BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. Nos. 365, 366 & 367 of 2009-10

(Arising out of the orders of the learned DCST, Cuttack-I Range, Cuttack in first appeal Case Nos. AA-94/CUIW/08-09; No. AA-95/CUIW/08-09 & AA-96/CUIW/08-09 disposed of on 25.08.2009 & order of Hon'ble Odisha High Court dtd.06.11.2019 in STREV No.10, 11 & 12 of 2018 against S.A. No.365, 366 & 367 of 2009-10 passed on 21.12.2017 in a common order by Tribunal)

Present :- Shri A.K. Das, Chairman Shri.S.K. Rout, 2nd Judicial Member & Shri S. Mishra, Accounts Member-II.

M/s. Bharat Motors,
Cantonment Road, Cuttack. ... Appellant.

-Vrs.-

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

For the Appellant : Mr. J. Sahoo, Sr. Advocate.
Mrs. Kajol Sahoo, Advocate.

For the Respondent : Mr. D. Behura, S.C.(C.T.)
: Mr. M.S. Raman, A.S.C(C.T.)

Date of Hearing : 08.12.2021 * Date of Order :28.12.2021**

O R D E R

In the instant case, the Hon'ble Odisha High Court in STREV No.10, 11 & 12 of 2018 adjudicated on the application of the instant dealer i.e. M/s. Bharat Motors, Cuttack relating to the assessment years 2001-02, 2002-03 & 2003-04 in which the common order dtd.21.12.2017 passed by the Full Bench of Odisha Sales Tax Tribunal (in short, OSTT) in S.A. No.365,366 & 367 of 2009-10 that confirmed the orders of the ld. Deputy Commissioner of Sales Tax (in short, DCST), Cuttack I Range, Cuttack in first appeal case No. AA-94/CUIW/08-09, No.AA-95/CUIW/08-09 & AA-96/CUIW/08-09, was

challenged. The Hon'ble Court Vide their order dtd.06.11.2019 remanded the case to this Tribunal with the following observation:-

".....By way of this revision petition, the petitioner has challenged the order dated 21.12.2017 (Annexure-1) passed by the Odisha Sales Tax Tribunal, Cuttack in S.A. Nos. 365, 366 and 367 of 2009-10.

After arguing at length, learned counsel for the petitioner seeks permission to withdraw the revision petition with liberty to the petitioner to approach the learned Tribunal by filing review petition.

Accordingly, the STREV stands disposed of as withdrawn.

However, it is directed that if the petitioner approaches the learned Tribunal by filing review petitioner along with an application for condonation of delay within a period of four weeks from today, learned Tribunal shall take into consideration all the contentions raised by the petitioner. While considering the prayer for condonation of delay, learned Tribunal shall also take into consideration the period of pendency of this revision, i.e. from 25.01.2018 till today....."

2. The brief facts of the case are that the instant dealer i.e. M/s. Bharat Motors, Cuttack bearing RC No.CUIW 348 carries on business in selling motors vehicles (Ambassador Cars and Trekkers) of M/s. Hindustan Motors ltd. after effecting purchases from outside the State. However, on receipt of AG (Audit) objection that alleges that the dealer has been under-assessed due to non-inclusion of entry tax paid on the purchase value of the motor vehicle in the sale price as illustrated on tax liability of a dealer under OET Act, the cases for the years 2001-02, 2002-03 and 2003-04 were reopened and accordingly, re-assessment were made U/s. 12(8) of the OST Act in which the

dealer participated. On re-assessment, extra tax demand of Rs.7,09,324.00; Rs.7,98,907.00 and Rs.7,60,467.00 respectively were raised by the ld. Sales Tax Officer (in short, LAO) Cuttack I City Circle, Cuttack and confirmed in first appeal cases by the concerned ld. DCST after proper hearing. Being aggrieved, the dealer appellant filed second appeal before the Full Bench of this Tribunal who confirmed the orders of forum below vide their reasoned order dtd,21.12.2017 in a common order. Being further aggrieved, the dealer filed STREV bearing No.10, 11 & 12 of 2018 before the Hon'ble Court who vide their order dtd.06.11.2019 directed the dealer-petitioner to file review petition along with an application for condonation of delay before this Tribunal who shall take into consideration all the contentions raised by the dealer petitioner. Accordingly, the dealer filed review petitions for the impugned periods before this Tribunal.

