

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

S.A. No. 2590 of 1997-98

(Arising out of order of the learned Asst. Commissioner of Sales Tax,
Ganjam Range, Berhampur in Appeal Case No. AA 688/1996-97
dtd.22.08.1997 being directed by the Hon'ble High Court of Orissa,
Cuttack vide STREV No.149/2004 dtd.07.08.2019)

P r e s e n t : Shri A.K. Dalbehera, & Shri P.C. Pathy,
1st Judicial Member Accounts Member-I

M/s. Madras Cements Ltd.,
Goods Shed Road,
Berhampur. ... Appellant

- V e r s u s -

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

For the assessment period: 1995-96

For the Appellant ... Mr. J.B. Sahoo &
Miss K. Sahoo, Advocate
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 21.12.2019 **** Date of order: 21.12.2019

ORDER

The appellant had preferred the second appeal before this
Tribunal and the matter was adjudicated by this Tribunal on
18.06.2004. Being aggrieved by the order of this Tribunal, the
appellant had preferred a revision before the Hon'ble High Court of
Orissa vide STREV No.149/2004 and the Hon'ble Court vide their
kind order dtd.07.08.2019 held as follows:-

“4. Considering the facts and circumstances of the case and in view of the submissions made by learned counsel for the petitioner, we are of the considered opinion that the factual matrix is required to be re-examined by the learned Tribunal afresh.

In that view of the matter, the impugned order dated 18.06.2004 passed by the learned Tribunal is quashed and set aside and the matter is remitted back to the Tribunal for hearing the matter afresh and disposing the same within four months from the date of receipt of a copy of this order. It is made clear that we have not expressed any opinion on merits. The Tribunal shall dispose of the matter on its own merit.

5. The STREV is disposed of to the extent indicated above. All connected Misc. Cases/I.As are also disposed of.”

2. The brief facts of the case are that, the appellant carries on business in cement on wholesale basis at Goods Shed Road, Berhampur being registered under the Orissa Sales Tax Act, 1947 (hereinafter referred to as, OST Act) having R.C. No.GAI-6620. The Head Office of the appellant is situated at Madras (now Chennai) in the State of Tamil Nadu and its factory at Jagayyapet in Krishna District in the State of Andhra Pradesh. The appellant carries on business on wholesale basis by maintaining stock register and sales

register supported with sales memo. Learned Sales Tax Officer, Ward-A, Ganjam I Circle, Berhampur (hereinafter referred to as, the LAO) completed the assessment basing on a fraud case report submitted by the IST of the Circle raising extra tax demand of Rs.3,76,874.00 which is the subject matter of dispute. The appellant had preferred first appeal before the learned Asst. Commissioner of Sales Tax, Ganjam Range, Berhampur (hereinafter referred to as, the learned ACST) who dismissed the appeal by confirming the assessment of the LAO.

3. The learned Counsel for the appellant filed the order of the Hon'ble Court before this Tribunal on 27.08.2019 and accordingly the matter was taken up. The appellant at this juncture has come up with different grounds/issues for consideration which are as under:-

- (i) The allegation of differential stock arising out of counting on the date of inspection on 18.05.1995 held to be suppression is illegal and arbitrary.
- (ii) The contention of the appellant as to mistake/error in counting is not considered.
- (iii) The opening stock and closing stock quantity of the appellant are not rejected by the LAO and the appellant has paid tax on closing stock carried over quantity during the subsequent year.
- (iv) The Revenue has not substantiated by producing any documentary evidence including stock counting

calculation sheet with details of various grades of cement to justify the accuracy of counting when the correctness of counting is specifically challenged by the appellant.

- (v) Error in counting or alleged discrepancy of stock cannot be considered as suppression since the receipt of stock and sale are duly accounted for.
- (vi) The appellant having disclosed higher quantity of stock, prima facie no suppression can be legitimately alleged against the appellant.
- (vii) The appellant having given details of stock available at the time of inspection as per the books of account maintained, it is for the Revenue to disprove.
- (viii) In absence of any finding that the alleged quantity found short is sold, levy of tax on surmised sale is untenable in law.
- (ix) The enhancement of turnover by Rs.31 lakhs by assuming suppression once in every month and multiplying by 12 times is fundamentally erroneous, unreasonable, irrational and unsustainable.
- (x) The date of inspection being 18.05.1995, the probable suppression for future period i.e. after 18.05.1995 is illegal and unsustainable.
- (xi) The tax demand raised in the assessment and in the order passed by the learned ACST mechanically

upholding the same are liable to be quashed for the ends of justice.

