BEFORE THE ODISHA SALES TAX TRIBUNAL (FULL BENCH), CUTTACK

S.A.No. 391/2009-10

(From the order of the ld.ACST, Cuttack-II Range, Cuttack, in Appeal No. AA/298/CU II/07-08, dtd.28.01.2009, confirming the assessment order of the Assessing Officer)

P R E S E N T :

Smt. S. Misra	Sri S. Mohanty	&	Sri R.K. Rout
Chairman	2nd Judicial Member		Accounts Member-II

M/s. Lafarge India Pvt. Ltd.,
Manguli Dist. Cuttack. ... Appellant

-Versus –

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

(Assessment year : 2003-04)

Appearance :
For the Appellant ... Mr. S.R. Sharma, Advocate
For the Respondent ... Mr. M.S. Raman, A.S.C. (C.T.)

Date of Hearing: 03.01.2019 ****** Date of Order: 03.01.2019

ORDER

This appeal is directed against the order of the learned First Appellate Authority/Asst. Commissioner of Sales Tax, Cuttack-II Range, Cuttack (in short, FAA/ACST) in First Appeal Case No. AA/298/CU II/07-08, dtd.28.01.2009 in confirming the ex-parte order of assessment passed by the learned Sales Tax Officer/Assessing Authority, Cuttack-II Circle, Cuttack (in short, AA/STO) for the assessment year 2003-04 u/s.12(4) of the Odisha Sales Tax Act, 1947 (in short, OST Act).

2. Facts on the backdrop of this second appeal are : The assessee-dealer was subjected to assessment u/s.12(4) of the OST Act

for the assessment period 2003-04 by the STO, Cuttack-II Circle, Cuttack. It was an ex-parte assessment, wherein the AA had taken into consideration of the returns filed by the dealer up to the month of February and no return for the month of March, 2004 is default, he added Rs. 2,00,00,000/- as turnover for March, 2004 and thereby the GTO for the entire assessment period was determined at Rs.7,05,79,163.63. TTO was determined accordingly at Rs.646,57,558.29 after allowing deduction of Rs.59,21,605.34. OST @12% on TTO was imposed and surcharge @10% on the tax was also levied. The dealer was found to have deposited tax of Rs.63,07,026/-. Resultantly, the balance tax due from the dealer was calculated at Rs.22,27,772/-.

3. This ex-parte order of the assessment was challenged before the FAA by the dealer, who in turn, declined to interfere with the order of the AA. As a result, the demand remained undisturbed.

4. Felt aggrieved, the dealer has preferred this second appeal. It is contended by the dealer that, the AA has enhanced the GTO without any basis. It is the assessee-dealer had not filed return for the month of March, 2004 but for that reason, the enhancement of GTO by Rs.2,00,00,000/- is arbitrary and against the principle of natural justice. The dealer has failed to file return due to ignorance but without any notice and without initiating any proceeding u/s.11(3) of the OST Act, the addition of Rs.2,00,00,000/- to the GTO is arbitrary and not tenable in the eye of law.

5. The appeal is heard without cross objection whereas in the hearing, Revenue has supported the impugned order as lawful.

6. Following questions are framed for decision in the following paragraphs : (i) Whether the FAA has committed wrong in accepting the findings of the AA, which was passed ex-parte and (ii) Whether the FAA was wrong in upholding the addition of Rs.2,00,00,000/- to the GTO for default of filing of return for one

month by the dealer and (iii) Whether the concurrent finding of both the fora below without notice u/s.11(3) of the OST Act is not sustainable in law?

