BEFORE THE JUDICIAL MEMBER-I: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 72(C) of 2017-18

(Arising out of the order of the ld. JCST, Sambalpur Range, Sambalpur, in First Appeal Case No.AA 32/BGH/CST/2015-16, disposed of on dtd.04.07.2017)

P r e s e n t: **Shri S. Mohanty,**
1st Judicial Member

M/s. Ramawatar Hanumanprasad,
At/P.O.- Sohela,
Dist.- Bargarh-768033. ... Appellant

- V e r s u s -

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

For the assessment period: 01.04.2006 to 31.12.2010

For the Appellant ... Mr. B.N. Agarwal, Advocate
For the Respondent ... Mr. M.L. Agarwal, S.C.

Date of hearing: 12.07.2019 ******** Date of order: 12.07.2019

O R D E R

Legal sustainability of an order of assessment passed u/s.12(4) of the Central Sales Tax (Orissa) Rules, 1999 (hereinafter referred to as, CST(O) Rules) covering the period of assessment from 01.04.2006 to 31.12.2010 passed on 20.04.2014 by the assessing authority and confirmed on 04.07.2017 by the first appellate authority in appeal before him is under challenge in this second appeal by the assessee-dealer as not maintainable in law since very initiation of assessment is wrong and assessment order is barred by limitation as well, hence prayed for deletion of the demand by setting aside the order of first appellate authority.

2. The dealer was assessed u/r.12(4) of the CST(O) Rules on the basis of report of the A.G. Audit Team, Odisha. As per the observation of the A.G. Audit Team, the dealer had escaped assessment which was confirmed by the assessing authority in his assessment order to the extent that, the dealer has not paid any tax towards CST sale, the dealer has not submitted any declaration form 'C', so, after adjustment of VAT collected the balance CST due was raised against the dealer to the tune of Rs.2,12,223.00. The assessment order was challenged before the first appellate authority and the first appellate authority dismissed the first appeal before him summarily for non-deposit of 20% of the disputed amount before him. Thereafter, the dealer had preferred second appeal before this Tribunal and this Tribunal had remanded the matter to the first appellate authority with a direction to verify if there was deposit of 20% and if the first appellate authority just ignored the fact of deposit and rejected the appeal before him summarily or not? In remand appeal, the first appellate authority on verification found that, the dealer had actually deposited 20% of the demand, so he decided the appeal on merit but, in the result he confirmed the order of assessment. However, after adjusting the deposit already made, the demand became reduced to Rs.1,12,198.00.

3. When the matter stood thus, the dealer preferred this second appeal. The main contentions of the dealer before this Tribunal are questions of law goes to the root of the assessment, such as the initiation of escaped assessment u/r.12(4) of the CST(O) Rules in this case is not maintainable as it is not preceded by any audit assessment u/r.12(3) of the CST(O) Rules. Further, there was no clear-cut thirty days period notice given to the dealer by the assessing authority for the purpose of assessment and the assessment order was an antedated one as even though the assessing authority posted the case before him for a future date i.e. 24.04.2014 for hearing but, he has passed the order on 20.04.2014 in absence of the dealer i.e. the date

the case was not posted before him. Further, since the period of assessment covers from 01.04.2006 to 31.12.2010 it is also contended that, the assessment is barred by limitation under the law as it was effective previous to the amendment from 06.07.2006 and even as per the new law as per the amendment also.

4. The appeal is heard with Cross Objection from the side of the Revenue supporting the order of first appellate authority.

5. **Finding:-**

This is a second of round of litigation by the dealer. Being unsuccessful before both the authorities below, the dealer has challenged the sustainability and maintainability of the order of assessment on the plea that, mandatory provisions under law were not complied by the assessing authority and such violation goes to the root of the assessment for which the assessment should be vitiated. Counsel for the dealer Mr. B.N. Agarwal, placed reliance in the matter of **Delhi Footwear Vrs. STO (2015) 77 VST 146 in W.P.(C) No.2971 of 2009**, decided on 25.09.2014, **M/s. Balaji Tobacoo Store Vrs. Sales Tax Officer, Cuttack I East Circle, Cuttack; (2015) 81 STC 170**, **Bijay Metal Works Vrs. State of Odisha in S.A. No.114(V)/2014-15**, **Jayshree Chemicals Ltd. Vrs. State of Odisha in W.P.(C) No.2777/2008**, **Chandrika Sao Vrs. STO (2015) 81 VST 86 (Orissa)** and **Ambika Bricks Vrs. State of Odisha**.

