BEFORE THE DIVISION BENCH-II: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No.15 (ET) of 2017-18
&
S.A. No.17 (ET) of 2017-18

P r e s e n t : Shri S. Mohanty, 2nd Judicial Member & Shri P.C. Pathy, Accounts Member-I

S.A. No.15 (ET) of 2017-18

(From the order of the ld. JCST (Appeal), Sambalpur Range, Sambalpur, in First Appeal Case No. AA 30/SAI/OET/2016-17, disposed of on 16.03.2017)

M/s. M.M. Garments,
At:- Gujarati Colony,
Sambalpur. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2007 to 31.03.2008

S.A. No.17 (ET) of 2017-18

(From the order of the ld. JCST (Appeal), Sambalpur Range, Sambalpur, in First Appeal Case No. AA 32/SAI/OET/2016-17, disposed of on 16.03.2017)

M/s. M.M. Garments,
At:- Gujarati Colony,
Sambalpur. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2009 to 31.03.2011

For the Dealer : Mr. A. Kedia, Advocate
For the Revenue : Mr. S.K. Pradhan, A.S.C.

Date of Hearing: 05.04.2019 **** Date of Order: 05.04.2019

O R D E R

Both appeals above preferred by the same dealer against the orders of first appellate authority passed for different tax periods, are taken up together, since identical issues are raised for decision in these two appeals by the appellant, hence decided accordingly by this common order.

S.A. No.15(ET) of 2017-18 is from the order of first appellate authority for the assessment period 01.04.2007 to 31.03.2008 and S.A. No.17(ET) of 2017-18 is for the assessment period 01.04.2009 to 31.03.2011.

2. **Facts of S.A. No.15(ET) of 2017-18**

The assessee-dealer in the instant case deals in handloom goods, suiting, shirting, sarees, silk sarees, bed sheets, pillow covers, napkins, turkis towel etc. on wholesale basis effecting purchases from outstate dealers. The regular assessment for the tax period 01.04.2007 to 31.03.2008 was reopened as per sec.10 of the Orissa Entry Tax Act, 1999 (hereinafter referred to as, the OET Act) on the basis of fraud case report submitted by Vigilance Wing, Sambalpur. In the reassessment proceeding, learned assessing officer determined the sale suppression caused by the dealer to the tune of Rs.77,24,369.00. The escaped turnover as sale suppression was taxed @ 2% calculated to Rs.1,54,487.00. Besides tax, penalty u/s.10(2) of the OET Act i.e. twice of the tax demand was imposed and thereby the total demand against the dealer was raised at Rs.4,63,461.00.

The dealer challenged the order of assessing authority before the first appellate authority on many grounds including the grounds like, the

assessment order was an exparte order, no notice in form E-32 was served on the dealer, the assessing authority has reopened the assessment mechanically, the order of assessment is vague since GTO and TTO were not determined and the detection of sale suppression is baseless.

The first appellate authority in consideration of the dealer's plea held that, the assessment order suffers from patent mistakes like, it is silent whether the reassessment proceeding is preceded by any assessment u/s.9A or 9C of the OET Act, the assessment order does not disclose tax declared by the dealer, tax paid by the dealer and tax assessed by the dealer. In conclusion, the first appellate authority returned the matter to the assessing authority for assessment afresh by setting aside the order of assessment.

3. The dealer has challenged the order of the first appellate authority before this forum with the contentions like, the first appellate authority should have quashed or vitiated the entire proceeding instead of remanding the matter to the assessing authority for assessment afresh. The assessment was conducted in gross violation of the Act and Rules. The order of assessment contains misrepresentation of facts like, the assessing authority had verified the books of account of the dealer, the order of assessment issued in form E-7 does not contain the GTO and TTO, the assessing authority has not applied his mind independently to the fraud case report and the reopening is a purely mechanical one which cannot withstand in law and imposition of penalty is illegal. So, the very assessment proceeding should be vitiated.

4. **Facts of S.A. No.17(ET) of 2017-18**

In a similar way, basing fraud case report submitted by the Vigilance Wing, Sambalpur, the assessment for the period 01.04.2009 to 31.03.2011 was reopened as per sec.10 of the OET Act. In the fraud case report, the enforcement official had reflected sale suppression as well as purchase suppression. The assessing authority in the reassessment proceeding determined purchase suppression to the tune of Rs.8,83,072.00 and sale suppression to the tune of Rs.61,06,456.00 and thus the total

suppression towards purchase suppression and sale suppression was calculated at Rs.71,66,142.00.