7. Advancing argument on behalf of the dealer, learned Counsel for the dealer vehemently argued that, the Revenue should have initiated proceeding u/s.11(3) of the OST Act for default in filing return but without giving any notice u/s.11(3) of the OST Act, the AA has added Rs.2,00,00,000/- to the GTO by applying best judgment principle theory, which is illegal. It is also argued that, since the dealer had no business transaction in the month of March, 2004, the dealer had not filed any return and the same was nothing but the ignorance of law by the dealer. As such, the assessment need to be set-aside and the demand be deleted accordingly. In support of his contention, he has also advanced the order of Division Bench of this Tribunal passed in S.A.No.186(ET)/2009-10 for the self-same assessment period relating to the dealer whereby this Tribunal has remanded the matter to the AA for assessment afresh.

Per contra, learned Addl. Standing Counsel, Mr. Raman argued that, when the dealer has failed to furnish the return and thereafter when the dealer remained absent in the assessment proceeding, the AA had no option but to apply the principle of best judgment assessment, which is done in this case.

On careful perusal of the impugned order as well as the order of the AA it is found that, the dealer has not taken any plea of 'no' transaction/turnover during the month of March, 2004 before both the fora below. However, the dealer took the same plea before this Tribunal for the first time. Ignorance of law has no excuses, is the well settled principle. The dealer cannot take a plea that, due to ignorance of law, he did not file return for the month of March, 2004 and that is why he is not liable. If that be, we are of the consensus view that, both the

forums below have rightly applied the principle of best judgment assessment for the month of March, 2004.

8. Initiation of proceeding u/s.11(3) is independent of the assessment u/s.12(4) of the OST Act. As because the Revenue should or could have initiated proceeding u/s.11(3) of the OST Act but not initiated, thereby any such proceeding, the liability u/s.12(4) can be vitiated or can be said to be unlawful is inconceivable.

9. The next contention of the learned Counsel for the dealer is, addition of Rs.2,00,00,000/- to the GTO by both the fora below is highly arbitrary and whimsical. It is found that, the turnover of the dealer for eleven months previous to March, 2004 was accepted at Rs.5,05,79,163.63. In that event, in no stretches of imagination, it can be believed/accepted that, the transaction in the month of March, 2004 might have at Rs.2,00,00,000/-. The AA should have taken into consideration of the transaction of the dealer for previous assessment years. Also he should have taken into consideration of the ratio of turnover of the dealer month-wise in comparison to the month of March for the previous assessment years so as to arrive at a possible and plausible opinion regarding the turnover for the month of March, 2004 in question. It seems the AA and the FAA both have determined the GTO in a much higher side.

The best judgment assessment of the AA here in this case seems to be quite whimsical and unreasonable. The power of best judgment assessment apparently are too wide and can be used to the detriment of an assessee and can be manipulated by a corrupt office. Therefore, there has to be checks and balances to the „guess work" done in case of a best assessment judgment. In making best judgment assessment the officer does not possess arbitrary powers to assess any figure as he likes. Though quasi judicial in nature these assessments are to be based on the principles of justice, equity and good conscience. In common parlance the words “best judgment” carry the

connotation that what is being done is in order to make an estimate. Similarly, the best judgment assessment can only be made after giving the assessee an opportunity of being heard. Such opportunities shall be given by issuance of notice by way of a show cause as to why the assessment should not be completed to the best of the judgment and that opportunity for hearing will not be necessary. Here in this case, as we notice the learned AA and FAA have applied the principle of best judgment assessment almost mechanically. So, the best judgment assessment of the learned AA seems to be more whimsical and nowhere near to reality. Similarly, it is also found that, the FAA has mechanically accepted the best judgment assessment of the AO. Thus, from the above facts and circumstances, taking cue from the assessment of the preceding years, the volume of transaction of the dealer for those years and the possible enhancement of turnover in current assessment year assessment afresh is found required.

The appeal is allowed on contest. The impugned order is set-aside. The matter is remitted back to the AA for assessment afresh as per the observation above. The whole exercise should be completed within a period of four months hence.

Dictated & corrected by me,

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

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

I agree,

Sd/-
(Smt. S. Misra)
Chairman

I agree,

Sd/-
(R.K. Rout)
Accounts Member-II