4. Heard both the sides at length. The learned Counsel for the appellant pressed the points brought in the grounds of appeal. The learned Standing Counsel appearing for the Revenue on the other hand supported the order of the LAO and the learned ACST. As per the submission of the learned Standing Counsel, the appellant-dealer could not adduce proper evidence to prove the bonafides on shortages. The statement was recorded from the depot-in-charge. The copy of the statement and the stock position report were supplied to the appellant-dealer by the inspecting officials and subsequently such report of shortage was forwarded to the LAO. The entire exercise of stock was done in presence of the representative of the appellant-dealer and thereafter the statement was duly signed by the authorized person. The assessing officer rightly rejected the stand of wrong counting as it was done in presence of the representative of the appellant-dealer. In first appeal the appellant-dealer could not explain the discrepancy of shortages. The appellant-dealer failed to produce the books of account for verification by this Tribunal. The learned Standing Counsel also submitted that it is a settled principle of law that the ultimate burden of proof rests on the assessee who is unquestionably in possession of best evidence as regards his affairs of the business. When a fact to be proved (whether affirmative or negative) is peculiarly within the knowledge of the party, it is for him

to prove it (Sec.106 of Indian Evidence Act, 1872) as held in CIT v. Ram Ratan Gupta (1963) 48 ITR 531. It is equally well settled that the proper books of accounts has to be maintained by a dealer having transparency of his business activities. The Hon'ble Courts from time to time have held that, it is open to the assessee to maintain his books of account in any manner which he considers proper, but at the same time a duty is cast on him to maintain the same in such a manner that it can be scrutinized and examined at any moment by visiting officials or by the assessing authority, and the manner must be such as to create confidence regarding its authenticity. But, it cannot be said that the account books cannot be rejected even if they are maintained in such a manner that they cannot be verified as held in Banwaridas Ganpatlal v. CST (1976) 38 STC 345 (All.). The learned Standing Counsel relied upon different judgments as reported in Banwarilal Sitaram v. State of Orissa (1976) 37 STC 595 (Ori.), CST v. Ramanarayan Sitaram (1976) 37 STC 591 (Ori.), State of Orissa v. Muralimohan Prabhudayal (1983) 52 STC 35 (Ori.), commissioner of Sales Tax v. M/s. H.M. Esufali (1973) 32 STC 77 (SC), V. Aboobacker v. State of Kerala (2010) 27 VST 208 (Ker.), Nathu Ram Ramesh Kumar v. Commissioner (2014) 70 VST 1 (SC), Commissioner of Sales Tax v. Mohan Brickfield (2006) 148 STC 638 (SC), Khubram Asram v. Commissioner of Sales Tax (1961) 12 STC 581 (Ori.), Kulamani Mohanty v. State of Orissa (1987) 67 STC 418 (Ori.) etc.

We have respectfully gone through the said decisions. However, in view of the recent direction of the Hon'ble Court such decisions are not applicable to the facts and circumstances of the present case.

5. In this case it is seen that, the appellant-dealer is having its branch office at Goods Shed Road, Berhampur which receives stock from its factory on stock transfer basis and sells the goods (cement) in the trade name and style of M/s. Madras Cement Ltd. A notice was issued u/s.12(4) of the OST Act in response to which the Sales Officer of the appellant-dealer appeared and produced the books of account for the year 1995-96 which were examined. As per the books of account the appellant-dealer had opening stock of cement of 24.05 MT as on 01.04.1995 and received 14,661.75 MT during the year under assessment. Out of the total stock of 14,665.80 MT, the appellant-dealer had shown sale of 14,356.15 MT during the year by exhibiting stock at 160.95 MT as on 31.03.1996. The returns filed by the appellant-dealer disclosed the gross turnover at Rs.3,34,41,944.49 against which the appellant-dealer had claimed deductions of Rs.35,74,818.60 towards collection of sales tax and returned the taxable turnover at Rs.2,98,67,126.45. However, at the time of hearing the appellant-dealer furnished different figures, distinct from those of returned during the year. In the statement, the dealer has shown GTO, TTO and tax collected at Rs.3,33,62,944.49, Rs.2,97,96,590.73 and Rs.35,66,353.74 respectively which indicate

less exhibition of turnover in the statement furnished to the tune of Rs.79,000.02, Rs.70,535.72 and Rs.8,464.86 in the gross turnover, taxable turnover and tax collected respectively. The representative of the appellant-dealer at the time of hearing could not explain anything regarding such alteration in figures, hence the LAO took the return figure furnished by the dealer as the basic figure for completing assessment. From the taxable turnover the dealer had claimed sale of cement worth Rs.1,15,464.28 to manufacturing industry through Form-IV declaration. At the time of hearing, the appellant-dealer had furnished such forms which on verification were found in order and the claim of sale of goods at concessional rate of 4% was allowed in full. However, there was a fraud case against the appellant-dealer submitted by the Ward IST, Ganjam I Circle, Berhampur alleging suppression of sales to evade payment of tax, which is the subject matter of dispute before this Tribunal.