The assessment was completed in absence of the dealer as the dealer did not appear before the assessing authority. On determination of the escaped turnover due to the suppression above, the tax due from the dealer was calculated at Rs.12,7,578.00, penalty u/s.10(2) of the OET Act was calculated at Rs.2,55,156.00, thereby the total demand raised at Rs.3,82,734.00.

5. Being aggrieved with such assessment and demand as raised, the dealer preferred appeal before the first appellate authority. The first appellate authority in turn took the same view as taken against the assessment for other period mentioned above in the facts of S.A. No.15(ET) of 2017-18 and then remanded the matter to the assessing authority for assessment afresh.

When the matter stood thus, the dealer being aggrieved with the order of first appellate authority preferred this second appeal and the contention of the dealer in this second appeal are, just replica of the contention in S.A. No.17(ET) of 2017-18.

6. Both the appeals are heard without cross objection. But, in the hearing Revenue supported the impugned orders.

7. The questions raised for decision in these appeals are, whether the reopening of assessment in both the cases is not sustainable in absence of any valid order with reason of reopening being passed by the assessing authority, (i) whether both the assessments are invalid for want of proper notice in Form E-32 and E-7, (ii) whether both the reassessments are not maintainable since both are not preceded by any assessment u/s.9 of the OET Act.

8. The expression for any reason as contemplated u/s.10 of the OET Act does not mean a purely subjective satisfaction on the part of the assessing authority. The satisfaction ought to be a satisfaction reached by the assessing authority on the basis of facts or materials available before it.

The material on which the assessing authority bases its opinion must not be arbitrary, irrational, vague, distinct or irrelevant. It must bring home the appropriate rationale of action taken by the assessing authority in pursuance of such belief. In absence of such material, the action taken by assessing authority on such 'reason to belief' or 'for any reason' is arbitrary and bad in law.

In a number of decisions, the Hon'ble Supreme Court and the Hon'ble High Court have observed that, department claim as a matter of right to reopen the assessments without appreciating the real intend or purpose behind enacting such provision. Assessment orders are not a scrap of paper which can be overturned by reopening the assessment in casual manner. Finality to assessment must be recognized as a matter of principle and reopening should be an exception. In AIR 1989 SC 997, State of U.P. Vrs. Maharaja Dharmander Prasad Singh, it is held as follows-

> "The authority cannot permit its decision to be influenced by the direction of others as this would amount to abdication and surrender of its discretion. It would then not be the Authority's discretion that is exercised, but someone else's. If an authority hands over its discretion to another body it acts ultra vires."

9. In (2006) 148 STC 61 (Orissa), Indure Limited Vrs. Commissioner of Sales Tax, Cuttack, Orissa and others, discussing therein a judgment of earlier period in the Ugratara Bhhojanalaya and Uttareswari Rice Mills cases their Lordships have categorically stated that:

> "14. So, after considering all the decisions cited on this point, this Court feels bound by the interpretation given to Section 12(8) of O.S.T. Act by the Apex Court in Uttareswari Rice Mills (supra) and which was subsequently followed in Ugratara Bhojanalaya (supra). Following the aforesaid ratio this Court reiterates that the difference in phraseology between "For any reason" and "Where the Sales Tax Officer has reasons to believe" does not make any material difference in view of the provisions in Rule 23 of the said rules which mandate that notice for re-opening has to be in Form VI and Form VI uses the expression "Where the Sales Tax Officer has reasons to believe". So the question No. (IV) is answered by holding that the words 'for any reason' in Section 12(8) of OST do not give-wider powers to the authorities to re-open assessment compared to words 'reasons to believe' since the words 'reasons to believe' are incorporated in the statutory form

in which notice of assessment is to be issued. The Court also holds that while exercising power under Section 12(8) of OST, the authority has to act consistently with the statutory norms prescribed under the statutory rules and the forms.

In Uttareswari, construing Section 12(8) of O.S.T. Act, the Apex Court held that the Sales Tax Officer issuing the notice "should have reason to believe that the turnover of a dealer has escaped assessment or has been under-assessed." The Apex Court further held that the approach has to be practical.

15. Following that judgment of the Apex Court, the Division Bench of Orissa High Court held in Ugratara that some basis for reopening has to be disclosed in the notice.

(a) Here no basis has been disclosed either in the notice or in the records. Rather the records show that the issuance of the notice preceded any recording of an order in the file. So it is clear that the notice has been issued mechanically and at a point of time when there could not be even any formation of opinion. So the notice was mechanically issued first and then it was sought to be covered up by recording an opinion in the file.

