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

S.A. No. 69 of 2004-05

(From the order of the ld. ACST, Balasore Range,
Balasore, in First Appeal Case No. AA 135/BA-2002-2003,
disposed of on 30.12.2003)

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

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

- V e r s u s -

M/s. Utkal Polyweave Industries (P) Ltd.,
At:- Ganeswarpur Industrial Estate,
P.O.- Januganj, Dist.- Balasore. ... Respondent

For the Appellant : Mr. M.L. Agarwal, S.C.
For the Respondent : Mr. M.P. Jena, Advocate

Date of hearing: 03.04.2019 **** Date of order: 04.04.2019

O R D E R

Revenue being aggrieved with the order of the first appellate authority, reversing thereby the order of assessing authority in a reassessment u/s.12(8) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as, OST Act) relating to the respondent-dealer for the assessment year 1992-93 has preferred this appeal challenging the sustainability of the impugned order.

2. Facts that are relevant for the purpose of this appeal are, the dealer's unit was an eligible industrial unit IPR, as initially it was availing the benefit under IPR'1986. However, in a later period, as the benefit was

extended up to seven years enhancing for five years as per IPR' 1989. The dealer had started commercial production w.e.f. 24.03.1987 with the eligibility certificate issued by the concerned authority. For the assessment 1992-93, the dealer was originally assessed u/s.12(4) of the OST Act. The assessment was reopened on the basis of fraud case report with the allegation that, the dealer had exceeded the limit of production beyond i.e. the installed capacity during the assessment period and thereby, the dealer has disentitled itself from exemption of tax beyond the limit of the installed capacity as per DIC certificate. The assessing authority held the excess production by the dealer to the tune of Rs.1,35,96,373.00 as taxable turnover. Tax on it was calculated at Rs.1,63,156.00 and then tax and surcharge comes to Rs.17,94,510.00.

3. The dealer carried the matter before the learned ACST, Balasore Range, Balasore, the first appellate authority who in turn reversed the findings of the assessing authority on the plea that, there was no restriction in accordance to the IPR' 1989 on the production limit of the dealer and since the dealer was entitled to exemption as per Sl. No.30FF of the schedule of the rate chart under OST Act, the tax liability fixed by the assessing authority is not tenable.

When the tax due became deleted by the order of the assessing authority, being aggrieved, the Revenue has preferred this second appeal.

4. The contention of the Revenue is, the dealer has produced goods exceeding the installed capacity, the goods beyond the installed capacity is necessarily taxable. So, the excess quantity production was rightly taxed by the assessing authority. Hence, it is prayed for restoration of the order of the assessing authority by setting aside the impugned order.

The appeal is heard without cross objection. However, the dealer has supported the findings of the first appellate authority in the hearing.

5. The question raised for decision in this appeal is:- whether the first appellate authority has committed wrong in his finding that, there was no limitation for production for the IPR exemption availed by the dealer and

as such the dealer is not guilty of any production beyond the installed capacity exigible to Entry Tax.

6. Advancing argument on behalf of the Revenue, learned Standing Counsel submitted that, initially the dealer was availing benefit under IPR' 1986. The certificate issued by the DIC reveals the production capacity of the dealer was to the tune of 300 MTS/30,00,000 nos. of bags and the outer limit of the value of the goods so produced was 120,00,000. By virtue of the extension of the exemption as per IRP' 1989, the installed capacity was enhanced by 48 MTs and the value was also enhanced by Rs.19.20 lakhs. So, from the DIC certificate it is found that, the dealer has a limitation so far as the production capacity is concerned to get the IPR exemption. But, in fact the dealer has produced more than the installed capacity and in accordance to that, the reopening of the assessment and tax liability fixed by the assessing authority is justified.

7. Per contra, learned Counsel for the dealer vehemently argued that, there is no limitation for production. The dealer' unit was given extension of exemption as per IPR' 1989. So, the view of the assessing authority is palpably wrong. It is also argued that, production does not mean sale, so even if, for sake of argument it is accepted that, the production crossed the limit but in that event also the dealer cannot be asked to pay tax. It is also argued that, the very initiation of the reassessment keeping view the order of the first appellate authority against the order of assessing authority in an assessment u/s.12(4) of the OST Act is not maintainable.