3. Since, the facts and the circumstances for the impugned periods are same, all the appeals are now disposed of in a common order after proper hearing from both the rival sides and having gone through all the relevant information available in this record including assessment records and appeal records. Now, that we observe as follows:-

i. Allowing withdrawal of revision petition after hearing at length, the Hon'ble Court directed the appellant-dealer to approach this Tribunal and raise all contentions raised in STREV No.10 of 2018.

ii. Placing reliance on the case law in *Indure Limited Vrs. Commissioner of Sales Tax, (2006) 148 STC 61 (Ori),* the counsel for the appellant advanced argument that the assessing authority had "abdicated his discretion to the dictates of the AG audit". Perusal of assessment record and reading of assessment order makes us to understand that "on the basis of AG Odisha

Objection Memo No.21 dated 03.01.2007, the assessment was reopened and notice was issued to the dealer under Section 12(8) of the OST Act for the year 2001-02".

a. As the material available in the assessment records would show that the dealer-appellant has appeared before the assessing authority in response to the notice for assessment under Section 12(8) of the OST Act, and produced books of accounts, no prejudice is caused by undertaking the re-assessment to determine the correct tax liability the objection of the dealer is liable to be rejected.

b. At paragraph 3 of the review application filed pursuant to direction of the Hon'ble Court in STREV No.10 of 2018 vide Order dated 06.11.2019, the dealer has framed the following question:

"Whether in the facts and circumstances of the case in absence of independent formation of opinion and recording of reason by the assessing authority reassessment proceeding under Section 12(8) of the Orissa Sales Tax Act and consequential order of reassessment dated 21.12.2007 under section 12(8) of the OST Act can be sustained?"

c. Records of authorities below do not demonstrate that the dealer had raised such an objection at the very opportune stage. The assessing authority has recorded in his assessment order as follows:

"… In response to the notice issued, the dealer appeared, filed hazira and produced the books of accounts in respect of their business which are duly examined with reference to objections raised by AG Orissa, Bhubaneswar."

d. We are fortified by decisions rendered by the Hon'ble Court post-*Indure Limited (supra)* and earlier decisions including Hon'ble Supreme Court of India.

e. The proceeding under Section 12(8) on the basis of A.G. objection is a valid basis. In *Bindlish Chemical and Pharmaceutical Works Vrs.*

Commissioner of Sales Tax, (1993) 89 STC 102 (Ori), the Hon'ble Court interpreted that the words "for any reason" in Section 12(8) of the OST Act are of wide import and view of the audit party can form basis for re-assessment under Section 12(8). The Hon'ble High Court of Orissa in *Shyam Gudakhu Factory Vrs. State of Odisha, 76 (1993) CLT 487,* observed as follows:

"… We shall first deal with the scope of reopening under Section 12(8) of the Act. As observed by the apex Court in Sales Tax Officer, Ganjam Vrs. Uttareswari Rice Mills, (1972) 30 STC 567 (SC), the power to take resort to Section 12(8) is only available where there is reason existing for doing so, and existence of the reason that the turnover of an assessee has escaped assessment or has been under-assessed is the sine qua non for initiation of the proceeding. This aspect has been highlighted by us in State of Orissa Vrs. Ugratara Bhojanalaya, SJC No.43 of 1988 disposed of on 03.07.1992 [(1993) 91 STC 76 (Ori)], that the use of the words 'if for any reason' shows that legislative intent is to confer wide discretion on the assessing officer to reopen a proceeding. But it has to be borne in mind that 'no reason' is not equivalent to 'any reason'. The expression 'any reason' means any legally tenable reason and not any fanciful or imaginary reason.

In the case at hand it cannot be said that the assessing officer acting on the basis of A.G.'s report had no legally supportable reason to initiate the re-assessment proceeding. …"

f. In *Larsen & Toubro Ltd. Vrs. State of Jharkhand, Civil Appeal No. 5390 of 2007, disposed of on 21.03.2017 [(2017) 103 VST 1 (SC)]*, it has been held by the Hon'ble Supreme Court of India that:

"22. There are a catena of judgments of this Court holding that assessment proceedings can be reopened if the audit objection points out the factual information already available in the records and that it was overlooked or not taken into consideration. Similarly, if audit

points out some information or facts available outside the record or any arithmetical mistake, assessment can be re-opened."

g. The appellant relied on *Indure Limited Vrs. Commissioner of Sales Tax, (2006) 148 STC 61 (Ori)*. This case law is not applicable to the fact situation of the present case. *Per contra*, the State of Odisha urged that:

i. The present case being factually distinct and differently placed, the decision in *Indure Ltd. (supra),* may not apply. The counsel for the Revenue brought to our notice the Order dated 23.07.2007 of the Hon'ble Supreme Court of India in SLP(C) No.10149 of 2007 [arising out of said *Indure Limited (supra)*]. The said Order reads thus:

