

IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV No.109 of 2008

***M/s. Radhakeshav Rice Mill Pvt.
Ltd.***

Petitioner

Mr. Jagabandhu Sahoo, Sr. Advocate

-Versus-

State of Odisha

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Opp. Party

Mr. Sunil Mishra, SC (CT & GST)

**CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAİK**

DATE OF JUDGMENT :20.06.2022

R.K. Pattanaik, J

1. This is an application under Section 24(1) of the Orissa Sales Tax Act, 1947 (Repealed Act) (hereinafter referred to as 'the OST Act') read with Section 104 of the Orissa Value Added Tax Act, 2004 filed by the Petitioner assailing the impugned order dated 11th April, 2007 (Annexure-3) passed in S.A. No.1051 of 2000-01 by the Orissa Sales Tax Tribunal, Cuttack (shortly as 'the Tribunal') for having enhanced the tax demand on the grounds *inter alia* that the same is beyond jurisdiction and not based on material facts on record and thus, liable to be set aside.

2. Taking into account the issues involved, the following questions of law are hereby taken up for consideration, namely,

(a) Whether, in the facts and circumstances of the case, the order of the Tribunal enhancing the assessment without taking recourse to Rule 50(3) of

the Orissa Sales Tax Rules, 1947 (in short 'the Rules') is sustainable in law?

(b) Whether enhancement of turnover in absence of any materials to establish that the goods found short have been sold is justified in view of the ratio decided in the case of *Mahabir Rice Mill v. State of Orissa* reported in **1983 54 STC 218 (Ori)**?

(c) Whether the determination of sales turnover by the Tribunal can be held to be based on lawful and valid nexus and sustainable in law?

(d) Whether, in the facts and circumstances of the case, disposal of second appeal by the Tribunal without compliance of Rule 57 of the Rules for service of notice inviting cross-objection is justified in view of Section 23(3)(b) of the OST Act read with Rule 52 of the Rules?

3. In fact, in the present case, fraud case reports alleging purchase and sales suppression of paddy, rice and broken rice by the Petitioner were received, whereafter, proceeding under Section 12(4) of the OST Act for the period 1997-98 was initiated. As a result, the Sales Tax Officer, Sambalpur-I Circle, Sambalpur (in short 'the STO') recomputed the tax and directed the Petitioner to pay the balance amount of Rs.3,41,352/-. The said demand was challenged by the Petitioner before the Assistant Commissioner of Sales Tax, Sambalpur Range, Sambalpur (in short 'the ACST') which was partly allowed and the assessment was reduced by Rs.2,51,748/- with a direction to refund the

excess payment, if any made. Against the aforesaid order of the ACST, appeal was carried to the Tribunal by the State which was allowed in part enhancing the assessment by Rs.2,46,937/-. So to say, the enhancement was upheld to the extent indicated and the Petitioner was directed to pay the balance tax under Annexure-3.

4. According to the Petitioner, the reports submitted by the Vigilance Unit, