

u/S. 12(8) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act') pertaining to the period 2004-05.

2. The facts as revealed from the case record are as follows :-

The dealer-assessee named and styled as "M/s. Konark Metal & Wire Product, Industrial Estate, Jharsuguda" deals in business involving manufacture and sale of AAA conductor, ACSR conductor, XSPE conductor etc. on wholesale and retail basis. He was assessed u/S. 12(4) of the OST Act on 27.02.2008 raising extra demand of `335.00 only for the period 2004-05. Then on receipt of Audit Objection from A.G. (Audit) Odisha, Bhubaneswar the dealer was again subjected to assessment due to certain contraventions in respect of declaration forms to the tune of `11,72,173.00. The authorized person of the dealer-assessee responding the notice issued u/S. 12(8) of the OST Act appeared before the assessing officer and on being confronted about the aforesaid contraventions he explained that they had not evaded any tax and further they did not know much about the Audit Objection. Subsequently on further calculation the assessing officer determined the GTO and TTO of the dealer-assessee afresh, imposed differential tax @ 8% and surcharge @ 10% and thus found the total tax dues of the dealer-assessee to be `11,72,173.00 for payment of which he issued a demand notice accordingly.

Being dissatisfied with the said order the dealer-assessee brought the matter to the first appellate authority and advanced the following grounds to sustain his appeal :-

- (i) The order passed by the assessing officer was wrong, illegal and against law;
- (ii) The dealer had disclosed the entire turnover of the relevant year to the STO at the time of assessment and no part of his turnover had escaped assessment or had been under assessed during the said year. Therefore, reopening of the assessment u/S. 12(8) of the OST Act was absolutely unreasonable on the part of the assessing officer.

It was further contended by the dealer-assessee that reopening of the assessment cannot be done on the ground of mere change of opinion and in the instant case this action of reopening of assessment was absolutely redundant in the facts and circumstances of the case. That apart no valid notice was sent to the dealer-assessee for reopening of assessment which totally makes the impugned proceeding vulnerable and as such the assessment and the consequential demand made by the assessing officer cannot be sustained. The first appellate authority, however, on perusal of the materials available on record vis-à-vis the above grounds raised by the dealer confirmed the order of assessment.

3. Being aggrieved with the findings of the first appellate authority the dealer-assessee preferred this appeal raising the following grounds :-

That the dealer-assessee was noticed vide Memo No. 2203 dated 23.09.2010 intimating him therein the date of hearing as 11.10.2010 and accordingly the dealer-assessee had appeared before the first appellate authority for hearing of the appeal but as there was a compulsion on the part of the first appellate authority for verification of the assessment record before disposing of the appeal, the dealer-appellant before him (first appellate authority) and his Advocate were informed that another date would be fixed after obtaining the assessment record from the concerned Circle. However, subsequently the first appellate authority passed the order confirming the assessment without giving a chance to the dealer-appellant to argue his case and without verification of the assessment record. It is also contended by the dealer-appellant that he had disclosed the entire turnover of the relevant year to the STO at the time of assessment. No part of his turnover had escaped assessment or was under assessed calling for reopening the assessment u/S. 12(8) of the OST Act. As in the absence of new fact and law in the hands of the assessing officer reassessment proceeding u/S. 12(8) cannot be initiated. He thus urged before this Tribunal to set aside the said order. The dealer-appellant further contended emphatically that no valid notice was served on him

proposing for reassessment and thus the entire procedure of reassessment stands vitiated and as such the demand raised against him has to be set aside.

The State has filed cross-objection in this case supporting the impugned order.

4. In course of hearing learned Counsel appearing for the dealer-assessee submitted that in the instant case before reopening the assessment u/S. 12(8) of the OST Act, a notice u/R. 28(2) in Form-VI is supposed to be served on the dealer-assessee. But in the instant case no such valid notice was served upon him. In support of his contention he filed a xerox copy of the notice which he had received in Form-VI u/S. 12(8) of the OST Act, 1947. In fact the said notice reveals that the same was not signed by the Sales Tax Officer, Jharsuguda Circle, Jharsuguda though it seems that the said notice bearing No. 800 dated 19.02.2009 was sent to the dealer. The said notice bears only the seal of the Sales Tax officer, Jharsuguda Circle, Jharsuguda. Learned Counsel for the dealer-assessee cited a decision rendered in the case of Muralidhar Gopikishan (P) Ltd. and another Vs. State of Orissa and others, reported in [1999] 116 STC 308 (Ori.) and submitted that as per the aforesaid decision of our Hon'ble Court service of notice on the dealer is condition precedent for initiating a fresh assessment u/S. 12(8) of the OST Act. Mere participation of the dealer in the proceeding where no notice has been served on him would not validate them. He also

