BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK

S.A.No. 213(ET) of 2006-07

(From the order of the ld. ACST, Balangir Range, Balangir, in First Appeal Case No. AA-02(BP-II-ET) of 2005-06, dtd.21.07.2006, confirming the assessment order of the Assessing Authority)
(Assessment period : 2002-03)

S.A.No. 214(ET) of 2006-07

(From the order of the ld. ACST, Balangir Range, Balangir, in First Appeal Case No. AA-14 (BP-II-ET) of 2006-07, dtd.28.07.2006, confirming the assessment order of the Assessing Authority)
(Assessment period : 2003-04)

S.A.No. 215(ET) of 2006-07

(From the order of the ld. ACST, Balangir Range, Balangir, in First Appeal Case No. AA-14 (BP-II-ET) of 2006-07, dtd.28.07.2006, confirming the assessment order of the Assessing Authority)
(Assessment period : 2004-05)

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

M/s. General Manager,
Ordnance Factory,
P.O. Badmal, Dist. Bolangir. ... Appellant

-Versus-

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

For the Appellant : Mr. B.R. Mohapatra, Advocate
For the Respondent : Mr. S.K. Pradhan, Addl.Standing Counsel (C.T.)

Date of Hearing: 18.01.2019 *** Date of Order: 18.01.2019

O R D E R

The above three appeals are directed against the orders of First Appellate Authority/Asst. Commissioner of Sales Tax, Balangir Range, Balangir (in short, FAA/ACST) in First Appeal Case No. AA-02(BP-II-ET) of 2005-06 for the assessment year 2002-03, in First

Appeal Case No. AA-14 (BP-II-ET) of 2006-07 for the assessment year 2003-04 and in First Appeal Case No. AA-14 (BP-II-ET) of 2006-07 for the assessment year 2004-05. Since these three appeals involve identical questions for determination relating to consecutive assessment periods relating to the dealer-appellant, all are taken up and decided vide this common order for sake of convenience and to avoid conflicting opinion, if any.

2. **Factual matrix :**

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The dealer-appellant was subjected to assessment u/s.7(4) of the Odisha Entry Tax Act, 1999 (in short, OET Act) for the tax period 2002-03 that was consequential to the assessment u/s.12(4) of the Odisha Sales Tax Act, 1947 (in short, OST Act) for the self-same period initiated by the same Assessing Authority/Sales Tax Officer, Balangir-II Circle, Kantabanji (in short, AA/STO). On verification, the AA found that the dealer has disclosed purchases of schedule goods from outside the State for Rs.7,91,65,568.84. But on verification of the list submitted by the dealer, the amount of goods purchased from outside came to Rs.9,05,64,961.84. In view of such big difference in amount relating to the inter-state purchase of scheduled goods and when the dealer failed to produce purchase register, the AA rejected the books of account and assessed the dealer by applying principle of best judgment. He determined the GTO at Rs.24,55,04,646/- and TTO at Rs.9,05,64,961.84. Tax was calculated at Rs.13,29,433/-. The dealer having paid tax at Rs.3,56,882/-, the balance tax payable was calculated at Rs.9,72,551/-.

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For the period of assessment 2003-04 on verification, the AA found the dealer has disclosed purchases of schedule goods both from outside and inside the State for Rs.22,31,68,742.59, out of which purchases from registered dealer was of Rs.1,14,87,151/-. The dealer could furnish details of intra-state purchase of

Rs.6,46,32,357.75 but failed to explain the purchase of Rs.14,70,49,233.84 goods purchased from outside comes to Rs.6,46,32,357.75. When the dealer failed to produce purchase register, the AA rejected the books of account and assessed the dealer by applying principle of best judgment. He determined the GTO at Rs.22,31,68,742.59 and TTO at Rs.21,16,81,591.59. Tax was calculated at Rs.24,14,072.37. The dealer having paid tax at Rs.15,44,546/-, the balance tax payable was calculated at Rs.8,69,526/-.

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Similarly, the dealer-appellant was subjected to assessment u/s.7(4) of the Odisha Entry Tax Act, 1999 for the tax period 2004-05. On verification, the AA found the dealer has disclosed purchases of schedule goods both from inside and outside the State for Rs.16,94,29,607.53. But on verification of the list submitted by the dealer, the amount of goods purchased from registered dealer come to Rs.57,36,536/-. As a result, the AA determined the GTO at Rs.16,94,29,607.53 and TTO at Rs.16,36,93,071.53. Tax was calculated at Rs.18,83,570.15. The dealer having paid tax at Rs.8,92,562/-, the balance tax payable was calculated at Rs.9,91,008/-.

3. Being aggrieved with the demand of tax, the dealer had preferred appeals before the FAA against the assessment of each year above. However, the FAA in turn did not accept the pleas of the dealer and confirmed the order of assessment resulting thereby the demand remain undisturbed.

4. On this backdrop three numbers of second appeals mentioned above are preferred by the dealer. It is contended by the dealer that, the determination of GTO and TTO by the AA is not justified and wrong. The FAA has erred in charging tax at full rate in respect of the raw materials use for manufacturing purpose. The

enhancement of TTO and confirmation of the same by the FAA is not justified.

