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

S.A.Nos.127 & 128 (ET) of 2007-08

(From the order of the learned ACST, Sambalpur Range, Sambalpur, in Appeal case Nos.AA-512 & 513(SAII-ET) 06-07, Dated 30.05.2007)

Present: ... **Suchismita Mishra, Chairman.**

... **Sri Subrat Mohanty, 1st. Judicial Member**
&
... **Sri R.K.Pattnaik, Accounts. Member-III.**

M/s.ACC Limited, Bargarh Cement Works,
(Formely known as M/s.IDCOL Cement Ltd.)
At: Cement Nagar, PO. Bardol,
Dist.Bargarh. ... Appellant.

- V e r s u s –

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

For the Appellant ...Mr.S.Ray & Mr.K.K.Sahoo, Advocates.
For the Respondent ...Mr.M.L.Agarwal, Ld.S.C.(C.T.).

Period of Assessments:- 2002-03 & 2003-04

Date of hearing: 29.08.2019 *Date of Order:05.09.2019

O R D E R

Both the appeals above relating two consecutive tax period i.e. 2002-03 and 2003-04 relating to the assessee-dealer, involves same identical questions of decisions, hence, taken up together and decided by this common order for sake of convenience and waived conflicting order, if any.

2. The dealer M/s.ACC Ltd. Bargah formely known as IDCOL Cement Ltd. engaged in manufacturing and sale of

cement for the assessment years 2002-03 and 2003-04. The dealer was originally assessed but at a latter period on the basis of objection from A.G. Audit Unit, the assessment under OST Act as well as OET Act for the said assessment period were re-opened. The A.G. Audit Team has reported about under assessment for non-levy of ET on PVC box, plant, machinery, spare parts vide its order dated 09.02.2007, the STO, Bargarh Circle, the assessing authority determined the escaped turnover under OET Act and then raised demand of tax for the years 2002-03 and 2003-04 of Rs.7,91,538.89 & Rs.9,23,410.00 respectively and penalty of Rs.15,83,077.00 & Rs.18,46,820.00 respectively thereby, totalling the demand at Rs.23,74,617.00 and Rs.27,70,230.00 respectively.

3. Being aggrieved, the dealer carried the matter before the first appellate authority who in turn in confirming the order dated 14.02.2007 upheld the demand raised by the assessing authority when the matter stood thus, the assessee as the appellant preferred the present appeal with a prayer to vitiate the proceeding and in alternative deleted the demand towards tax and penalty.

It is contended by the dealer that the re-assessment in the case in hand is barred by limitation as the original reassessment bearing No.9419 dated 19.09.2005 was issued after the period of limitation for three years as required under Section 9(1) of the OET Act (the then provision for re-assessment). It is also contended that, the assessment was re-opened mechanically without any independent opinion of the assessing authority hence this being a re-assessment by mere change of opinion, is not sustainable in law. Besides, it is alleged that, the entire allegation of escapement turnover is actually revenue neutral as the ET to be paid should be adjusted in the set-off in accordance to Section-26 of the Act and Rule-19 of the OET Rules. Lastly, it is contended that the penalty as imposed is not applicable to the assessment for the period under

assessment and the penalty without any mensrea is otherwise also not warranted.

4. The appeal is heard without cross objection.

The questions framed for decision in this appeal are that:-

(i) Whether the re-assessment, so far initiation and completion both are barred by limitation under law?

(ii) Whether, the re-assessment is not sustainable in law as the assessment was opened mechanically without formation of independent opinion by the assessing authority?

(iii) Whether, the dealer is not liable to pay tax keeping view the fact he is entitled to claim set off?

Findings:-

5. ***Question No. (i) and (ii):-***

Both these questions are taken up together as inter dependant and inter linked question of fact and law. The dealer has challenged the very initiation of the re-assessment proceeding on the plea that the assessing authority had not issued any notice under OET for re-assessment. The first notice issued on 19.09.2005 was issued under the provisions of OST Act. Further the date i.e. 19.09.2005 when the notice for re-assessment was issued three years was the period as mandate under Section 9(1) of the OET Act for re-assessment was already over so the entire assessment is barred by limitation cannot sustain in law.

