

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

**S.A. No. 906 of 2005-06**

(Arising out of order of the learned ACST, Cuttack-II Range,  
Cuttack in First Appeal Case No. AA- 207/CU-II/2004-05,  
disposed of on dated 28.02.2005)

Present: **Shri A.K. Das, Chairman**  
**Smt. Sweta Mishra, 2<sup>nd</sup> Judicial Member**  
**&**  
**Shri S. Mishra, Accounts Member-II**

M/s. Oritrade Private Ltd.,  
D-2/8, New Industrial Estate,  
Jagatpur, Cuttack ... Appellant

-Versus-

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

For the Appellant : Sri J.J. Pradhan, Advocate  
For the Respondent : Sri M.S. Raman, Addl.SC (CT)

-----  
Date of hearing: 08.09.2021 \*\*\* Date of order: 30.09.2021  
-----

**O R D E R**

This appeal is directed at the instance of the  
dealer-appellant against the order dated 28.02.2005 passed  
by the learned Asst. Commissioner of Sales Tax, Cuttack-II  
Range, Cuttack (hereinafter called as 'first appellate  
authority') in First Appeal Case No. AA- 207/CU-II/2004-05  
thereby confirming the order dated 31.03.2004 of the Sales  
Tax Officer, Cuttack-II Circle, Cuttack (in short, 'assessing

authority') raising demand of ₹29,56,767.00 u/s. 12(4) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act') for the assessment period 2000-01.

2. The facts relevant for adjudication of the present appeal are summarised below :-

The appellant is a trading concern engaged in trading of bulk industrial chemicals like acid slurry, soda ash, sodium silicate, salt etc. He also deals with sale of detergent powder and detergent cake in the capacity as Commission Agent. The assessing authority issued notice u/s. 12(4) of the OST Act to the appellant for assessment in respect of assessment year 2000-01. In pursuance of such notice, the dealer neither appeared nor produced complete set of books of account. So, in the absence of the dealer the assessing authority completed the assessment basing on the materials available on record as follows :-

He determined the TTO at ₹6,63,22,658.00 out of which ₹6,00,00,000.00 was taxed @ 4% on calculation came to ₹24,00,000.00 and ₹63,22,658.00 was taxed @ 12% which on calculation came to ₹7,58,718.96. The assessing authority also held that the dealer was liable to pay surcharge @ 15% of the tax due which he determined at

₹4,73,807.83 and thus determined total tax and surcharge at ₹36,32,526.79. The dealer having paid ₹6,75,760.00 was held liable to pay the rest of the amount of ₹29,56,767.00.

2(a). The dealer-appellant challenging the aforesaid findings of the assessing authority preferred appeal before the first appellate authority u/s. 23(2) of the OST Act, who also disposed of the appeal exparte confirming the order of the assessing authority.

3. The dealer-appellant challenged the order of the first appellate authority on the ground that the forums below without giving reasonable opportunity of hearing, passed the impugned orders which are unsustainable in the eye of law. The forums below disposed of the matter in a hurriedly manner and did not give reasonable opportunity to the dealer-appellant to produce the books of account and other materials in support of his claim. The main ground on which the dealer challenged the order of the assessing authority is the delay in passing the order by the assessing authority. It was vehemently argued that in view of provisions u/s. 12(7) of the OST Act, the assessing authority was to pass order within thirty six months from the expiry of the assessment year. Accordingly, the assessing authority

should have passed the order on or before 31.03.2004, but the assessing authority having found that the assessment proceeding was barred by time, he ante dated the order which was passed on 02.07.2004. The orders passed by the forums below were illegal, arbitrary and against the sanction of law. More particularly, the assessing authority who was well aware of the period of limitation in disposing of the assessment proceeding, tampered the date of the assessment order in order to bring it within the limitation period. The respondent failed to explain the reason for inordinate delay of three months in issuing the assessment order for which the only inference can be drawn is that the order purported to have been passed on 31.03.2004 was actually passed on 02.07.2004 after expiry of the period of limitation. He submitted to allow the appeal and set aside the impugned orders of both the fora below.

4. The learned Addl. Standing Counsel (CT) for the revenue supporting the impugned orders argued that the question of limitation is a mixed question of fact and law which is to be determined from the materials on record. Such question having not been dealt by the first appellate authority, it would be difficult to decide such question in the

absence of materials on record. He strenuously argued that the assessing authority cannot be blamed for delay in issuing the order of assessment. It is not the responsibility of the assessing authority to issue any order to the person concerned. It is for the office to carry out the order or any kind of instruction passed by the assessing authority. He further argued that mere delay in issuing the assessment order is not sufficient to infer that the order was ante dated. There is no cogent and clinching material to establish that the order was ante dated and in the absence of any cogent evidence, it would not be just and proper to make baseless allegation against any person. The forums below have rightly determined the TTO and raising tax demand of ₹29,56,767.00. There is no illegality in such demand. The assessing authority determined the tax liability of the dealer-appellant on the basis of the materials on record on account of failure of the dealer-appellant to produce the books of account and other relevant materials. He submitted to dismiss the appeal and confirm the impugned orders passed by the forums below.