"The Special Leave Petition is dismissed ***on facts****."*

ii. In *Indure Ltd. (supra)* the fact (see paragraph 3 of the Judgment) was that notice under Section 12(8) was issued first and order in the order-sheet was maintained thereafter. In such situation, the Hon'ble Court held that the notice being mechanically issued, the same cannot be held to be tenable. Further in that case the petitioner challenged notice issued under Section 12(8) of the OST Act by way of writ petition. But in the instant case, the assessee has already acted pursuant to notice. Having filed hazira, the dealer-appellant produced books of account before the assessing authority and thereby participated in the proceeding for assessment. Therefore, now it cannot be permitted to turn around to contend that the initiation by issue of notice was bad.

iii. The counsel for the revenue brought to our notice the decision rendered by the Hon'ble Court in *D. Ch. Guruvalu Son & Co., (2008) 14 VST 509 (Ori) = 105 (2008) CLT 21 = 2008 (I) OLR 18*. Perusal of said Judgment, it is perceived that after noticing the ratio laid down in *Indure Ltd. (supra)*, the Hon'ble High Court held that if reasons for reopening are made known to the assessee-appellant subsequently, it would suffice initiation of proceeding. Therefore,

the order passed consequent upon participation of the assessee would not be vitiated.

h. Sub-section (8) of Section 12 of the OST Act employs the words "proceed to assess the amount of tax due from the dealer in the manner laid down in sub-section (5) of this section". Sub-section (5) uses the expression "a reasonable opportunity of being heard". In interpreting the expression, the Hon'ble High Court has been pleased to hold in *State of Orissa Vrs. Sri Gurumurty Patra, (1973) 31 STC 160 (Ori)* that the notice under Section 12(5) is not mandatory and only requirement is to render opportunity of hearing. In the present case, the appellant-dealer was given opportunity to present its case and place materials before the assessing authority as also before the first appellate authority. The Hon'ble High Court in the matter of *Sri Babulal Manjee Meheta Vrs. Commissioner of Sales Tax, (1992) 84 STC 220 (Ori)* has been pleased to observe that service of notice is not condition precedent for initiation of proceeding under Section 12(8) of the OST Act. But in the present case, proper notice was served on the dealer duly, accepting which it appeared and was made known about the objection raised in the audit report. Moreover, in the present case, the notice for re-assessment under Section 12(8) of the OST Act was never challenged before any Court nor any objection was raised with regard to the same before the assessing authority. The appellant-dealer waited for outcome of the demand; thereafter filed the first appeal.

i. This Tribunal finds that there exists reason to proceed with the assessment basing on the A.G. audit objection which is a valid basis to determine the correct tax liability under Section 12(8) of the OST Act.

j. Such being the position, we are of the considered opinion that the contention that the assessing authority had abdicated his discretion is liable to be repelled. The assessing authority has candidly stated in his order as follows:

"… The contents of the AG's observation is narrated and explained to the dealer with regards to non-inclusion of the payment of entry tax on the purchase value of motor vehicles in the corresponding sale value of the motor vehicles which resulted in under-assessment."

k. Since the subject-matter fell well within the scope of "under-assessment" warranting re-assessment under Section 12(8) of the OST Act, there is no infirmity in exercise of jurisdiction by the assessing authority.

iii. The learned senior counsel pressed into service second question as taken in the review application which is as follows:

"Whether entry tax paid by the petitioner mentioned in the sale invoice but not collected / realized from the buyers is to be considered as 'sale price' as per Section 2(h) of the OST Act?"

a. This Tribunal feels that such a question does not borne out of the facts and grounds of second appeal. Rather the dealer at Ground No.10 of the Memorandum of Second Appeal has taken the following stand:

"That the vehicles are sold as per the selling price fixed by the manufacturing company, i.e., M/s. Hindustan Motors Ltd. and sales tax thereon including surcharge are charged on the sale memo issued. The entry tax paid on the vehicle at the time of purchase is also disclosed in the sale memo. This amount of entry tax is finally taken as set off against sales tax and the balance tax including surcharge is paid to the Government Exchequer."

b. The question framed by the appellant is defective in the sense that none of the grounds or the contention of the dealer clearly stated that the appellant-dealer had not "collected / realized" the amount of entry tax paid by it from the buyers. Nonetheless, the copies of the invoices attached to the written note of submission filed by the appellant at the time of hearing of the second appeal indicate that set off of entry tax has been availed by the appellant without addition of amount of entry tax in the turnover. In other words, this Tribunal finds that having shown entry

tax component separately in the invoices, the dealer-appellant has passed on the burden. In this regard it is fruitful to refer to the following observation contained in *Delhi Cloth & General Mills Co. Ltd. Vrs. The Commissioner of Sales Tax, 1971 (2) SCC 559 = (1971) 28 STC 331 (SC) = 1971 AIR 2216:*

