**BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK**

**S.A. No. 987 of 2006-07**
**&**
**S.A. No. 195 (ET) of 2006-07**

(Arising out of orders of the learned ACST, Sundargarh Range, Rourkela in First Appeal Case Nos. AA- 281 (RLI)/2005-06 & AA- 115 (RLI)ET/2005-06, disposed of on dated 28.06.2006)

Present: **Shri A.K. Das, Chairman**
**Shri S.K. Rout, 2nd Judicial Member**
**&**
**Shri M. Harichandan, Accounts Member-I**

M/s. Ferro Scrap Nigam Ltd.,
Inside RSP, Rourkela ... Appellant

-Versus-

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

For the Appellant : Sri Basudev Panda, Sr. Advocate
& Sri Bivash Panda, Advocate
For the Respondent : Sri D. Behura, S.C. (CT) &
Sri M.S. Raman, Addl.SC (CT)

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Date of hearing: 27.12.2021 *** Date of order: 04.01.2022

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**O R D E R**

Both these appeals involve common question of facts and law for which they are taken up together and disposed of by this common order.

2. The dealer-appellant has preferred S.A. No. 987 of 2006-07 assailing the order dated 28.06.2006 passed

by the learned Asst. Commissioner of Sales Tax, Sundargarh Range, Rourkela (hereinafter called as 'first appellate authority') in Appeal Case No. 281 (RLI)/2005-06 thereby confirming the order of assessment dated 21.02.2006 passed by the Sales Tax Officer, Rourkela-I Circle, Uditnagar (in short, 'assessing authority') raising tax demand of ₹38,51,836.00 including surcharge of ₹3,50,217.24 for the assessment period 2002-03 by invoking power u/s. 12(8) of the Odisha Sales Tax Act, 1947 (in short, 'OST Act').

3. It has also preferred S.A. No. 195 (ET) of 2005-06 challenging the order dated 28.06.2006 passed by the same first appellate authority in Appeal Case No. AA-115 (RLI)ET/2005-06 thereby confirming the order of the assessing authority raising tax demand of ₹5,03,770.00 by invoking power u/s. 9 of the Odisha Entry Tax Act, 1999 (in short, 'OET Act') relating to the same assessment period.

4. The relevant facts leading to the filing of the present second appeals are that the dealer-appellant, who is a works contractor, engaged in execution of works relating to crushing for recovery of materials and scraps from slag as per agreement entered into with SAIL, RSP, Rourkela. The dealer-assessee was originally assessed u/s. 12(5) of the OST Act, which was reopened u/s. 12(8) of the OST Act

consequent upon the objection raised by the A.G. Audit. The A.G. Audit pointed out that the appellant-Company received ₹9,54,98,660.93 towards processing, salvages and services charges. The appellant having failed to furnish the details of expenditure incurred towards spare parts, it was not entitled to deduction on this score as the value of property worth ₹2,58,27,865.72 had been transferred to the contractee, i.e. SAIL, RSP in course of execution of works. Further, the expenditure of ₹1,79,49,579.76 for the services obtained from various agencies such as M/s. Central India Associates, Bhilai; M/s. Satyanarayan Agencies, Rourkela; and M/s. Delta Security Services, was not deductible as the expenditure incurred on such agencies had not been stipulated in the agreement entered into with the contractee. So, in the absence of documentary proof in support of the expenditure incurred towards spare parts and in the absence of agreement towards expenditure towards services obtained from other agencies, the reassessment was completed raising tax demand of ₹38,51,836.00.

Similarly in the assessment proceeding u/s. 9 of the OET Act relating to the period 2002-03, learned assessing authority took into consideration the objection raised by the A.G. Audit and held that the allowance of

₹2,52,28,512.00 as entry tax paid goods from the GTO was irregular since the dealer failed to produce the purchase details of entry tax paid thereby resulting in short levy of tax of ₹5,03,770.24 and thus, he computed the tax liability accordingly under the OET Act.

4(a). The dealer-appellant challenging the aforementioned findings of the assessing authority preferred appeals before the first appellate authority, who also on scrutiny of the materials on record concurred with the findings of the assessing authority and confirmed the orders of assessment raising tax demands of ₹38,51,836.00 by exercising power u/s. 12(8) of the OST Act and ₹5,03,770.00 by exercising power u/s. 9 of the OET Act. The dealer-Company being further aggrieved with the orders of the first appellate authority preferred present second appeals before this forum.

