

3. The brief fact of the case in hand is that the dealer-responder is a manufacturer of out-still liquor out of distillation of Mahua flower having different sale centers in various pockets of Jharsuguda District namely Belapahar, Lakhanpur, Kadamdehi and its other branches at Kudaloe, Grindola, Jamgaon, Nuadihi and Mahasingh.

4. At assessment stage, the LAO observed that the assessee has originally disclosed its GTO/TTO at Rs.72,73,305.00 which was subsequently revised to Rs.84,46,352.50 including sales tax collection of Rs.11,20,225.92. He further observed that the assessee has purchased Mahua Flowers of 6900 qntls valued Rs.17,25,000.00 and has paid purchase tax of Rs.1,28,360.00. Moreover, the assessee has consumed 6418qntls of Mahua Flower in preparation of out-stilled liquor. Accordingly, it has disclosed sale of out-stilled liquor of various degrees of 2,68,854.10 LPL for Rs.67,21,352.50 @ Rs.25 per LPL including tax. The LAO further observed that the assessee has paid monthly consideration money to Excise Department of Rs.3,48,713.00 relating to the months April and May, 2001 and Rs.4,55,000.00 for the period from June' 01 to March' 02 as per certificate furnished. Taking into account the total sale turnover and consideration money paid to Excise Department, the LAO didn't accept the sale price adopted by the assessee. Moreover, the assessee has also claimed deductions towards STC of Rs.11,20,225.92 from the revised GTO disclosed. The LAO observed that the assessee doesn't issue sale memo in respect of sales effected to the customers. While viewing the decision of first appeal case bearing No.AA55(SAIII) of 2001-02 dtd.30.03.2002 of the same dealer, the LAO found that the rate of liquor was upheld @Rs.30 per LPL in that case which he adopted as the sale price in the present case. Since, the sale price of the liquor has not been specified by the Excise Department and is influenced by

a number of inevitable factors like location of the shop, public demand, purchasing capacity of the consumers and the consideration money paid to Excise Department, the LAO estimated the sale price of out-stilled liquor @Rs.30 per LPL without tax. All these resulted in an extra demand of Rs.5,75,198.00 including surcharge and interest which was challenged by the assessee before the Id. FAA in shape of first appeal.

5. At appellate stage, the Id. FAA after due examination of the case, reduced the tax demand to Rs.1,77,441.00 from Rs.5,75,198.00 raised by the LAO in his assessment order with following observations:

- a. The Id. FAA after detail examination regarding sale price of out-stilled liquor, determined the same @Rs.28 per LPL including sales tax.
- b. Citing Hon'ble Odisha High Court decision in case of Bhubaneswar Wholesale Co-operative Stores Vrs. State of Orissa reported in (1988) 70 STC 279 and Gopabandhu Type Foundry Vrs. State of Orissa in OJC No.86295 of 1967, the Id. FAA allowed sales tax collected towards deduction from the Gross Turnover as it has been shown separately in the books of account of the assessee.
- c. On levy of surcharge, the Id. FAA observe that it has to be charged after deduction given towards purchase tax paid on Mahua Flower as per entry Sl. No.24 of List C of OST Rate Chart.

With these observations, the Id. FAA reduced the demand to Rs.1,77,441.00 relating to the material year which is now challenged by the State in shape of second appeal before this Tribunal mainly on following grounds appended to the memorandum of appeal:

- i. "That, the Id. ACST has committed an error in reducing the sale price of liquor from Rs.30/- to Rs.28/- per litre because in case

of the instant dealer in appeal case No.AA.55(SA-III) of 2001-02 dt.30.03.2002 the sale price of liquor was upheld at Rs.30/- per LPL. The ld. Assessing Officer had reasonably fixed the sale price at Rs.30/- adopted by the appellate authority and thus has committed neither any wrong nor any guess work.

ii. That, in view of this the order of the ld. ACST needs be quashed and the order of ld. Assessing Officer be modified after rectifying the modus of calculation of surcharge.”

6. During the course of hearing, the ld. Standing Counsel (C.T.) for the State vehemently argued against the appeal order passed by the ld. FAA being unjust, illegal, improper, arbitrary and bad in law and accordingly argued to quash the said order with a prayer that the order of LAO be modified after rectifying the modus of calculation of surcharge.

7. Per contra, the ld. Counsel for the dealer-respondent argued in favour of the order of ld. FAA, being just and proper in the facts and in the circumstances of the case that doesn't warrant further interference by this Tribunal.

8. On examination of the orders of the forums below, it is revealed that the LAO, taking into consideration the order of first appellate authority in case No.AA.55(SA-III) of 2001-02 of the same dealer, determined the sale price of out-stilled liquor @Rs.30 per LPL without tax against the claim of the dealer @ Rs.25/- per LPL including tax whereas the ld. FAA determined the same @Rs.28/- per LPL including tax for the material year. It is a fact that the sale price of out-stilled liquor has not been specified by the Excise Department and is influenced by a number of inevitable factors like location of the shop, public demand, purchasing capacity of the consumers and the consideration money paid to the Excise Department. Taking all the above factors into consideration, we, now, reasonably estimate the

sale price of out-stilled liquor @Rs.30/- per LPL including tax, the net value of which comes to Rs.25/- per LPL.