"Under s. 4 of the Act the liability to pay tax is that of the dealer. There is no provision in the Act imposing any liability on the purchaser to pay the tax so imposed on the dealer and there is no law empowering the dealer to collect the tax from his buyer. Hence the dealer would not be legally entitled to collect the tax payable by him from his buyer, and whatever collection the dealer makes from his customers can only be by adding the tax to the price, so that, the tax becomes part of the valuable consideration given by a purchaser for the goods purchased by him. Therefore, the distinction between the two amounts— tax and price— loses all significance, and the tax becomes a part of the sale price as defined in s. 2(c) of the Act and must be taken into consideration in computing the turnover."

c. In yet another case being *State of Rajasthan Vrs. JK Udaipur Udyog Ltd., (2004) 137 STC 438 (SC)* the Hon'ble Court laid down as a principle that:

The mere circumstance that selling dealer having availed of the exemption scheme were prohibited from collecting the tax from their customers or that they had not collected the sales tax from their customers is of no consequence. The primary liability to pay the sales tax is on the seller. The seller may or may not be entitled to recover the same from the purchaser. The State Government is entitled to recover the same from the selling dealer irrespective of the fact that the selling dealer may have lost the chance of passing on their liability to pay sales tax to their purchasers.

d. The definition of "sale price" contained in Section 2(h) spells out as follows:

"Sale price means the amount payable to a dealer as consideration for the sale or supply of any goods, less any sum allowed as cash discount

according to ordinary trade practice, but including any sum charged for anything done by the dealer in respect of the goods at the time of, or before delivery thereof."

e. Said definition clearly specifies that "any sum charged for anything done by the dealer in respect of the goods at the time of, or before delivery thereof" would form part of turnover. Entry tax being separately shown to have been charged in the invoices (evidence of which has been furnished by the appellant-dealer), without any iota of doubt in mind it can safely be concluded that the appellant-dealer has charged entry tax at the time of or before delivery of goods to its customers.

f. It is pointed out by the learned counsel for the respondent that the relevant statutory provisions contained in Section 4 of the OET Act read with Rules 3 and 18 of the OET Rules had not been followed in as much as it was found that the dealer had not included entry tax paid on purchases to his sale price while claiming set off.

g. It is found by this Tribunal that the goods (vehicles) brought into the local area which are subject to entry tax as scheduled goods @12% in terms of Part-III of Schedule appended to the OET Act read with Rule 3(1) of the OET Rules. In view of Rule 18 of the OET Rules, it is entitled to avail set off against sales tax payable. At this juncture, it is necessary to draw attention to Clause (b) of Note-1 appended to Taxable List *vide* Finance Department Notification bearing No.14687-CTA-37/2001 (Pt.) F. [SRO No.149/2001], dated 31.03.2001 issued in exercise of powers under Sections 5 and 6 of the OST Act, which reads as follows:

*"(b) The amount of tax payable in respect of goods specified in Part-III of the Schedule to the Odisha Entry Tax Act, 1999 as well as in Serial Nos. *** shall be reduced by the amount of Orissa Entry Tax paid on such goods under Orissa Entry Tax Act, 1999 and the rules made thereunder."*

Note-2 appended thereof speaks as follows:

"The set off of tax as provided in Note-1 above shall be regulated subject to the following conditions:

***

(b) The amount of set off claimed against payment of tax under the Orissa Entry Tax Act, 1999 shall be limited to the OST payable on sale of such goods."

h. A harmonious reading of aforesaid provisions contained in the OST Act and the OET Act coupled with terms of the Finance Department Notification leads to conceive that as much entry tax is paid by the dealer at the time of entry of the vehicles into the local area, the same amount is recouped by way of set off against sales tax payable.

i. Therefore, the Tribunal is of the firm opinion that entry tax being separately shown in the invoices [sample copies of which have been submitted by the appellant during the course of hearing of second appeal], said amount has been recouped by way of addition in the sale price and subsequently equivalent amount of entry tax has been availed as set off from the "sale price" [defined in Section 2(h) of the OST Act]. Strong indication in this regard has been coined in said definition by employing the expression— "but including any sum charged for anything done by the dealer in respect of the goods at the time of, or before, delivery thereof".