5. Learned Senior Counsel for the dealer-appellant challenged the orders of the forums below mainly on the ground that the assessing authority without recording any reason illegally reopened the proceeding u/s. 12(8) of the OST Act and there being no taxable event, imposition of tax in respect of service contract is illegal, arbitrary and against sanction of law. He also challenged the

tax demand of ₹5,03,770.00 raised under the OET Act on the ground that the purchases were locally made and nothing was brought from outside into the local area for the purpose of consumption, use and sale. Therefore, the order raising entry tax of ₹5,03,770.00 was illegal, arbitrary and against settled principles of law. It was vehemently urged by the learned Counsel for the dealer-appellant that the assessment was reopened without independent application of mind and without recording its satisfaction by the assessing authority. The assessing authority issued statutory notice after reopening the case u/s. 12(8) of the OST Act. The assessing authority while issuing notice should have disclosed the reason to believe on the basis of which it decided to reopen the assessment u/s. 12(8) of the OST Act. The assessing authority as well as the first appellate authority passed the impugned order of assessment in a mechanical manner raising tax demand under the OST Act as well as under the OET Act when there was no tax liability against the present dealer. The dealer-appellant entered into a service contract with the SAIL, RSP and it received gross payment towards execution of the works contract. There being no transfer of property in goods, there is no sale and accordingly, there is also no tax liability

due against the dealer-appellant. Similarly, there being no entry of goods into the local area, no tax liability arose under the OET Act. The fora below have passed the impugned orders in a very casual and irresponsible manner fixing the liability on the dealer-appellant. The orders of the forums below being contrary to settled position of law, the same needs to be interfered with by this Tribunal.

6. Per contra, learned Standing Counsel (CT) representing the State supporting the impugned orders of assessment passed u/s. 12(8) of the OST Act and u/s. 9 of the OET Act vehemently urged that the audit objection is a good ground to reopen the proceedings u/s. 12(8) of the OST Act and u/s. 9 of the OET Act. The assessing authority while reopening the case specifically mentioned in the order sheet about the audit objection and his suggestion thereof to reopen the proceeding u/s. 12(8) of the OST Act. The dealer-appellant accepting the notice participated in the assessment proceeding as well as in the appeal before the first appellate authority where he did not raise any such question. He further argued that this is a case of under assessment which is different from escapement proceeding. The dealer-appellant could not produce any document to substantiate its claim that the amount received by him

towards execution of works contract was not taxable being receipt of the amount towards services rendered by it and there is no entry of goods into the local area from outside the same, which is the mandate of Section 3 of the OET Act for raising entry tax demand. In support of his contention, he relied upon the decisions reported in [1973] 32 STC 98; [2004] 14 VST 509; [1993] 89 STC 102 and the order dated 20.09.2013 passed by this Tribunal in S.A. No. 1342 of 2002-03.

7. We have heard the rival submissions of the parties, gone through the grounds of appeal, impugned orders of the fora below vis-a-vis the materials on record. The following two questions emerge for consideration from the rival submissions of the parties :-

(i) Whether in the facts and circumstances of the case, the assessing authority was correct in its approach to reopen the proceeding u/s. 12 (8) of the OST Act ? and

(ii) Whether the assessing authority was correct in its approach in raising tax demand under the OST Act in respect of the gross payment received towards execution of works contract and raising tax demand under the OET Act for the purchases made by him ?

8. The first issue relates to the jurisdiction of the assessing authority to reopen the assessing proceeding u/s. 12(8) of the OST Act, for which the same is taken up first for adjudication. Before answering the first issue involved in the present appeal, i.e. whether the assessing authority was correct in its approach to reopen the assessment proceeding u/s. 12(8) of the OST Act basing on the objection of A.G. Audit, it is profitable to refer to the provisions contained u/s. 12(8) of the OST Act, which reads thus :-

> "(8) If for any reason the turnover of a dealer for any period to which this Act applies has escaped assessment or has been under assessed or where tax has been compounded when composition is not permission under this Act and the Rules made thereunder, the Commissioner may at any time within five years from the expiry of the year to which that period relates call for return under sub-section (1) of Section 11 and may proceed to assess the amount of tax due from the dealer in the manner laid down in sub-section (5) of this Section and may also direct, in cases where such escapement or under assessment or composition is due to the dealer having concealed particulars of his turnover or having without sufficient cause has furnished incorrect particulars thereof, that the dealer shall pay, by way of penalty, in addition to

the tax assessed under this sub-section, a sum equal to one and a half times of the said tax so assessed."