cited a decision rendered in the case of B.K. Gooyee Vs. Commissioner of Income-Tax, reported in AIR 1966 Cal 438 while submitting that the said decision though rendered in a matter relating to Income Tax yet the situation therein is almost akin to the present case. Thus while pointing out this defect in the notice issued by the assessing officer to the present dealer-assessee u/R. 28(2) he urged before this Tribunal to set aside the order of the first appellate authority as well as the assessing officer on this ground alone.

5. In reply to their such argument learned Addl. Standing Counsel (CT) appearing on behalf of the State also filed some case laws i.e. decisions rendered in the case of Commissioner of Sales Tax and others Vs. Subhash and Co., reported in [2003] 130 STC 97 (SC) and in the case of Babulal Manjee Mehta Vs. Commissioner of Sales Tax, Orissa and another, reported in [1992] 84 STC 220 (Ori.) and argued that if adequate opportunity to be heard has been given to a dealer-assessee then the question regarding service of an invalid notice loses its significance.

6. As stated above admittedly in the instant case a reassessment was done in respect of the dealer-assessee for the period 2004-05 basing upon certain objection advanced by the A.G. (Audit) in their report and during that assessment some escaped turnover was noticed for which the demand against the dealer-assessee was raised.

The dealer-assessee preferred an appeal against the said order of reassessment before the first appellate authority. The first appellate authority held that in the instant case during the original assessment the assessing officer could not notice the contravention and availing of deduction towards purchase of certain first point tax paid goods which were purchased against Form-IV. The appellant-dealer had not made any attempt to explain this shortcoming which was noticed by the A.G. officials but he only challenged the procedure adopted in framing the order of assessment u/S. 12(8) of the OST Act. Learned Addl. Standing Counsel (CT) cited the decision rendered in the case of Commissioner of Sales Tax and others Vs. Subhash and Co. (supra) in which the Hon'ble Apex Court have been pleased to define the term "Notice" in legal parlance while deciding the case under the statute "Madhya Pradesh General Sales Tax Act, 1958 and Madhya Pradesh General Sales Tax Rules, 1959". For better appreciation we would like to quote some of the paragraphs of the above decision of Hon'ble Apex Court.

Quote : "16. "Notice", in its legal sense, may be defined as information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent to knowledge in its legal consequences."Unquote.

Quote : "20. The emerging principles are :

- (i) None-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." Unquote.

7. In the present case the dealer-assessee even after getting this unsigned notice from the assessing officer had appeared before him and participated in the proceeding initiated u/S. 12(8) of the OST Act and not only that he had also submitted through his authorized agent that they had not evaded any tax and further did not know much about the Audit objection. This itself indicates that he was fully aware of the implication of this reassessment proceeding and not only that he had explained before the assessing officer while availing the opportunity of being heard. Therefore, if we go by the principles laid in the above

decision of the Hon'ble Apex Court then we certainly have no other option but to hold that the notice sent to the dealer in Form-VI under Section 12(8) of the OST Act only with the office seal of the STO, responding which the dealer had also appeared before the assessing officer and participated in the proceeding, in no way could be considered as invalid so as to vitiate the entire proceeding of assessment u/S. 12(8) of the OST Act. Apart from this the first appellate authority has elaborately discussed in his order with facts and figures as to why and under what circumstances he confirmed the order of assessment.

8. In the circumstances we find no infirmity in the order of the first appellate authority in confirming the order of assessment and as such the same does not invite interference by this Tribunal in any manner.

9. In the result, the appeal is dismissed. Cross-objection is disposed of accordingly.

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

Sd/-
(Subrat Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Ranjit Kumar Rout)
Accounts Member-II