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

S.A.No. 1700/2003-04

(From the order of the ld.ACST, Sambalpur Range, Sambalpur, in Appeal No. AA.106 (SAII) of 2002-03, dtd.11.02.2003, 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	Judicial Member-II		Accounts Member-II

M/s. Ganesh Oil Products Ltd.,
Dist. Bargarh. ... Appellant

-Versus –

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

Appearance :
For the Appellant ... None
For the Respondent ... Mr. M.S. Raman, ASC (CT)

(Assessment Period : 1998-1999)

Date of Hearing: 09.08.2018 Date of Order: 20.08.2018

ORDER

The dealer as appellant has challenged the sustainability of a confirming order of learned First Appellate Authority/Asst. Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short, FAA/ACST) raising demand of tax and surcharge in an assessment u/s.12(8) of the Odisha Sales Tax Act, 1947 (in short, OST Act) for the assessment period 1998-99.

2. The facts in dispute giving rise to this appeal are : On the strength of observation by the AG Audit, questioning the exemption

on EMD availed by the appellant during the assessment period. Regular assessment u/s.12(4) of the OST Act completed on 26.07.2000 was re-opened by the Assessing Authority, Sambalpur-II Circle, Bargarh (in short, AA) invoking Section 12(8) of the OST Act. In course of re-assessment proceeding, the AO found that, the dealer was a unit covered under IPR, 1989 which started commercial production w.e.f.25.07.1991. But on verification of the certificate issued by the General Manager, DIC vide Letter No.7395/dtd.19.09.1998 and No.7393/dtd.19.09.1998, the AO found the dealer entitled to avail the exemption upto 24.07.1998 whereas the dealer was found liable to pay tax in respect of the finished products thereafter i.e. w.e.f.25.07.1998. The AA held that, as per the operational guidelines issued by the Government in Industries Department dtd.10.06.1992 while issuing the exemption certificate, it is to be seen that, the additional investment is at least 25% of the fixed capital investment of the original unit. But it was found that, the dealer's existing installed capacity was reduced to Nil as per the certificate issued by the DIC. So, such allowance of EMD with an additional capacity of 25% as granted by the DIC was treated as illegal and invalid. Accordingly, the dealer was not allowed any exemption on the sale of finished products w.e.f.01.04.1998 to 24.07.1998. During this period, the dealer was found to have sold refine, mustard oil and refined soya oil worth of Rs.4,60,93,626/-. The dealer had also sold acid oil and oil sledge during the period from 01.04.1993 to 24.07.1998 whose value was calculated at Rs.65,81,790/-. In the result, the total tax payable by the dealer determined at Rs.26,33.559.84. Besides the tax due, surcharge was determined @15% and accordingly the total due raised against the dealer was at Rs.30,28,593.81.

3. Such denial of EMD and exemption in tax as determined by the AA was challenged before the FAA. The FAA in the impugned order reiterating the grounds taken by the AA, dismissed the appeal.

4. Thereafter, being aggrieved with the order of FAA, the dealer has filed this second appeal. It is contended by the dealer that, the initiation of proceeding u/s.12(8) of the OST Act in the case in hand was nothing but a change of opinion, which is not permissible in the eye of law. The authority below has no jurisdiction to reject the eligibility certificate granted by the State Government and such rejection amounts to without jurisdiction. It is further contended that, the authorities below have not extended proper opportunity of being heard to the dealer since the original assessment order was an ex-parte order whereas the order of the appellate authority is mechanical.

5. State contested the appeal without filing cross objection, but argued in support of the impugned order. The instant appeal raised for decision on questions such as, if the re-opening of the assessment invoking Sec.12(8) of the OST Act in the case in hand is illegal and if the fora below are wrong in rejecting the eligibility certificate granted by the DIC in favour of the dealer.

6. The appeal is heard in absence of the dealer as the dealer-appellant remained absent in the hearing in spite of receipt of the notice.

7. The question goes to the root of the validity of the proceeding such as, re-assessment invoking provision u/s.12(8) of the OST Act herein this case, it is found that, there was a regular assessment of the dealer's unit as per Sec.12(4) of the OST Act. But in a latter period on the observation of the AG Audit, the assessment was re-opened. At the first instance, the dealer's return was accepted.

The AA had accepted the eligibility certificate issued by the DIC in favour of the dealer. But when the Audit team has found that, the dealer's standing capital was reduced to Nil by the DIC and at a latter period the dealer's EMD was enhanced by 25%, they have suggested for re-assessment. The assessment was re-opened vide order dtd.22.12.2001. The order as it revealed, the AA has held that to examine the irregularities reported by the AG Audit team, the re-opening of the assessment is required u/s.12(8) of the OST Act. Provision u/s.12(8) of the OST Act reads as follows :

> (8) If for any reason the turnover of a dealer for any period to which this Act applies has escaped assessment or has been under-assessed [or where tax has been compounded when composition is not permissible under this Act and the rules made thereunder] the [Commissioner] may at any time within [Five years] [from the expiry of the year to which that period relates] call for return under sub-section (1) of Sec.11 and may proceed to asses the amount of tax due from the dealer in the manner laid down in sub-sec. (5) of this section and may also direct, in cases where such escapement or under assessment [or composition] is due to the dealer having concealed particulars of his turnover or having [without sufficient causes] has furnished incorrect particulars thereof, that the dealer shall pay, by way of penalty, in addition to the tax assessed under this sub-section, a sum not exceeding one and a half times of the said tax as assessed".