9. It is crystal clear from the provisions contained u/s. 12(8) of the OST Act, the Commissioner may at any time within a period of five years may proceed to assess the amount of tax due to the dealer in the manner laid down in sub-section (5) of the said section where for any reason the turnover of the dealer for any period to which this Act applies has escaped assessment or has been under assessed or has been compounded when the composition is not permissible under the Act and the Rules made thereunder. The section does not say that the authority has to record the reason for reopening the assessment u/s. 12(8) of the OST Act. The Hon'ble Court in the case of **M/s. D. Ch. Guruvalu Son & Co. Vs. Sales Tax Officer, Koraput-II Circle, reported in [2008] 14 VST 509 (Ori.)** in para-18 of the judgment observed that the assessing officer must have to record reasons in some form before initiation of proceeding u/s. 12(8) of the Act. He must at least indicate the basis for prima facie conclusion that there has been escapement or under assessment. In absence of such finding, initiation of proceeding u/s. 12(8) is not sustainable in the eye of law. Reliance was placed on the decisions

reported in [1993] 90 STC 280 (Ori.) in the case of Suburban Industries Kalinga Pvt. Ltd. Vs. Sales Tax Officer, Bhubaneswar; [2006] 148 STC 61 (Ori.) in the case of Indure Ltd. Vs. Commissioner of Sales Tax; and in [1993] 91 STC 76 in the case of State of Orissa Vs. Ugratara Bhojanalaya. It was further observed in the said judgment that if the dealer responds and participates in the proceeding, it is open to him to seek for the reasons which necessitated the reopening of the proceeding. At that stage, the assessing officer cannot take the plea that the reasons are not to be indicated. If he is in possession of the materials which he proposes to use against the dealer in the proceeding for re-assessment, he must before using the materials bring them to the notice of the dealer and give them adequate opportunity to explain and answer the case on the basis of those material. Reliance was also placed on the decision in the case of **Sales Tax Officer, Ganjam Vs. Uttareswari Rice Mills, reported in [1972] 30 STC 567**. In view of such settled position of law as laid down by the Hon'ble Court, the assessing authority is required to indicate the reason of reopening the proceeding u/s. 12(8) of the OST Act. In the instance case, it is found from the order sheet filed by the dealer-appellant that the assessing authority has

categorically mentioned that on examination of the report it found prima facie evidence of under assessment of tax to the tune of ₹38,51,836.00 under the OST Act and ₹5,03,770.00 under the OET Act. The reason assigned by the assessing authority is good reason to reopen the proceeding U/S. 12(8) of OST Act. Learned Senior Counsel for the dealer-appellant relying upon the judgment of the Hon'ble High Court of Orissa in the case of Fyaro Transformers, Balasore Vs. State of Orissa in STREV Nos. 16, 17 & 18 of 2009 disposed of on 24.11.2021 vehemently urged that the assessing authority having not examined the materials on record independently and having not recorded his satisfaction for reopening the case, the impugned order of assessment by exercising power u/s. 12(8) of the OST Act is without jurisdiction and unsustainable in the eye of law. Perused the judgment dated 24.11.2021 passed in STREV Nos. 16, 17 & 18 of 2009 by the Hon'ble High Court of Orissa. With due respect we are of the unanimous view that the facts and circumstances of the case relied upon by the learned Senior Counsel for the appellant is quite different and distinguishable from the facts of the present case. In the cited case, this Tribunal agreed with the petitioner-assessee that reopening of assessment was not based on any material independently

examined by the STO, but in the instant case the assessing authority has recorded his satisfaction regarding reopening the case basing on A.G. Audit objection. The document filed by the appellant before this Tribunal clearly indicate that some of the purchases were made from outside the local area which are undisputedly taxable u/s. 3 of the OET Act. The A.G. Audit objection with regard to under assessment based on the existing materials on which the initial assessment was made. No new material was taken into consideration for reassessing the dealer-appellant. So, no prejudice was caused to him as reassessment was on the basis of material on which the dealer-assessee relied on. There is clear distinction between under assessment and escapement of assessment. The case in hand is a clear case of under assessment which is apparent from the materials on record which were taken into consideration at the time of original assessment. So, the assessing authority cannot be faulted with in recording his satisfaction for reopening the case basing on the A.G. Audit objection. Therefore, the contention raised by the learned Senior Counsel must fall to the ground. This Tribunal also in the case of M/s. Larsen & Toubro Ltd. Vs. State of Odisha in S.A. No. 1342 of 2002-03 disposed of on 20.09.2013 while dealing with similar issue

observed that the appellant was given reasonable opportunity of hearing and he participated in the proceeding before both the forums below and at the time of assessment, he submitted written submission and requested for exclusion of sales tax collected which had been raised in the audit report. So, the reasons for reopening assessment were open before him at the time of assessment. Therefore, keeping in view the circumstances of the case, we feel that the dealer was given adequate opportunity and reasons for assessment were made known to him. The assessing authority so observing issued notice u/s. 12(8) of the OST Act. In view of such mention of the reason for initiation of the proceeding u/s. 12(8) of the OST Act, the assessment order cannot be said to be illegal and in contravention of the provisions contained u/s. 12(8) of the OST Act. The dealer in pursuance of such notice issued u/s. 12(8) of the OST Act, appeared before the assessing authority and participated in the assessment proceeding. Therefore, it cannot be said that he was not aware of the basis for initiation of proceedings u/s. 12(8) of the OST Act or u/s. 9 of the OET Act. The assessing authority as well as the first appellate authority did not commit any illegality in proceeding against the dealer-appellant u/s. 12(8) of the OST Act basing on the

audit objection. So, in view of the foregoing discussions, the first issue is answered in favour of the State and against the dealer-appellant.