To appreciate the grounds in appeal and the submission advanced by the learned Counsel, the provision u/r.12(4) of the CST(O) Rules as substituted w.e.f. 06.07.2006 of the CST(O) Rules needs to be looked into and the provisions are reproduced herein below-

> "*(4)(a)* Where, after a dealer is assessed under sub-rule (1), (2) or (3) for any period, the assessing authority, on the basis of any information in his possession, is of the opinion that the whole or any part of the turnover of the dealer in respect of any period or periods has escaped assessment, or has been under-assessed, or has been assessed at a rate lower than the rate at which it is assessable or that the dealer

has been allowed wrongly any deduction from his turnover or exemption under the Act or has been wrongly allowed set off of input tax credit in excess of the amount admissible under clause (c) of sub-rule (3) of Rule 7 of these rules, he shall serve a notice in Form IVA on the dealer.

(b) The hearing of the dealer shall be concluded in accordance with the provisions of clauses (b) and (d) of sub-rule (3).

(c) The assessing authority shall, after hearing the dealer in the manner specified in clause (b), assess the amount of tax payable by the dealer in respect of such period or periods for which assessment proceedings has been initiated and if he is satisfied that the escapement is without any reasonable cause, he may direct the dealer to pay, by way of penalty, a sum equal to twice the amount of tax additionally assessed.

(d) Where a dealer fails to comply with the requirements of the notice referred to in clause (a), the assessing authority may make an *ex parte* assessment of the tax payable by such dealer and pass an order of assessment in writing, after recording the reasons therein.

(e) No order of assessment shall be made under this sub-rule after expiry of five years from the end of the period in respect of which the tax is assessable."

The provision u/r.12(4a) as it revealed for escape assessment, there must have been an assessment under sub-rule (1), (2) or (3) which should have been preceded to the escaped assessment.

6. Counsel for the dealer argued that, in absence of any provisional assessment or audit assessment, the escaped assessment u/r.12(4) has no legs to stand and the ratio laid down by the Hon'ble Court in M/s. Balaji Tobacoo Store (supra) is squarely applicable to the case in hand. On the other hand, he has placed reliance on many decisions to show that, the assessment order was an antedated one for which, it is not sustainable in law. Learned Counsel draws the attention of the Bench to the LCR. On perusal of the LCR as it revealed, the assessment order shown to have passed on 20.04.2014 then was issued on 31.05.2015 i.e. after 16 months and then, dispatched on

09.10.2015 i.e. again five months thereafter and ultimately served on the dealer on 12.10.2015. This itself indicates the order was not prepared on the date it is shown to have prepared by the assessing authority.

As per the LCR, the assessing authority issued notice in form IVA vide memo No.5946 dtd.21.08.2013 by posting the hearing of the case to 24.09.2013. On 16.09.2013, the case record was again posted on the prayer of the dealer, whereby the dealer had prayed for supply the copy of the A.G. Audit objection. Thereafter, vide memo No.613 dtd.21.02.2014, the dealer was noticed fixing the hearing of the case on 04.03.2014. On 04.03.2014, the dealer filed preliminary objection and received copy of the A.G. Audit. Thereafter, the case was adjourned to 24.04.2014 but, in the meanwhile on 20.04.2014 final order was passed. The order-sheet does not reveal any order dtd.20.04.2014, whereas the case record was posted on 24.04.2014 and in presence of the counsel for the dealer, the order-sheet of 24.04.2014 reads as follows:

> "The Advocate for the dealer appeared & hearing completed."

If the hearing was completed on 24.04.2014 then, how it could be possible to pass the order on 20.04.2014 i.e. four days before the date of hearing. Learned Counsel strenuously argued that, adjournment for three times as required u/r.12(3)(d) was not provided. The order is antedated, even the dealer was not given proper opportunity of being heard, there was clear violation of principle of natural justice to the dealer, further the order is passed beyond the period of limitation.

7. All the points of argument advanced by the learned Counsel for the dealer have considerable force and on perusal of the LCR, I am of the considered view that, the assessing authority has dealt the present case before him in a casual manner remaining callous to the mandatory provisions. It is evident that, the case was

handled in a careless manner. It is manifest on the record that, orders are passed as per the sweet whim of the assessing authority and the order-sheet does not tally with the date of order. All these defects only lead to a conclusion that, in the case in hand, there was clear-cut violation of the principle of natural justice by not extending proper opportunity of being heard to the dealer. The order is antedated one, the order is barred by limitation. On the other hand, if we look at the order of the first appellate authority, the first appellate authority has not discussed anything raised before him in the grounds of appeal by the dealer. He has only confirmed the order of the assessing authority but adjusted the tax already paid in between. So, the first appellate authority is also found to be casual. So, to sum up, here it can only be said that, the assessment proceeding and before the assessing authority and thereafter the proceeding before the first appellate authority are being dealt with by the officer in a very casual manner with utter disregard to the mandate of law.

8. In the result, the irresistible conclusion is, the entire assessment proceeding has no legs to stand in law, hence vitiated.

Accordingly, it is ordered.

The appeal is allowed on contest. The impugned order is set aside. The order of assessing authority being barred by limitation, the entire assessment order is found not sustainable and enforceable in law.

Dictated & corrected by me,

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

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