At the outset, it is pertinent to take note of the fact that, the dealer was initially assessed u/s.12(4) of the OST Act. That assessment was carried in appeal by the dealer before the first appellate authority in First Appeal Case No. AA-525/BA-1993-94. That, said first appeal was decided on 20.09.1999. Once the order of the first appellate authority passed, thereby the assessment of the assessing authority was no more remained in force. As per the theory of doctrine of merger, the order of assessing authority merged in the order of first appellate authority. Once the order of the

assessing authority was not existence as it was merged in the order of the first appellate authority, then there was no scope to reopen the assessment of the assessing authority. It is only the assessment order of the first appellate authority subsists which could have reopened and the same is permissible under law. But, in no case the order of the assessing authority can be reopened for the reason that, on the date of reopening the order was not in existence as it was merged in the order of the first appellate authority. On this backdrop, it can safely be said that, the reopening in this case is not maintainable hence the entire reassessment is vitiated.

8. As per the fraud case report the annual installed capacity of the dealer-company was 108 MT i.e. 15,43,000 nos. with value of Rs.77.15 lakhs. The unit undergone EMD w.e.f. 10.04.1993 by 48 MT but the dealer had produced 47,53,813 pieces of bags sold at Rs.3,68,49,432.00 during the assessment period. The intelligence team has suggested for levy of tax on the value of the excess production of Rs.2,91,34,432.00.

The assessing authority on verification of the certificate found that, the installed capacity of the dealer was 300 MT i.e. 30,00,000 nos. of bags as per PMT certificate issued on 29.05.1987. The dealer had produced 47,53,813 nos. of bags during the year of assessment. Thus, there was excess production of 17,53,813 nos. of bags which is beyond the exemption level. The assessing authority estimated the value of those excess production at Rs.1,35,94,773.90, it was taxed and the tax with surcharge raised at Rs.17,94,510.00.

The first appellate authority on the other hand held that, the General Manager, DIC, Balasore has issued PMT certificate for production of 300 MT/30,00,000 of bags per annum. The dealer's unit produced 47,53,813 nos. of bags but, the excess production is not violative of the IPR exemption or the certificate issued by the General Manager, DIC. The first appellate authority relied on Sl. No.30FF and provision of the tax free schedule of rate chart under OST Act and provision in 7.2.2 of Sales Tax Incentive under Part-II of IPR, 1989 and held that, there was no limit for production of the dealer hence, the dealer cannot be denied exemption on

the production and sale exceeding the installed capacity. The Permanent Registration Certificate (PMT) issued by the DIC contain the installed capacity of the dealer was 300 MT i.e. 30,00,000 nos. of bags value of Rs.120,00,000. The IPR exemption to the dealer's unit was extended as per IPR' 1989 and on such expansion the capacity was enhanced by 48 MT with value of Rs.19.20 lakhs.

The annual installed capacity as per the PMT certificate itself denotes the upper ceiling limit of the production and sale of a SSI unit covered under IPR benefit. The dealer has not filed any eligibility certificate contrary to the installed capacity to show that, there is no ceiling fixed by the department relating to the production and sale of the dealer. Similarly, once the dealer is found to have produced certain amount of goods within a particular assessment year, then the presumption is, the value of that amount of goods is the turnover of the dealer for the purpose of exemption under IRP' 1986 or IPR'1989 for that assessment year. It is not the positive case of the dealer that, the dealer has not affected sale of those quantity of goods for the said price and to that effect the dealer has not filed the copy of the return for the said period. Rather, the assessment u/s.12(4) of the OST Act and the appeal thereupon indicates the dealer had produced that amount of goods worth of the aforesaid amount. Be that as it may, on this point it can safely be said that, the argument of the learned Counsel for the dealer is not conceivable and to that effect the view of the first appellate authority is not sustainable in the eye of law. In the decision above, when it was categorically held that, the reopening in this case has no legs to stand and is not maintainable keeping view the fact that, the original assessment is set aside and merged in the assessment by the first appellate authority then by necessary implication, it can be said that, no liability can be fixed on the dealer in the reassessment proceeding as determined by the assessing authority. So, even though the finding of the first appellate authority is not sustainable but in ultimate analysis the dealer is found not liable for tax due as determined by assessing authority since, the entire proceeding is not maintainable hence vitiated. Accordingly, it is ordered.

9. The appeal by the Revenue is dismissed on contest as per the observation above.

Dictated & corrected by me,

Sd/-
(Subrata Mohanty)
2nd Judicial Member

Sd/-
(Subrata Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

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