We further observe that the ld. LAO didn't allow sales tax collected amounting to Rs.11,20,225.92 from the GTO towards deduction as the assessee has not issued sale memo in respect of sales effected to the customers whereas the ld. FAA allowed the same basing on the judgment of Hon'ble Orissa High Court in case of Bhubaneswar Wholesale Co-operative Stores Vrs. State of Orissa reported in (1988) 70 STC 279 as the assessee has shown it separately in his books of account. It will be reasonable & proper to quote the relevant portion of the aforesaid order so as to apply the ratio in the instant case:

“TAXABLE TURNOVER- DEDUCTION-REGISTERED DEALER-SALES TAX COLLECTED FROM CUSTOMERS-NOT SHOWN SEPARATELY IN CASH MEMOS BUT SHOWN IN BOOKS OF ACCOUNT-LIABILITY OF SALES TAX CAN BE PASSED ON TO PURCHASER UNDER AUTHORITY OF STATUTE-DEDUCTION OF SALES TAX RECOVERED FROM PURCHASERS ALLOWABLE IN COMPUTATION OF TAXABLE TUNVOER-ORISSA SALES TAX ACT (14 OF 1947), SECS.2(dd), (h), 5(2)(A)(b), 9-B-ORISSA SALES TAX RULES, 1947, RULE 26-A.

Where a dealer is authorized by law to pass on any tax payable by him on transactions of sale to his purchasers, such tax does not form part of the sale price, But where there is no such statutory provision authorizing him in that behalf, the tax does form part of the consideration when he includes it in the price and realizes it from his purchasers.

Section 5(2)(A)(b) of the Orissa Sales Tax Act, 1947, entitles a registered dealer to deduct from his gross turnover the amount of tax realized by him from his purchasers, without any further qualification that the tax must have been realized in accordance with the procedure mentioned in section 9-B(2) of the Act. Failure by the

dealer to show the sale price and the tax separately in the cash or credit memos, and issuing instead a consolidated memo would not by itself deprive him of the right to claim the tax so collected as deduction from his gross turnover, particularly when Rule 26-A of the Orissa Sales Tax Rules, 1947 prescribes maintenance of accounts showing separate details of moneys “realized or stipulated for realization by way of tax on each day”

Held accordingly, that although the dealer had not shown the price of the goods and the amount of sales tax realised on the sales separately in the sale memos, since they had been shown separately in the books of account of the dealer, which had not otherwise been rejected by the assessing officer, the dealer was entitled to claim deduction of the amount representing sales tax recovered from purchasers, from its taxable turnover.”

As such, we observe that the ld. FAA has rightly allowed deductions from GTO towards sales tax collected as it has been shown separately in the books of account of the assessee that does not require any further interference by the Tribunal.

Now coming to the issue of levy of surcharge on the tax calculated, we refer to the relevant entry in the OST Rate Chart. It is observed that as per FD Notification No.14687 CTA 37/01(pt) F dtd.31.03.2001 (SRO No.149/01), the following relevant entry is made in the rate of tax on sale of goods :

Sl. No.	Description of goods	Rate of tax
24	country liquor including out-still liquor.	20% subject to reduction by the amount of tax under the OST Act paid on Mahua Flower out of which it is distilled.

The above notification was made effective from 1st day of April, 2001.

Accordingly, surcharge is to be calculated on tax towards sale of out-stilled liquor after allowing deduction towards purchase

tax paid on Mahua Flower from which it is distilled as per provisions of the Statute.

With the above facts and circumstances of the case, the following re-calculation tax is made for justice and equity:

a.	Purchase of Mahua Flowers locally	6900qntls @Rs.250/- per Qntl.	Rs.17,25,000/-
b.	Sale of out-stilled liquor	268850.10 LPL @Rs.30/- per LPL including tax.	Rs.80,65,503/-
c.	GTO (D)		Rs.97,90,503/-
d.	(-) STC		Rs.11,20,225.92
e.	TTO (D)		Rs.86,70,277.08
f.	Tax @8% on Rs.17,25,000/-	Purchase of mahua flower	Rs.1,38,000/-
g.	Tax @20% on Rs.69,45,277.08/-	Sale of out-stilled liquor	Rs.13,89,055.42
h.	Total tax calculated		Rs.15,27,055.42
i.	(-) PT paid on mahua flower used in preparing liquor.		Rs.1,28,360/-
j.	Total		Rs.13,98,695.42
k.	(+) Surcharge @10% thereon		Rs.1,39,869.54
l.	Total		Rs.15,38,564.96
m.	(-) already paid u/r. 36 of OST Rules		Rs.12,42,855
n.	Balance payable		Rs.2,95,709.96 or Rs.2,95,710/-

9. In the result, the appeal filed by the State is partly allowed and the demand raised by the LAO in his assessment order is reduced to Rs.2,95,710.00 for the impugned period.

The cross objection filed by the dealer-respondent is disposed of accordingly.

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