

**BEFORE THE SINGLE BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.**  
**S.A.No. 5/2017-18**

(From the order of the Id.DCST (Appeal), Balasore Range, Balasore, in Appeal  
No. AA-152/BA-1997-98 (OST), dtd.05.10.2016,  
confirming the assessment order of the Assessing Officer)

**Present: Sri S. Mohanty**  
**2<sup>nd</sup> Judicial Member**

M/s. Upendra Jewellery,  
Station Road,  
Dist. Balasore. ... Appellant

**-Versus-**

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

For the Appellant : Mr. M.C. Mahapatra, Advocate  
For the Respondent : Mr. S.K. Pradhan, Addl. Standing Counsel (C.T.)

(Assessment year 1995-96)

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Date of Hearing: 19.06.2018      Date of Order: 21.06.2018

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**ORDER**

The assessee as appellant has challenged the sustainability of the order passed by the First Appellate Authority/Deputy Commissioner of Sales Tax (Appeal), Balasore Range, Balasore (in short, FAA/DCST) in First Appeal Case No.AA-152/BA-1997-98 (OST) dtd.05.10.2016 confirming thereby the demand of tax and penalty raised in a proceeding u/s.12(5) of the Odisha Sales Tax Act, 1947 (in short, OST Act) by the Assessing Officer/Sales Tax Officer, Balasore Circle, Balasore (in short, AO/STO) relating to the assessment period 1995-96 of the assessee.

2. The facts taken into consideration for effective decision in this appeal are; The Revenue has treated the assessee as unregistered dealer having it's business under the name and style of M/s. Upendra Jewellery, a proprietorship concern at Station Road, Balasore, engaged in trading of gold and silver ornaments with repairing and remaking of the ornaments as well.

Proceeding u/s.12(5) was initiated on the fraud case report dtd.31.04.1996 with the allegation that the dealer was not maintaining accounts and the dealer was engaged in sale of gold and silver ornaments in a clandestine manner showing the same as repairing and making on the demand of the customers with receipt of labour and service charges. In the report it was suggested that, the dealer's turnover should not be less than Rs.3,00,000/- per annum. The AO on confrontation of the allegation to the dealer and in consideration of the explanation of the dealer, in ultimate analysis arrived at a conclusion that, the books of account produced before him by the dealer are all fabricated. The dealer's transaction exceeds the limit of unregistered dealer as per Sec.4(7)(a) of the OST Act and thereafter, the AO on application of the best judgment principle, determined the daily average sale of the dealer at Rs.2,000/-. Allowing one day of a week as a closure day, he determined the GTO for the assessment year at Rs.7,82,500/-. From the GTO he allowed deduction of the labour and service charges at Rs.4,50,000/- and thereafter the TTO was determined at Rs.3,32,500/-. Taxing the TTO @4% which was calculated to Rs.12,000/-, he levied penalty of Rs.6,000/- u/s.12(5) of the OST Act. As a result, the total demand raised to Rs.19,300/-.

3. Being aggrieved with such demand, the dealer preferred appeal but to his ill-luck, the appeal was disposed of after long lapse of around 20 years setting him ex-parte, whereby the FAA did not interfere with the order of AO and thus the demand remained undisturbed.

4. Felt aggrieved, the dealer has preferred this second appeal on the contentions like, inordinate delay in disposal of the appeal of the dealer without giving him an opportunity of being heard caused miscarriage of justice. The dealer is engaged in repairing of gold and silver ornaments of the customers. The dealer is not engaged in any purchase or sale as claimed by the AO. So, the assessment and demand of tax is illegal.

5. The appeal is heard with cross objection by the State stating therein the sustainability of the impugned order as lawful and binding in nature. In the appeal in hand, it is to be seen that, (i) Whether the FAA has

passed the impugned order without giving proper opportunity of being heard to the dealer and if so, any prejudice is caused to assessee ? (ii) Whether the FAA is wrong in holding that the dealer is engaged in sale or purchase of any ornaments ?

6. The lower appellate court's record is perused. The order as it revealed on dtd.05.10.2016, the FAA passed the impugned order ex-parte. The appeal was filed on dt.02.09.1997. It was taken up for hearing on dt.05.10.2016 and disposed of on the same day setting the dealer ex-parte. The appellate authority treated the notice sent to the dealer through registered post as sufficient and then setting the dealer ex-parte, he proceeded with the appeal. Perused the acknowledgement receipt against the registered post available in the LCR. It reveals that the dealer himself received the notice from the Appellate Court. In that view of the matter, it is held that, though there is inordinate delay but the appellant was set ex-parte only when he did not turn up in spite of receipt of notice. As such there is no reason to believe that, the ex-parte order is violative of the principle of natural justice. Since the dealer has not made any attempt before the FAA to set-aside the ex-parte order but preferred appeal, then the appeal is to be heard on merit.