10. The second issue raised by the dealer-appellant as to whether the assessing authority was correct in its approach in raising tax demand of ₹38,51,836.00 under the OST Act and ₹5,03,770.00 under the OET Act. The record reveals that the dealer-appellant is a works contractor, who executed works relating to crushing for recovery of materials and scraps from slag as per the agreement entered into with SAIL, RSP, Rourkela. As per the agreement, the appellant-Company shall crush for recovery of metallics and scrap from all currently produced slag from Rourkela Steel making shops and furnaces, from miscellaneous iron arising from blast furnace operations, as well as from other metal containing debris and general refuse, SAIL, RSP at its costs shall take in its thimbles of the currently produced slag, debris and general refuse to the appellant's plant and shall place it alongside the SAIL, RSP dumping pits in such position that the thimbles can be tipped by the electrically operated equipment installed and maintained by the SAIL, RSP. Any large pieces of scraps on flat cars delivered to the appellant by SAIL, RSP for

processing shall be unloaded by the dealer-appellant. The dealer will accept sticker thimbles for further handling if made available to them in flat cars. In view of the nature of works executed by the dealer-appellant and in view of the terms and conditions of the contract, we are of the unanimous view that the contract between the dealer-appellant and SAIL, RSP is purely a service contract and there is no transfer of property in goods for attracting tax liability under the OST Act. In course of hearing of the second appeal, learned Standing Counsel (CT) fairly conceded that there is no taxable event for attracting the provisions of OST Act. So, in view of such submission of the learned Standing Counsel (CT) for the State and in view of the nature of works contract entered into between the parties, the order of the assessing authority raising tax demand of ₹38,51,836.00 under the OST Act which has been confirmed by the first appellate authority cannot be sustained in the eye of law. Both the forums below have committed serious illegality in raising tax demand of ₹38,51,836.00 under the OST Act in respect of service contract entered into between the dealer-appellant and SAIL, RSP, Rourkela. Further, it is found from the copy of the order dated 17.04.1995 passed in S.A. Nos. 1678 & 2006 to

2010 of 1988-89 and order dated 18.11.1995 passed in Ref. Application No. 220 to 225 of 1995-96, similar issue came up before this Tribunal in which the present dealer-appellant was exonerated from the tax liability holding that the transaction in question was purely arising out of a service contract for which any amount received by it was not taxable under the OST Act. The forums below have not properly examined the contract entered into between the parties and on erroneous appreciation of fact and law raised tax demand of ₹38,51,836.00 under the OST Act for which the same is not sustainable in the eye of law and needs interference of this Tribunal.

11. But, so far as entry tax is concerned, the dealer-appellant is liable to pay entry tax in respect of the goods brought from outside local area into the local area. It was vehemently urged by the learned Counsel for the dealer-appellant that all the purchases were made within the local area and to substantiate his contention, he filed a statement showing details of purchases made during the period in question. On verification of such statement, though it is found that many of the purchases have been made within the local area, it is difficult to ascertain the correctness of the document filed by the dealer-appellant without

verification of the books of account. The document filed by the dealer-appellant is a self-serving document, the authenticity of which can be ascertained only after proper verification of books of account. Therefore, on the basis of this document, it cannot be said that all the purchases were made within the local area. The statement reveals some purchases were made from outside the local area which were taxable u/s. 3 of the OET Act. So, in view of this position, it would be just and proper to send back the matter relating to the raising of tax demand of ₹5,03,770.00 under the OST Act to the assessing authority to verify the authenticity of document filed by the dealer-appellant before this forum with the books of account and recompute the tax liability under the OET Act.

12. In view of the foregoing reasons, S.A. No. 987 of 2006-07 filed under the OST Act is allowed and the orders of the forums below raising tax demand of ₹38,51,836.00 are hereby set aside. But so far as S.A. No. 195 (ET) of 2006-07 filed under the OET Act is concerned, the orders of the forums below are hereby set aside and the matter is remitted back to the assessing authority to recompute the tax liability of the dealer-appellant under the OET Act for the period 2002-03 keeping in view the

observations made herein above within three months from the date of receipt of this order.

Dictated & Corrected by me

Sd/-
(A.K. Das)
Chairman

Sd/-
(A.K. Das)
Chairman

I agree,

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

I agree,

Sd/-
(M. Harichandan)
Accounts Member-I