6. As per the report, on 18.05.1995 the Ward IST along with another IST visited the business premises of the appellant-dealer and physically verified the goods kept in their godown. They also verified the books of account maintained by the appellant-dealer till the time of their visit. As per the verification of books of account, there was opening stock of cement of different varieties numbering 18,284 bags and there was receipt and sale of cement of 421 bags and 200 bags respectively on that day during the time of their visit. So, as per the books of account there should have been 18,505 bags of cement of

different varieties in physical stock. Against this, the IST detected that there was stock of only 15,851 bags of cement of different kinds in the godown. However, the order of LAO shows that there should have been 18,805 bags of cement of different varieties in physical stock. This shows that the calculation of the LAO is wrong in that regard. The godown in-charge of the appellant-dealer had submitted before the IST that, 458 bags of cement were damaged and in support of such contention he produced copy of letter dtd.31.03.1995 regarding the correspondence made between the branch and head office of the appellant-dealer for loss of 405 bags of cement. But, there was no correspondence regarding 53 bags of cement about the damage of such bags. The LAO has not taken into consideration the copy of the letter dtd.31.03.1995 to find out the real shortage. For the rest of the bags, the godown in-charge took the plea that the shortage might be due to mistake in counting of bags which the LAO has not taken into consideration and such finding needs no interference. The stock accounts were verified by the IST on 18.05.1995 which was found to be 18,284 bags but as per the contention of the appellant-dealer the opening stock on that day was 18,201 bags. The LAO held that the agent of the appellant-dealer though claimed that there was shortage of 458 bags due to cumulative damage but he could not produce any material evidence either before the IST or before him. Hence, it indicates that, the copy of letter dtd.31.03.1995 produced by the godown-in-charge has not been taken into consideration by the LAO.

The contention of the appellant-dealer regarding the shortage of tax owing to counting mistake is not tenable as the godown-in-charge himself was present during counting. Hence, there was suppression of sale but the computation is wrong in view of the factual matrix of the case as discussed above.

7. In absence of any findings with the alleged quantity found short is sold, levy of tax on surmised sale is untenable in law as per the ratio laid down in case of M/s. Lachminarayan Sawalram Vrs. State of Orissa in OJC No.286 of 1968 decided on 20.07.1971 and Mahabir Rice Mill Vrs. State of Orissa (SJC No.125 and 174 of 1976 decided on 11.09.1980). In the case of Mahabir Rice Mill (supra), it is held as follows :

“Best judgment assessment- The assessee is a registered dealer. Taking into consideration the report of the Food Corporation of India, who found on physical verification short fall in the stock of super-fine rice as also paddy, the Assessing Officer after confrontation rejected the books of account of the assessee and estimated the price of short fall by adopting prevailing Government rate and raised an additional demand. In the first appeal, the additional demand was vacated and on appeal by the State, Tribunal restored the assessment. In a reference after considering the material on record, Hon’ble High Court held that there is no material at all in the assessment record to support the fact that there has been any clandestine purchase of paddy or similar sale of rice. The only basis was shortage report of the Quality Inspector of Food Corporation of India. The explanation of the assessee was that there had been damage to the stock in hand which has not been taken into account and by independent enquiry such claim has not been found to be untenable. In the absence of supporting evidence, merely on the report of the Inspector jumping into conclusion that there had been purchase and sale making the

assessee liable to tax and resorting to best judgment assessment is untenable.”

This analysis of the Hon'ble Court supports the contention of the appellant-dealer.

In the case of M/s. Lachminarayan Sawalram (supra), the Hon'ble Court held that, before any tax can be levied, there must be a finding that the quantity of petrol and diesel oil which fell short with reference to the stock account had been sold; without such a finding the tax cannot be levied.

This analysis of the Hon'ble Court is against the contention of the Revenue.

8. From the aforesaid discussion and the decisions of our own Hon'ble High Court, we find that the matter is to be remitted back to the LAO for fresh assessment on proper computation as per our observation. The letter produced before the IST has also to be taken into consideration. The estimation of suppression on monthly basis also seems to be arbitrary as the LAO arrived at the conclusion on the alleged suppressed turnover of sale by multiplying the figure pertaining to actual suppression detected by twelve times against detection of discrepancies in stock once in the year and estimated the total suppression at Rs.31 lakhs.

9. In the net result, the appeal is allowed and the orders of both the forums below are set aside. The matter is remanded back to the LAO for fresh assessment by verifying the books of account and

other relevant documents in accordance with the provisions of law in view of our aforesaid findings and observation and such process is to be completed within three months from the date of receipt of this order.

Dictated & corrected by me,

Sd/-
(A.K. Dalbehera)
1st Judicial Member

Sd/-
(A.K. Dalbehera)
1st Judicial Member

I agree

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