The substantive question of law and fact essential for decision of these appeals are (i) If the FAA was wrong in confirming the order of assessment regarding enhancement/determination of TTO as determined by the AA. (ii) If the FAA has committed wrong in confirming the order of assessment in imposing tax @1% instead of ½% against the materials claimed to have used as raw materials in manufacturing purpose. Besides, the above two questions, the dealer has raised another question in course of the argument like (iii) the entire proceeding should be vitiated in view of the fact that, no valid notice for assessment u/s.7(4) was ever served on the dealer. So, the dealer is not liable to pay tax as demanded.

5. As mentioned above, the dealer was subjected to regular assessment for three successive assessment periods i.e. 2002-03, 2003-04 and 2004-05. It is evident from the record as well as it is undisputed that, the dealer was subjected to assessment u/s.12(4) of the OST Act and vis-à-vis the same assessments under the OST Act, the dealer was also assessed under OET Act. No separate notice under OET Act for assessment was issued or served on the dealer.

Learned Counsel appearing for the dealer vehemently harped on this irregularity in initiation of the assessment proceeding and argued that, the entire assessment proceeding should be vitiated for such lacunae which goes to the root of the case. In **Commissioner of Sales Tax and Others –Vrs.- Subash & Co. 130 STC 97 (SC)**, their lordship has held as follows :

> "**20.** The emerging principles are :
> (i) Non-issue of notice or mistake in the issue of notice or defective service of notice does not affect the jurisdiction of the assessing officer, if otherwise reasonable opportunity of being heard has been given.
> (ii) Issue of notice as prescribed in the Rules constitutes a part of reasonable opportunity of being heard :
> (iii) If prejudice has been caused by non-issue or invalid service of notice the proceeding would be vitiated. But irregular service of notice would not render the

proceedings invalid; more so, if assessee by his conduct has rendered service impracticable or impossible.

(iv) In a given case when the principles of natural justice are stated to have been violated it is open to the appellate authority in appropriate cases to set aside the order and require the assessing officer to decide the case *de novo.*"

With the principle above as laid down by the authority, when we delve into the case in hand, it is found that, the dealer had faced assessment proceeding before the STO without raising this point. After assessment, the dealer carried the matter before the appellate authority but there also, the dealer had not raised this point that, he was never been served with any notice for OET Act for assessment. The dealer took active part in the assessment proceeding and in the proceeding before the FAA, which is an extended forum of assessment. The assessment orders which was passed on 01.02.2005/29.04.2006, the FAA order/the impugned orders were passed on 21.07.2006 and 28.07.2006 respectively. Thereafter, the dealer preferred second appeal before this forum. Before the two forums below, the dealer contested the case raised his explanations and pleas against the allegations basing which the assessment was initiated. But he remained silent over the period and thereafter one fine morning in the financial head of the second appeal, the dealer raised the plea that, notice was not given for which prejudice is caused to him. However, the dealer has miserably failed to appraise the forum, how he became prejudice and how it can be said that, principle of natural justice has been violated while passing the orders by the fora below. The dealer had availed ample opportunities to know the allegations against him. By knowing the allegations against him, he has raised defense plea before the two forums below and thereafter, he took active participation in the hearing and obtained the final order though decided against him. So, at this belated stage before the second appellate forum, taking the hyper-technical plea of the procedure, the dealer cannot be escaped from the tax liability if

otherwise he is found to be liable under law. In all eventualities, it will be unsafe to hold that, the dealer was not provided with ample opportunity to defend his case. Once it is believed that, proper and fair opportunity of being heard has been duly extended to the dealer and when the dealer has not raised the question of procedural defect in the notice at the earliest opportunity and even thereafter before the appellate forum, then it is inconceivable to accept the argument advanced by the dealer. Hence, the plea of the dealer is declined as of no merit.

6. Coming to the other point for determination in the case in hand, it is found that, this is a dispute between two Government organizations. The dealer is an organization under Central Government, whereas the taxing authority is the unit of State Government. The impugned order as it revealed, due to non-production of connected documents, the AA applied the principle of best judgment and determined the escaped turnover. Learned Counsel for the dealer argued that, the AA has not taken into consideration of the schedule and non-schedule goods while determining the tax liability under OET Act. As such, the imposition of tax on the entire amount, which includes the non-schedule goods itself is erroneous.

7. The next plunk of argument is, since the portion of the goods was incorporated as raw materials in the manufacturing process, the same need to be taxed at half of the rate fixed for the schedule goods. On perusal of the impugned order it is found that, as the assessee-dealer failed to produce the document before both the forum below, the fora below has proceeded with the assessment applying best judgment principle. When the dealer is a Government of India undertaking, it can very well presume that, the dealer has necessarily produced all the documents of the purchases and the goods used in the manufacturing process. However, it is needless to mention here that, the impugned order as it revealed the dealer was

careless and casual to produce all the documents, which he wants to produce as submitted in the hearing of this appeal. In normal course such a willful default should not be dealt with sympathetic consideration. But the dealer being a Government of India undertaking, it is believed that, an opportunity should be provided to the dealer to produce the details of the accounts of purchase basing which the exact amount of tax liability can be determined. On failure it can safely be said that, the determination of tax liability arrived by the AA need not be disturbed.

In the result, it is held that, these are fit case where the matter should be remitted back to the AA for determination of the tax liability afresh on production of the required books of account and connected documents, purchase bills, register etc. by the dealer. Accordingly, it is ordered.

The appeals by the dealer are allowed on contest. The matter be remanded back to the AA for assessment afresh as per the observation above.

Dictated & corrected by me,

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

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

I agree,

Sd/-
(Suchismita Misra)
Chairman,

I agree,

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