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

S.A. No. 30(C) of 2012-13

(Arising out of orders of the learned JCST, Sundergarh Range, Rourkela in First Appeal Case No. AA- 13 (RL-II-C) of 2010-11, disposed of on dt. 21.03.2012)

Present : **Smt. Suchismita Misra, Chairman**
Shri Subrat Mohanty, 2nd Judicial Member
&
Shri Prabhat Ch. Pathy, Accounts Member-I

M/s. Kedia Carbon Pvt. Ltd.,
At/PO- Kalunga, Dist. Sundargarh. . . . Appellant

- V e r s u s –

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

For the Appellant … Mr. K. Kurmy, Advocate
For the Respondent … Mr. M.L. Agrawal, S.C. (CT)

Date of hearing: 31.01.2019 **** Date of order: 27.02.2019

O R D E R

This appeal is directed against the order dated 21.03.2012 passed by the Joint Commissioner of Sales Tax, Sundargarh Range, Rourkela (in short, "first appellate authority") in First Appeal Case No. AA- 13 (RL-II-C) of 2010-11 confirming the order of assessment passed by the Sales Tax Officer, Rourkela-II Circle, Panposh

(in short, 'assessing officer') u/R. 12(4) of the Central Sales Tax (Odisha) Rules, 1957 (in short, 'CST (O) Rules') for the year 2005-06.

2. The facts as revealed from the case record are that the dealer-assessee named and styled as "M/s. Kedia Carbon Pvt. Ltd., Kalunga" having been registered as SSI Unit under DIC, Rourkela manufactures coal tar, pitch and all its forms for sale. In course of its business it does inter-State trade of aforesaid goods. In response to a notice issued to the dealer-assessee u/R. 12(4) of the CST (O) Rules it appeared before the assessing officer alongwith its books of account for the year 2005-06. During that relevant year the dealer had disclosed sales at `4,70,62,379.00 in course of inter-State trade against Form 'C' and as such it also furnished valid 'C' form for `4,05,53,147.93. Thus the assessing officer on verification of those 'C' forms accepted the same as those were found to be in order and imposed tax @ 1% for the said turnover. However, as the assessing officer found one of the 'C' forms bearing No. A-1/101465 dated 26.11.2005 to be defective he disallowed the same and taxed the related transaction at the appropriate rate. Further as the dealer could not furnish valid 'C' form in respect of transaction amounting to `65,09,231.07 he was taxed as such and ultimately after determining its (dealer-assessee's) GTO and NTO and allowing deduction towards sales tax collected etc. the assessing officer

passed an order requiring the dealer to pay a sum of `7,48,410.00 and accordingly issued a demand notice to that effect.

Being aggrieved with the said order the dealer-assessee though preferred an appeal challenging the same before the first appellate authority, yet did not appear before the first appellate authority despite notice served on it for which the matter was heard exparte and ultimately the first appellate authority confirmed the order of assessment while rejecting its appeal.

3. The dealer-assessee being dissatisfied with the manner of disposal of his appeal as well as the order passed by the first appellate authority came up with the present appeal before this Tribunal challenging the order of the first appellate authority as bad in law and on facts. It further submitted that the dealer-appellant was not given the opportunity of being heard in the matter. It is contended by the learned Counsel appearing on behalf of the dealer-appellant that the dealer being an SSI Unit sold its finished goods i.e. coal tar and creosote oil in course of inter-State trade and commerce which were exigible to tax @ 1% against 'C' form as per Finance Department Notification No. 14700 dated 31.03.2001 w.e.f. 01.04.2001. The said goods are exigible to tax @ 4% as per Sl. Nos. 19 and 44 of Schedule-B of the Rate Chart under the OVAT Act w.e.f. 01.04.2005. Therefore, the sale turnover of the dealer-appellant for the year 2005-06 under the CST Act for

`65,09,231.07 which were taxed @ 12.5% as provided u/S. 8(2)(b) of the CST Act instead of @ 10% is wrong and against the statutory provisions of relevant law. That apart the dealer-appellant was prevented from furnishing two numbers of 'C' form for `43,46,807.00 which were received by it after passing of the order of assessment and before disposal of appeal as the notice was not served on him properly. As a result of this the dealer-appellant suffered wrong so far as its tax liability is concerned.

4. The State-respondent filed its cross-objection mentioning therein that the second appeal preferred by the dealer is not maintainable since the assessing officer had rightly completed the assessment basing upon the statutory provisions under the Act and Rules which was again rightly confirmed by the first appellate authority.

5. Admittedly the impugned order was passed exparte in the instant case. In course of hearing the appeal learned Counsel appearing on behalf of the dealer-appellant submitted that in this case the order of assessment has to be considered as non est in the eye of law because the same was barred by limitation. He pointed out that in the instant case the order of assessment was passed on 31.03.2009 pertaining to the assessment period 2005-06 and the same was issued on 31.12.2009 which was received by the dealer-appellant in January,