5. We have heard the learned Counsel for the parties, gone through the grounds mentioned in the

memorandum of appeal vis-a-vis the materials on record. It reveals from the record that the present dealer-appellant in pursuance of notice u/s. 12(4) of the OST Act did not appear and produce the books of account for determining the tax liability of the dealer-appellant. Even in the appeal filed by the dealer-appellant, none appeared on the date fixed for hearing for which the first appellate authority proceeded with ex parte hearing of the appeal. If the orders of forums below are examined on merit, the only conclusion would be that the forums below were correct in their approach in proceeding with the matter ex parte as this appellant, in spite of repeated opportunities availed, did not produce the books of accounts and participated in the hearing. Accordingly, they determined the tax liability of the dealer-appellant. The main ground on which the dealer-appellant challenged the impugned order is the delay in passing the assessment order by the assessing authority. In this connection, the revenue in spite of repeated adjournments, did not produce the assessment record for verification by this Tribunal whether, in fact, the assessment order was issued belatedly as claimed by the dealer-appellant or not. The dealer-appellant clearly asserted in the memorandum of

appeal presented before this forum as well as before the first appellate authority that the assessing authority passed the impugned order on 02.07.2004 and ante dated the same showing it to have been passed on 31.03.2004 only with an intention to bring it within the period of limitation. Now, in the aforesaid factual background, it is to be seen whether the order of the assessing authority is barred by limitation. The provisions contained in Section 12(7) of the OST Act provides that –

“(7) Any assessment made under Section shall be without prejudice to any prosecution instituted for an offence under this Act :

Provided that when the Commissioner has imposed a penalty in addition to the amount assessed under this Section, and where the amount due on account of tax and penalty has been paid, no criminal proceedings shall be taken against the dealer :

Provided further that no order assessing the amount of tax due from a dealer in respect of any year or part thereof shall be passed later than thirty-six months from the expiry of the year :

Provided further that the period of limitation fixed in the proviso immediately preceding shall not apply to assessment under sub-section (5) or sub-section (8) of this Section or to enhancement of assessment or order of fresh assessment made or passed under Section 23.”

Therefore, from the above 2<sup>nd</sup> proviso, it is amply clear that no assessment order can be passed by the assessing authority after expiry of thirty-six months of that year.

6. Adjudicating the similar issue in the case of M/s. Cobra Instalaciones Y Services Vs. Commissioner of Sales Tax, Cuttack & others, the Hon'ble High Court of Orissa interpreting the decision in the case of State of Punjab Vs. M/s. Shreyans Industries Ltd, reported in (2016) 4 SCC 769, held as follows :-

“26. In State of Punjab v. M/s. Shreyans Industries Ltd. (2016) 4 SCC 769, the Supreme Court was interpreting Section 11(10) of the Punjab General Sales Tax Act, 1948 (PGST Act), in terms of which the Commissioner could grant a three-year extension for completion of assessment after recording in writing the reasons for extending such period. The specific question considered was “whether the power to extend time is to be necessarily exercised before the normal expiry of the said period of three years run out ?”

27. The above question was answered by holding that “power to extend the time is to be exercised before the normal period of assessment expires.”...

28. In light of the legal position explained above, it was important for the Commissioner to have exercised the power to extend the period before the original period of limitation expired .....

29. For all the abovementioned reasons, the Court is unable to sustain the validity of the impugned assessment order dated 15<sup>th</sup> May 2013, which, on the date it was passed, was in violation of Section 42(6) of the OVAT Act. The Court further holds that the order dated 20<sup>th</sup> July, 2013 passed by the CST in terms of the proviso to Section 42(6) of the OVAT Act cannot validate such an illegal assessment order, which, on the date it was passed, was clearly time barred .....

The Full Bench of this Tribunal vide order dated 19.08.2021 passed in S.A. No. 322 (V) of 2014-15 and S.A. No. 389 (V) of 2014-15 taking note of the aforesaid decision of the Hon'ble Court set aside the assessment order being barred by limitation. Similarly, in S.A. No. 1129 of 2004-05, this Tribunal in its order dated 31.01.2017 relying on the decision of the Hon'ble High Court of Orissa in the case of M/s. Delhi Foot Wear, Cuttack, reported in 77 VST 146, held that the delay in issuing the assessment order could not be explained by the revenue and accordingly, quashed the assessment. In the present case, the question of limitation though was specifically raised by the appellant before the first appellate authority, it did not consider and answer the said question which would go to the root of the case. In the absence of the assessment record or any other

material, it is also difficult on our part to decide whether assessment order is barred by time or not.

7. In view of the foregoing discussions, the appeal filed by the dealer-appellant is allowed and the impugned order of the first appellate authority confirming the order of assessment for the year 2000-01 is hereby set aside. The matter is remitted back to the first appellate authority with a direction to call for the assessment record and to decide the question whether assessment order is barred by time or not and on merit the legality and propriety of the impugned order of assessment giving an opportunity of hearing to the dealer appellant within a period of three months from the date of receipt of copy of this order.

Dictated & Corrected by me

Sd/-  
(A.K. Das)  
Chairman

Sd/-  
(A.K. Das)  
Chairman

I agree,

Sd/-  
(Sweta Mishra)  
2<sup>nd</sup> Judicial Member

I agree,

Sd/-  
(S. Mishra)  
Accounts Member-II