty.

Decision of the Allahabad High Court affirmed."

Applying the ratio of above judgments and Drugs (Price Control) order of 1995, we reasonably observe that what has been realized as tax is factually a reimbursement of the tax paid by way of

incidental charges. As such, we do not find any infirmity or illegality in the order passed by the ld. FAA in reducing the demand to Rupees nil and thus, is to be upheld.

Now coming to the second leg of the issue i.e. issue no.ii as to whether the proceeding can be drawn by the LAO u/s.9B(3) of the OST Act when it is time-barred, we observe that there is no provision in the said Act regarding limitation to start the said proceeding. In such a situation of the case, Article 137 of the Limitation Act, 1963 come into play that prescribes a reasonable time of three years to initiate such proceedings. We observe that in the instant case the original assessment was passed U/s.12(4) of the OST Act on 29.03.2000 levying penalty u/s.9B(3)(a) of the OST Act which was set-aside by the ld. FAA by his order on 23.11.2000 against which the dealer preferred second appeal before this Tribunal and the Tribunal confirmed the order of ld. FAA by its order dtd.21.09.2013 in S.A. No.1466 of 2000-2001 remanding the case to the LAO with the observation that a separate proceeding is required to be instituted and a separate order is required to be passed as it is a distinct proceeding having no relationship with the assessment u/s.12(4) of the OST Act and as such the Tribunal has never directed to ld. LAO to institute the proceeding U/s.9B(3) of the OST Act as it has made a general observation on the question which was before the Tribunal for adjudication. As per Article 137 of the Limitation Act, 1963, such proceedings can be drawn within

three years from the year to which it relates. As such, the penal proceedings could only have been drawn by 31.03.2000 and beyond that it will be barred by limitation.

7. With the above facts and circumstances of the case, we confirm the appeal order passed by the ld. FAA for the impugned period and consequently the appeal filed by the State is rejected, being devoid any merit. Cross-objection filed by the dealer-respondent is disposed of accordingly.

Dictated & corrected by me.

Sd/-
(Srichandan Mishra)
Accounts Member-II

Sd/-
(Srichandan Mishra)
Accounts Member-II

I agree,

Sd/-
(A.K. Das)
Chairman

I agree,

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