2010. Nowhere the State explained as to why there was delay of nearly ten months in service of the order of assessment upon the dealer-assessee. In the circumstances the said order of assessment having been served on the dealer-assessee after the period of three years which would be computed from the year of assessment has to be taken as barred by limitation. The said period of limitation i.e. three years which was in vogue prior to 01.08.2009 was substituted as five years only w.e.f. 01.08.2009 by Central Sales Tax (Orissa) Amended Rules, 2009 vide Notification No. 36275-CTA-33/2009 (SRO No. 286/2009) dated 01.08.2009 (OGE No. 1115 dated 01.08.2009). Therefore, he urged before the Court that the aforesaid order of assessment being illegal and void cannot bind the dealer-assessee with any tax liability. Apart from this he also argued that rejection of Form 'C' for Q/e. 03/2005 was bad in law and contrary to Circular No. III (I) 38/09-8445/CT dated 24.05.2014 issued by the Commissioner of Commercial Taxes, Odisha and judgment of this Tribunal passed in S.A. No. 25 (C) of 2005-06 dated 31.08.2019 (OCL India Ltd. Vs. State of Odisha). He also argued in alternatively that the goods in question were taxable @ 4% under Sl. Nos. 19 and 44 of the Schedule-B of the OVAT Act but the assessing officer taxed the same @ 12.5 and erred grossly in the matter.

6. In reply to the aforesaid contentions advanced by learned Counsel for the dealer, learned Standing Counsel (CT) appearing on behalf of the State submitted that the dealer-assessee had never raised any issue before the first appellate authority regarding the validity of the order of assessment on the point of limitation. It had never opposed the order of assessment on the ground that the same was barred by limitation on account of its being passed after three years from the period of assessment as it contends before this forum at present. On the other hand, the order of assessment reveals that the same was passed on 31.03.2009 pertaining to the period of assessment 2005-06 i.e. within three years from the period of assessment. Therefore, the dealer-assessee is precluded from raising this issue for the first time before this Tribunal in the second appeal taking the State-respondent by surprise. Apart from this learned Standing Counsel (CT) for the State also submitted that the order of assessment is absolutely correct and confirmation of the same by the first appellate authority is also justified because of the reason that the dealer-assessee had never bothered to appear before the first appellate authority for hearing of its appeal despite opportunity given to it to controvert the order of assessment.

7. Regarding applicability of law on limitation in respect of the order of assessment learned Counsel for the dealer-asseessee

cited some decisions of Hon'ble Apex Court and Hon'ble Courts. On perusal of the decision rendered by the Hon'ble Apex Court in the case of State of Andhra Pradesh Vs. M. Ramakishtaiah & Co., reported in [1994] 93 STC 406 (SC), it is found that in the said case the order of assessment was passed on January 6, 1973 but the same was served on the assessee on November 21, 1973 (10½ months later) and there was no explanation from the Deputy Commissioner why it was so delayed. It is also made clear by the Hon'ble Apex Court in the above decision that if there had been proper explanation it could have been a different matter. Thus, in absence of any explanation whatsoever Hon'ble Apex Court emphasized that there must be a presumption that the order was not made on the date it purports to have been made. Accordingly it was held that the order was bad.

Similarly in the judgment rendered in the case of Sanka Agencies Vs. Commissioner of Commercial Taxes, Hyderabad, reported in [2005] 142 STC 496 (AP), by Hon'ble High Court of Andhra Pradesh it is held that the court should presume that the order was not made on the date it was purported to have been made if the delayed service of the order has not been explained. Relying on the aforesaid judgments of Hon'ble Apex Court and Hon'ble High Court of Andhra Pradesh, our Hon'ble High Court of Orissa in the case of Chandrika Sao Vs. Sales Tax Officer, Balasore Range, Balasore and another, reported in

[2015] 81 VST 86 (Ori.), quashed the assessment order as well as the consequential demand notice thereof observing therein that –

Quote- "In the instant case, there is no explanation for the delay of more than four months caused in issuing the assessment order to the petitioner except stating that due to clerical mistake there has been a delay of four months. Nothing has been stated in detail as to when the order of assessment has been handed over to the dispatch section and who is responsible for such delay. Therefore, we have no hesitation to hold that the order of assessment under annexure-1 was not made on the date it was purported to have been made. In order to give an impression that the impugned order of assessment was passed within the period of limitation, the order bears the date June 18, 2008 whereas it has been passed much later that." Unquote.

8. In the present case there was delay of nine months in service of the order of assessment on the dealer-assessee though the said order was said to have been passed on 31.03.2009 i.e. just on the last day of completion of three years from the year of assessment. There is absolutely no explanation offered from the side of the State as to why there was this delay in service of the said order on the dealer-assessee. Under such circumstance keeping in view the ratios decided by the Hon'ble Apex Court and Hon'ble Courts in the above cited cases as well as our Hon'ble High Court in the case of Chandrika Sao (supra), it has to be held that the order of assessment is bad in law and it has to

be treated as non est in the eye of law since deficiency so far on the point of limitation is concerned goes to the root of the case.

9. Thus, as per the discussion made in the foregoing paragraphs it is found that the order of assessment cannot be considered as legal and valid and therefore, any finding on other issues raised by the dealer-appellant challenging the impugned order seem to be redundant in the circumstances of the case.

10. In the result, the appeal is allowed. The impugned order of the first appellate authority is hereby set aside. The order of assessment for the relevant period alongwith the demand notice pertaining to the said period is quashed. Excess tax paid, if any, be refunded to the dealer-appellant as per the provisions of law. Cross-objection is disposed of accordingly.

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

Sd/-
(Subrat Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Prabhat Ch. Pathy)
Accounts Member-I