Bare reading of the provision as it revealed, when there is any escaped assessment or turnover of the dealer has been under-assessed or where tax has been computed when composition is not permissible under this Act and rules made therein, in that case, the assessment can be re-opened. Adverting to the case in hand, it is found that, the dealer was originally assessed by the AA. The AA had accepted the eligibility certificate issued by the DIC. So, unhesitatingly it can safely be said that, it is nothing but a change of

opinion. The present case in hand does not attract any of the contingencies like, escaped assessment or under-assessment. It is the documents basing on which the AA had allowed the exemption the said documents and it's validity was questioned at a latter period by the AG Audit and that became a foundation for re-opening of the assessment. Re-opening of Sec.12(8) of the Act is not a mere personal satisfaction on sweet whim. The AA is to form an opinion and that opinion must be based on reasonability in the eye of law. Otherwise, a mechanical formation of opinion cannot withstand the scope and spirit of the provision. In the case in hand, it is found that, the same AA who had accepted the documents and allowed the exemption has changed his opinion at a latter part on the basis of AG Audit report. Nothing new evidence brought to the notice of the AA and the allegations does not reveal a case of escapement or under-assessment. So, to sum up it can be said that, re-opening of the assessment in the case in hand, is a mechanical one and is not sustainable. Reliance can be placed in **Naba Bharat Ferro Alloys Ltd. and Another Vrs. State of Orissa and Others (2010) (I) OLR 976** in this regard.

The impugned order as it revealed, the dealer's unit was availing IPR benefit. Such benefit was extended and EMD was allowed to the dealer granting 20% enhancement of the fixed capital investment. Claim of the Revenue is, once the dealer's existing installed capacity was reduced to Nil and when the name of the financial institution has not been mentioned in the certificate issued by the DIC, the certificate should have treated as invalid. The contention of the dealer in the grounds of appeal is, the AA or the FAA should have examined the authority who had issued the exemption certificate. DIC is a wing of the Government of Odisha and

the certificates are issued to the SSI Unit to promote industries. What was the condition before the DIC to issue such certificate to enhance the fixed capital when the installed capacity was reduced to Nil, the best person to explain it was the issuing authority. It is not the case that, the document issued by the DIC is a fraud one. It is also not the case that, the dealer was asked to furnish better particulars in addition to the documents. The authority below has held that, on principles such certificate should not have been issued. If that be, the action of the authorities is without jurisdiction. The taxing authority cannot question the legality of a document issued by another Department unless and until the document is proved to fraud one or it was not issued by the competent authority or the issuing authority has no competency to issue such documents. Because the dealer should have treated as ineligible to get the certificate, the AA cannot invalidate the certificate. It is a matter *inter se* between the dealer and the DIC why and how this exemption was granted. But in any case, the AA or the FAA cannot treat the document as invalid for the purpose of tax exemption. In **Naba Bharat Ferro Alloys Ltd. and Another Vrs. State of Orissa and Others (2010) (I) OLR 976** it is held as follows :

> In the case of **Vadilal Chemicals Ltd. V. State of Andhra Pradesh and Ors. : [2005] 142 STC 76 (SC),** the Supreme Court while considering a similar question, observed that the exemption was granted with a view to give a fillip to the industries in the State. It was further observed that a liberal interpretation of the term 'manufacture' should have been adopted by the State authorities, more particularly, when the State authorities had granted the certificate of eligibility after due consideration of the facts. The Hon'ble court proceeded to hold as follows:
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> Further more, under the incentive scheme in question, there was only one method of verifying the eligibility for the various incentives granted including sales

> tax exemption. The procedure was for the matter to be scrutinized and recommended by the State Level Committee and District Level Committee and the certification by the Department of Industries and Commerce by issuing an eligibility certificate. There was no other method prescribed under the scheme for determining an industrial unit's eligibility for the benefits granted. The Department of Industries and Commerce having exercised its mind, and having granted the final eligibility certificate (which was valid at all materials times), the Commercial Taxes Department could not go beyond the same. More so when the Commissioner, Sales Tax and accepted the eligibility certificate issued to the appellant and had separately notified the appellant's eligibility for exemption under the 1993 G.O. In these circumstances the DCCT certainly could not assume that the exemption was wrongly granted nor did he have the jurisdiction under Section 20 of the State Act to go behind the eligibility certificate and embark upon a fresh enquiry with regard to the appellant's eligibility for the grant of the benefits. The counter-affidavit filed by the respondents-sales tax authorities is telling. It is said that the Sales Tax Department had decided to cancel the eligibility certificates for sales tax incentives. As we have said the eligibility certificates were issued by the Department of Industries and Commerce and could not be cancelled by the sales tax authorities.
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> 22.A similar view has been expressed by the Supreme Court in the case of Pondichery State Cooperative Consumer Federation Ltd. v. Union Territory of Pondicherry, [2007] 10 VST 630 SC, wherein the Hon'ble Court while affirming the view taken in Vadilal Chemcials case (supra), has held that as the exemption in that case was granted to all small and large scale industries registered with Director of Industries and since the assessee therein was recognized and certified as a small industrial unit, engaged in the activity of re-packing of edible oil and further since the exemption was granted with the open eyes to that particular industry, the State cannot be allowed to turn around and take a stance that the appellant-assessee was not entitled to the exemption on the ground that it did not manufacture any goods".

In respectful agreement with authoritative pronouncement above in ultimate analysis, we are of the consensus view that, denial

of tax exemption to the dealer is otherwise not sustainable in the eye of law. In the wake of above it is hereby ordered.

The appeal is allowed. The impugned order is set-aside. The proceeding u/s.12(8) of the OST Act is not maintainable and accordingly the tax liability is deleted.

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