6. Per contra, learned Standing Counsel strenuously argued another notice was issued in an proper form i.e. Form No.E-32 on 28.09.2012 and keeping view the amended provision i.e. Section 10(1) the re-opening cannot be held as barred by limitation. The question of limitation as per Section 9(1) of old Act and the extended period for limitation i.e for seven years has been dealt with by the Hon'ble Court in Shree Maruti Cloth Store Vrs. STO reported in (2010) Vol.II ILR2707. The decision relates to the re-

assessment which was initiated before the amended period came into force where the Hon'ble Court has said that the period of limitation of seven years as per the amended provision should be applied to these cases. The amendment relating to time period came into force w.e.f. 19.10.2005. The cases in hand relate to assessment periods for 2002-03 and for 2003-04. The law before amendment with the time period was three years in that case the time period for assessment period 2002-03 was to be ended on March,2006 and for the assessment period 2003-04 was to be ended on March, 2007. The amended provision came into force w.e.f. 19.10.2005. In view of the principle laid down by the Hon'ble Court in Shree Maruti Cloth Store (supra) here it can be said that neither the first notice nor the second notice were barred by limitation. The argument of the learned Counsel for the dealer is not conceivable to the extent that, though the first notice was suffering from patent defects as issued under OST Act, the second notice which was issued under OST Act cannot be taken into consideration. When the second notice was issued within the period of limitation the defect in first notice cannot vitiate the second notice. So notwithstanding the fact that the first notice on dated 19.09.2005 was a defective one the initiation of re-assessment proceeding on the basis of second notice on dated 28.09.2012 is illegal if the proceeding is otherwise found to be lawful.

6(a). Next plank of the argument by the learned Counsel for the dealer is re-opening of the re-assessment basing on the A.G. Audit report in the case in hand is non-application of mind and is a mechanical one.

Learned Standing Counsel advanced much stress on the decisions of this Tribunal in S.A.No.31 (ET) of 2017-18 dated 07.05.2019 and in S.A.No.83(V) of 2017-18 dated 07.05.2019 and argued that the Tribunal has ignored the latches in the notice of formation of opinion by the Assessing Authority has must show such hyper technical defects should not vitiate the entire assessment. The

view of this Tribunal in the aforesaid two cases by learned Accounts Member is of its kind relating to the fact of both the cases in particular. The question being a mixed question of law and fact cannot be treated as a precedent to other cases of similar nature.

6(b). It is pertaining to mention here that, on verification of the LCR it is found that, the assessing authority has not maintained any order sheet. The LCR only contain the notices and final order whereas it does not contain any order sheet maintained by the assessing authority depicting initiation of proceeding, the opinion if any formed by the assessing authority based on the Audit report and day to day follow up actions taken up by the assessing authority till final order.

6(c). The expression, for any reason as contemplated u/s.10 of the OET Act does not mean a purely subjective satisfaction on the part of the assessing authority. The satisfaction ought to be a satisfaction reached by the assessing authority on the basis of facts or materials available before it.

The material on which the assessing authority bases its opinion must not be arbitrary, irrational, vague, distinct or irrelevant. It must bring home the appropriate rationale of action taken by the assessing authority in pursuance of such belief. In absence of such material, the action taken by assessing authority on such 'reason to belief' or 'for any reason' is arbitrary and bad in law.

6(d). In a number of decisions, the Hon'ble Supreme Court and the Hon'ble High Court have observed that, department claim as a matter of right to reopen the assessments without appreciating the real intend or purpose behind enacting such provision. Assessment orders are not a scrap of paper which can be overturned by reopening the assessment in casual manner. Finality to assessment must be recognized as a matter of principle and reopening should be an exception.

In AIR 1989 SC 997, State of U.P. Vrs. Maharaja Dharmander Prasad Singh, it is held as follows-

> "The authority cannot permit its decision to be influenced by the direction of others as this would amount to abdication and surrender of its discretion. It would then not be the Authority's discretion that is exercised, but someone else's. If an authority hands over its discretion to another body it acts ultra vires."

A Constitution Bench of the Apex Court also had an occasion to consider the expression '**reason to believe'** in the case of **BARIUM CHEMICALS LIMITED AND ANOTHER VRS. COMPANY LAW BOARD AND OTHERS (AIR 1967 SC 295)** wherein it was held that, the words, "reasonable grounds to believe" were to be a restraint on administrative power just as compliance of the rules of natural justice in a quasi judicial power which otherwise would render the power arbitrary. The words "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining "reason to believe or " the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the Court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits. It is an alternative safeguard to rules of natural justice where the function is administrative.

In (2006) 148 STC 61 (Orissa), Indure Limited Vrs. Commissioner of Sales Tax, Cuttack, Orissa and others, discussing therein a judgment of earlier period in the Ugratara Bhhojanalaya and

Uttareswari Rice Mills cases their Lordships have categorically stated that:

"14. So, after considering all the decisions cited on this point, this Court feels bound by the interpretation given to Section 12(8) of O.S.T. Act by the Apex Court in Uttareswari Rice Mills (supra) and which was subsequently followed in Ugratara Bhojanalaya (supra). Following the aforesaid ratio this Court reiterates that the difference in phraseology between "For any reason" and "Where the Sales Tax Officer has reasons to believe" does not make any material difference in view of the provisions in Rule 23 of the said rules which mandate that notice for re-opening has to be in Form VI and Form VI uses the expression "Where the Sales Tax Officer has reasons to believe". So the question No. (IV) is answered by holding that the words 'for any reason' in Section 12(8) of OST do not give-wider powers to the authorities to re-open assessment compared to words 'reasons to believe' since the words 'reasons to believe' are incorporated in the statutory form in which notice of assessment is to be issued. The Court also holds that while exercising power under Section 12(8) of OST, the authority has to act consistently with the statutory norms prescribed under the statutory rules and the forms.

