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

S.A. No. 44 of 2016-17

(From the order of the ld. Addl. CST (Appeal), N.Z., Odisha, Sambalpur, in Appeal Case No. AA SA-II 22/03-04, dtd.05.12.2016)

P r e s e n t : Shri S. Mohanty, 1st Judicial Member & Shri R.K. Pattnaik, Accounts Member-IIII

M/s. Shyam Sundar rice Mill,
At/P.O.- Gudesira,
Dist.- Bargarh. ... Appellant

- V e r s u s -

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

For the assessment period: 2001-02

For the Appellant ... Mr. A.K. Poddar, Advocate
For the Respondent ... Mr. S.K. Pradhan, A.S.C.

Date of hearing: 10.09.2019 ******** Date of order: 10.09.2019

O R D E R

A confirming order of assessment u/s.12(4) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as, OST Act) for the assessment period 2001-02 raising a balance tax demand of Rs.1,47,904.00 is under challenge by way of this second appeal with a prayer to delete the demand by treating the sale suppression as invisible, permissible and compulsory loss in the process of handling.

2. The assessee-appellant is a registered dealer engaged in business of purchase of paddy and sale of rice, broken rice and bran. The IST, Bargarh II Circle, Bargarh submitted a fraud case report No.49 dtd.20.06.2002 alleging shortage of paddy and broken rice and

rice and excess of bran covering the period 2001-02 basing which the dealer was subjected to assessment u/s.12(4) of the OST Act. It is reported that, on physical verification of the stock in comparison to books of account, there was shortage of Q. 17.31 of paddy, Q. 11.42 of broken rice and Q. 37.25.305 of rice, whereas there was excess stock of bran of Q. 7.99 of rice. In the assessment, learned assessing officer did not accept the explanation by the dealer like the shortage is within permissible limit of 1.25% as declared by the Civil Supply Department of Odisha. Thus, as a result, learned assessing officer determined the sale suppression of Rs.1,44,545.58. On that basis, it has enhanced the TTO by 34,69,093.92 and levied tax thereon. In addition to that, the assessing officer has also added stitching charges to the tune of Rs.2,18,038.75 to the GTO. Thus, in total the TTO was calculated by him at Rs.17,84,11,419.17, the balance tax demand was calculated at Rs.1,47,904.00 and raised accordingly.

3. As against the assessment above, the dealer knocked the door of the first appellate authority who in turn vide impugned order dtd.05.12.2016 did not interfere with the order of assessing authority resulting thereby, the demand remained undisturbed.

On the backdrop above, the dealer has preferred this appeal.

4. The contentions of the dealer are, the authorities below have not taken into consideration of the permissible shortage in the handling of goods in the business of rice milling. Practically it was not possible for weighment of each day stock so as to find out the shortage per day. So, the shortage was not reflected date-wise in the books of account. It is further contended that, enhancement to the GTO and TTO is exorbitant and whimsical. It is alleged that, the first appellate authority has not extended the proper opportunity of being

heard, imposition of tax on the stitching charges of the rice bags is illegal and it is not a part of the sale price.

5. The appeal is heard with Cross Objection from the side of the Revenue. Disputing the pleas of the dealer, inter alia, the Revenue has contended that, the impugned order is just and proper.

6. From the rival contentions above, the questions framed for decision in this appeal are,

(i) Whether the determination of suppressed/escaped turnover in the case in hand is just and proper?

(ii) Whether there was compulsory loss in the handling of the goods leading to a conclusion that the determination of GTO and TTO is erroneous?

(iii) Whether the enhancement is exorbitant and not sustainable in the facts and circumstances of the case?

(iv) Whether sufficient opportunity was not extended by the first appellate authority in the hearing and thereby there is violation of principle of natural justice?

(v) Whether taxation on stitching charges is wrong?

(vi) What order?

7. The dealer has taken a specific plea that, the impugned order was passed exparte and thereby proper opportunity of being heard was not provided to the dealer. As against that, the learned Addl. Standing Counsel argued that, the dealer who had preferred first appeal remained absent in the hearing before the first appellate authority in spite of receipt of notice. So, the impugned order passed, setting the dealer exparte justified for the reasons above.

Perused the impugned order and the order sheet maintained before the first appellate authority. A bare perusal of the order sheet, it only can be said that, the first appellate authority has not bothered to maintain the order-sheet in accordance to procedure

laid down in law. So, no definite conclusion can be drawn on the basis of order-sheet which is left blank that the notice of hearing was served duly on the dealer and the dealer had intentionally remained absent before the first appellate authority or not. Moreover, when we go through the impugned order with regard to the merits of the case which is also found that, the first appellate authority has gone mechanically by accepting the reasons of the assessing authority. In that view of the matter avoiding further discussion in this question it can safely be said that, in the case in hand, the dealer has not been provided with opportunity of being heard and once the first appellate authority has not dealt with the dealer's contention by a reasoned order. It is also believed that, the dealer cannot be denied a forum which is broadly treated as an extended forum of assessment. Therefore, on the above score only, the impugned order cannot withstand in law and the matter needs to be remanded back to the first appellate authority for disposal afresh.

8. In the case in hand, the claim of the taxing authority is, on visit to the dealer's unit by the Vigilance Wing there was detection of shortage with regard to paddy, rice and broken rice but there was excess stock of bran. Claim of the dealer is, the shortage in paddy or rice was due to the compulsory loss in the process of handling. The loss is within the permissible limit allowed by the Civil Supply Department of Government of Odisha.

Learned Counsel for the dealer argued that, the same dealer was allowed to avail shortage sustained in case of handling for the other assessment period. Learned Addl. Standing Counsel on other hand argued that, the shortage sustained was not mentioned in the books of account on date-wise. So, the plea of the dealer is not sustainable. In answer to this submission, the learned Counsel for

the dealer argued that, in the regular course of business it was not possible to measure the shortage on each date.

9. From the nature of the business undertaken by the dealer, it is believed that, shortage may be caused in the process of handling of rice and broken rice and this view is also fortified from the permissible percentage of shortage as per the notification of the Civil Supply Department of the Government of Odisha. So, it will be erroneous to hold that, in no case the dealer would suffer any shortage. In that view of the matter here in this case, it is believed that, the first appellate authority should make an endeavor to determine the question of loss in handling taking into consideration of the dealer's plea and the return and assessments of the dealer relating to the other periods. It is made clear that, if the handling loss for other assessment period is found allowed to the dealer, then on application of rule of consistency the dealer cannot be denied to avail the same benefit for the assessment period in question.

10. The next question is, whether the enhancement is exorbitant. Once the books of account is not rejected, we are of the considered view that, the determination of suppression should be limited to actual suppression detected. Without rejecting the books of account there is no scope for enhancement of the suppression more to say at the sweet whim of the assessing authority. Thus, in this case the enhancement of suppression is not well founded. Therefore, in ultimate analysis we are of the consensus view that in the remand assessment the first appellate authority will do well to reconsider all the questions afresh. It is made clear that, the first appellate authority should form his opinion independent of any observation on the question of fact discussed hereinabove.

11. In the wake of above, it is ordered as follows.

The appeal is allowed on contest. The impugned order is set aside. The matter is remitted back to the first appellate authority for disposal afresh as per the observation hereinabove. The first appellate authority is requested to complete the assessment afresh within a period of four months hence.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

Sd/-
(S. Mohanty)
1st Judicial Member

I agree

Sd/-
(R.K. Pattnaik)
Accounts Member-III