7. The allegation against the dealer is, he is engaged in sale and purchase of gold ornaments. The plea of the dealer is he was engaged in repairing of the gold ornaments of the customers. To fortify his plea the dealer has produced Xerox copy of his certificate of Goldsmith issued by the designated officer. It is argued that, as per the certificate issued, the dealer is not entitled to carry any business of buying and selling. So the dealer's unit being a goldsmith, he engaged in repairing of the ornaments of the customers but not engaged in sale of the gold ornaments. The dealer also produced Xerox copies of assessment of the previous two years like 1992-93 and 1993-94. Both these cases were initiated on the fraud case report and the AO in the proceeding u/s.12(5) rejected the return filed by the dealer as not believable. The AO has applied the best judgment principle and determined the GTO. Thereafter, he allowed the deduction towards tax free goods and labour and

service charges then he taxed the rest amount of the GTO @4%. For the year assessment year 1993-94 vide Order dtd.31.08.1995, the assessee was asked to pay tax of Rs.450/-. Similarly for the year 1992-93 vide Order dtd.03.09.1994, the assessee was asked to pay Rs.290/-. Here in the case in hand, for the period 2002-03 and 2003-04, the dealer is asked to pay Rs.17,000/-. The AO had applied best judgment principle and determined the tax liability. Now the question is, when the tax liability was very low amount, the dealer had complied it but when the tax liability is a big amount i.e. Rs.17,000/-, the dealer disputed the same taking the plea that, he was not engaged in sale of gold and silver ornaments. If the dealer was engaged in repairing work as a goldsmith as per certificate issued to him then he should have challenged the assessment for the previous periods also. Once he admitted the assessment for the previous periods, then he is estopped from challenging the assessment of subsequent periods taking a plea that, he was not engaged in sale of ornaments. The dealer had produced a register showing entry of the persons whose ornaments he had repaired but that does not mean the dealer is engaged in selling of ornaments. Thus, it is held that, both the fora below are not in holding that the dealer is engaged in selling of ornaments besides repairing and making of those.

The AO has treated the GTO for the assessment period at Rs.7,82,500/- and TTO at Rs.3,32,500/- i.e. as per his best judgment assessment.

Perusal of the assessment order for the year 1992-93 which reveals the AO has held Rs.6,000/- as TTO for that year. Similarly for the year 1993-94, the AO has held the TTO at Rs.10,000/-. But the AO has treated the TTO at Rs.3,00,000/- for the year 1994-95. It seems the AO has determined the TTO in a much higher side i.e. in comparison to previous years. The best judgment assessment of the AO here in this case seems to be quite whimsical and unreasonable. The power of best judgment assessment apparently are too wide and can be used to the detriment of an assessee and can be manipulated by a corrupt office. Therefore, there has to be checks and balances to the 'guess work' done in case of a best assessment judgment. In making best judgment

assessment the officer does not possess arbitrary powers to assess any figure as he likes. Though quasi judicial in nature these assessments are to be based on the principles of justice, equity and good conscience. In common parlance the words “best judgment” carry the connotation that what is being done is in order to make an estimate. Similarly, the best judgment assessment can only be made after giving the assessee an opportunity of being heard. Such opportunities shall be given by issuance of notice by way of a showcause as to why the assessment should not be completed to the best of the judgment and that opportunity for hearing will not be necessary. Here in this case, as we notice the Id.AO has applied the principle of best judgment assessment almost mechanically. So, the best judgment assessment of the Id.AO seems to be more whimsical and nowhere near to reality.

Similarly, it is also found that, the FAA has mechanically accepted the best judgment assessment of the AO because it was an ex-parte order. Thus, from the above facts and circumstances, taking cue from the assessment of the previous year relating to the year, now it is incumbent upon this Tribunal to make another best judgment assessment. Taking cue from the assessment of the preceding years, the volume of transaction of the dealer for those years and the possible enhancement of turnover in current assessment year, to my view the TTO of the dealer should be determined at best at Rs.75,000/-. Tax on it is determined at 4% i.e. Rs.3,000/- accordingly, to which the dealer is liable to pay. The dealer is also liable to pay penalty at Rs.2,000/- beside tax due. Accordingly, it is ordered.

The appeal preferred by the dealer is allowed in part on contest. The dealer is required to pay tax with penalty at Rs.5,000/-.

Dictated & corrected by me,

Sd/-  
(S. Mohanty)  
2<sup>nd</sup> Judicial Member

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