(b) From a perusal of the file, it appears that there was an audit objection. From the affidavit of the Revenue also it appears that notice was issued as suggested by audit objection.

(c) Of course audit objection can be a valid factor which can be taken into consideration by the concerned officer for initiating a proceeding for re-opening of assessment. But the concerned Sales Tax Officer must independently apply his mind and form an opinion that on the basis of audit objection, an order for re-opening of assessment can be passed. That would be a valid basis for re-opening. But the Sales Tax Officer's formation of opinion cannot be dictated by audit objection.

(d) In the instant case in the audit report it was objected that the tax has been under assessed. The concluding part of the audit objection states "The desirability of the opening of the case under Section 12(8) of O.S.T. Act for re-assessment may be kindly re-examined under intimation to Audit". The said audit objection is dated 10.9.98. The impugned noticed of re-opening was issued on 23.9.98. But the Sales Tax Officer recorded an order for issuing the notice under Section 12(8) of O.S.T. Act only on 24.10.98. So the notice was issued mechanically even before the order for issuing the notice was actually passed. This is not permissible in law.

16. Reference in this connection may be made to the decision of the Supreme Court in the case of Mahadayal Premchandra v. Commercial Tax Officer, Calcutta and Ors. .

In that case the Commercial Tax Officer assessed the dealer under Bengal Finance (Sales Tax) Act on the instruction of the Assistant Commissioner. The Court did not approve of such procedure as it found that in the orders which were passed by the Commercial Tax Officer he was "merely voicing the opinion of the Assistant Commissioner without any conviction of his own" (Page 670, Para 18 of the report).

> Here also by purportedly issuing notice under Section 12(8) of O.S.T. Act, the Sales Tax Officer was merely 'voicing' the audit objection without recording any formation of opinion of his own. So the ratio in the case of Mahadayal squarely applies to the facts of the present case."

10. On the touchstone of well settled principle above, when we delve into the LCR and the order passed by the assessing authority in the reassessment proceeding for tax period 01.04.2007 to 31.03.2018 (S.A. No.15 (ET), it is found that, the assessing authority has not passed any order forming opinion on the basis of fraud case report to initiate reassessment proceeding. The order sheet is also silent if any notice under form E-32 has ever issued/sent or served on the dealer. Needless to mention here that, it was an exparte order of reassessment. The order sheet further reveals the assessing authority has left blank space to be filled in a later period. It only carries orders of two dates such as 07.03.2013 stating therein issue an intimation to dealer for production of books of account and then the next date is 16.03.2013 when the final order was passed. Statutory notice was not given, statutory period was not allowed, no order stating any independent application of mind by the assessing authority to reopen the assessment. Thus, it is found that, not only the notice under form E-7 is defective but, the exparte order of reassessment without notice is illegal and it goes to the root of the very proceeding. Besides, the mechanical opening of the assessment also harp the sustainability of the order at the threshold.

Similar irregularity and illegality is noticed in the reassessment for the tax period 01.04.2009 to 31.03.2011 (S.A. No.17). The LCR as it reveals, the first order and second order are inserted in a later period. Both the orders are undated and without signature of the assessing authority. The order sheet is reproduced for better appreciation-

> " Order No.1. Since the marginal note. Issue notice to the dealer in VAT form-307 fixing date to appear on 16.05.2012 with relevant books of account.
>
> Order No.2. Issue intimation to the dealer fixing date to 06.06.2012."

This case record was never put up on 16.05.2012 or 06.06.2012 but all on a sudden it was put up on 18.01.2013 on which date the final order was passed.

11. Bare perusal of the orders above, it can safely be said that, the orders are afterthought and even, does not passed in accordance to the mandate of the provision elaborately discussed above.

Needless to mention here that, if it is the satisfaction of the first appellate authority that, there was no assessment u/s.9 of the OET Act then, the defect cannot be cured on remand assessment.

From the discussion above, here in this case, it can successfully said that, both the reassessment proceedings are untenable in the eye of law for non-adherence to the statutory mandate.

In the result, it is also believed that, discussion on other questions become redundant as the proceedings are found not maintainable and need to be vitiated in view o the authoritative pronouncements of the Hon'ble Court mentioned above. Accordingly, it is ordered.

Both the appeals are allowed. The reassessment proceedings in both the cases are vitiated as not maintainable.

Dictated & corrected by me,

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

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

I agree

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