j. Whether entry tax is liable to be included in the sale price has already engaged the attention of the Hon'ble High Court of Orissa way back in 1978. Following the view expressed in *State of Orissa Vrs. Pushraj Bijayakumar, (1978) 41 STC 443 (Ori)*, the Hon'ble Court in the case of *State of Orissa Vrs. Santosh Agency, (1982) 50 STC 393 (Ori)* held that octroi forms part of turnover. By virtue of Section 41 of the Odisha Entry Tax Act, 1999, entry tax is levied in lieu of octroi as was levied in exercise of powers under Section 131(1)(kk) of the Odisha Municipal Act, 1950. Therefore, said Judgments have relevance to the present context.

k. In the case of *State of Karnataka Vrs. Hindustan Copper Ltd., (2008) 11 VST 64 (Kar),* the Hon'ble Court answered the question of law that "Whether the amount of entry tax collected on entry of goods into the local area before its sale to the ultimate consumer can be treated as the pre-sale value of the goods, when the assessee has passed on the same to the ultimate purchaser adding it to the sale price of the goods?", in favour of the Revenue and against the dealer. This Tribunal finds said question fell for consideration in an identical situation and *pari materia* provisions contained in the Karnataka Statute. Therefore, this Tribunal reaches at the conclusion that the authorities below have not committed any error in adding entry tax component to the sale price in order to ascertain the turnover for the purpose of levy of sales tax thereon.

iv. The third question posed by the senior counsel by pressing the review petition is as follows:

"Whether the learned Tribunal is correct to record the findings that the provisions of Section 4(3) of the OET Act stipulating entry tax paid to be shown separately in the cash memo does not necessarily mean that the sale price is to be computed without including entry tax?"

a. Section 4 deals with reduction of tax liability. Under sub-section (3) thereof to avail such reduction condition that entry tax paid and tax payable under the Sales Tax Act are to be shown separately in the cash memo or the bill or invoice issued by the selling dealer (appellant) has been stipulated. The sample copies of invoices as produced by the appellant show that it has shown entry tax paid separately in the invoices. The sales tax component as charged to the customers is also disclosed. Necessary corollary would be that the appellant is eligible to claim set off in order to discharge reduced liability under the OST Act. Section 4(3) of the OET Act cannot be read in isolation in order to assess of sales tax liability under the OST Act. Said provision under the OET Act is required to be read along with Finance Department Notification issued under Section 5 and Section 6 of the OST Act [already discussed herein above]. Section 5A which deals with "surcharge" which is additional tax

over and above what is provided under Section 5. The set off of entry tax paid can be claimed in the following manner:

Sales Tax determined by applying rate of tax prescribed under Section 5	*A*
Surcharge [10% on A]	*B*
Total Sales Tax payable [A + B]	*C*
Minus (-)	
Entry Tax paid	*D*
Net liability under the OST Act [C - D]	*E*

b. The aforesaid method and mode of calculation is in conformity with what has been set at rest by the Hon'ble Supreme Court in the case of *Commissioner of Commercial Taxes Vrs. Bajaj Auto Ltd., (2017) 97 VST 24 (SC).* The Hon'ble Apex Court has been pleased to hold as follows:

*"20. *** Section 5 of the OST Act provides for rate of sales tax. Section 5A of the OST Act levies surcharge on the dealer which is nothing but an additional tax. Therefore, on a plain reading of the provisions under the OST Act as well as under the OET Act, a dealer is not entitled for reduction of the amount of entry tax from the amount of tax payable before the levy of surcharge under Section 5A of the OST Act. A harmonious reading of Rule 18 of the Rules as well as Sections 4, 5, 5A of the OST Act reveals no conflict or inconsistency. ****

21. Section 5A of the OST Act is self-contained provision and the surcharge, as already seen above, is leviable at the specified per centum of tax payable under the OST Act. Tax payable under the OST Act is independent of the provisions of OET Act. The assessment or quantification or computation of surcharge shall have to be made in accordance with the provisions of the OST Act.

22. Thus, on a conjoint reading of Section 5 of the OST Act, Section 4 of the OET Act and Rule 18 of the Rules, we are of the considered

opinion that the amount of surcharge under Section 5A of the OST Act is to be levied before deducting the amount of entry tax paid by a dealer."

4. Since, all the questions raised by the dealer-appellant in his review applications have been answered as per our observations and comments above, we do not find illegality in our earlier order dt.21.12.2017, restoring the orders of the forum below for the impugned periods.

5. In view of the aforementioned discussions, the review petitions filed by the dealer-appellant, being devoid of any merit, stand rejected.

Dictated & corrected by me,

Sd/-
(Srichandan Mishra)
Accounts Member-II

Sd/-
(Srichandan Mishra)
Accounts Member-II

I agree,

Sd/-
(A.K. Das)
Chairman

I agree,

Sd/-
(S. K. Rout)
2nd Judicial Member