In Uttareswari, construing Section 12(8) of O.S.T. Act, the Apex Court held that the Sales Tax Officer issuing the notice "should have reason to believe that the turnover of a dealer has escaped assessment or has been under-assessed." The Apex Court further held that the approach has to be practical.

15. Following that judgment of the Apex Court, the Division Bench of Orissa High Court held in Ugratara that some basis for reopening has to be disclosed in the notice.

(a) Here no basis has been disclosed either in the notice or in the records. Rather the records show that the issuance of the notice preceded any recording of an order in the file. So it is clear that the notice has been issued mechanically and at a point of time when there could not be even any formation of opinion. So the notice was mechanically issued first and then it was sought to be covered up by recording an opinion in the file.

(b) From a perusal of the file, it appears that there was an audit objection. From the affidavit of the Revenue also it appears that notice was issued as suggested by audit objection.

(c) Of course audit objection can be a valid factor which can be taken into consideration by the concerned officer for initiating a proceeding for re-opening of assessment. But the concerned Sales Tax Officer must independently apply his mind and form an opinion that on the basis of audit objection, an order for re-opening of assessment can be passed. That would be a valid basis for re-opening. But the Sales Tax Officer's formation of opinion cannot be dictated by audit objection.

(d) In the instant case in the audit report it was objected that the tax has been under assessed. The concluding part of the audit objection states "The desirability of the opening of the case under Section 12(8) of O.S.T. Act for re-assessment may be kindly re-

examined under intimation to Audit". The said audit objection is dated 10.9.98. The impugned noticed of re-opening was issued on 23.9.98. But the Sales Tax Officer recorded an order for issuing the notice under Section 12(8) of O.S.T. Act only on 24.10.98. So the notice was issued mechanically even before the order for issuing the notice was actually passed. This is not permissible in law.

16. Reference in this connection may be made to the decision of the Supreme Court in the case of Mahadayal Premchandra v. Commercial Tax Officer, Calcutta and Ors. .

In that case the Commercial Tax Officer assessed the dealer under Bengal Finance (Sales Tax) Act on the instruction of the Assistant Commissioner. The Court did not approve of such procedure as it found that in the orders which were passed by the Commercial Tax Officer he was "merely voicing the opinion of the Assistant Commissioner without any conviction of his own" (Page 670, Para 18 of the report).

Here also by purportedly issuing notice under Section 12(8) of O.S.T. Act, the Sales Tax Officer was merely 'voicing' the audit objection without recording any formation of opinion of his own. So the ratio in the case of Mahadayal squarely applies to the facts of the present case."

6(e) Change of opinion on the basis of self-same material cannot be a reason to believe that, a case of escaped assessment exists requiring assessment proceeding to be reopened (**Binani Industries Limited V. Asst. Commissioner of Sales**

Tax (2007) 6 VST 783) relied. Discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to reopen the assessment (**Commissioner of Tax V. Dinesh Chandra H. Shah (1971**)

6(f). In a recent decision in M/s.Preeti Oil Limited Vrs. State of Orissa OJC No.3848/99 vide order dated 04.02.2019, the Hon'ble Court has adopted the view laid down in the case of Ugartala Bhojanalaya (supra).

7. On the touch stone of settled principle by the authority above when we delve into the cases in hand, it is found that the assessing authority has not passed any order forming opinion on the basis of fraud case report to initiate the re-assessment proceedings. The notices issued to the dealer are incomplete. Bare perusal of the assessment order it can very well established that, the assessing authority has mechanically proceeded with the assessment by accepting the report of the Audit team. Similarly, the impugned order is also found to be a stereo type without assigning any reason and findings on the grounds raised by the dealer.

Needless to mention here that, the first appellate authority is duty bound under law to deal and decide each of grounds of appeal raised before him unless the order cannot withstand under law as incomplete and illegal. The impugned order suffer from such defect in the case in hand.

Thus, from the discussion above, here in this case, it is found that the re-assessment is not sustainable in law. So far as the decision on merit of the allegation brought in by vigilance team and the findings by both the fora below, discussion into that is redundant since the entire re-assessment proceeding is vitiated as illegal and not sustainable.

Accordingly, it is ordered.

8. The appeals are allowed on contest. The impugned order are set aside. The re-assessment proceedings are annulled as not sustainable in law.

Dictated and Corrected by me,

(Sri Subrat Mohanty)
1st. Judicial Member.

(Sri Subrat Mohanty)
1st. Judicial Member.

I agree,

(Suchismita Mishra)
Chairman.

I agree,

(Sri R.K.Pattnaik)
Accounts Member-III.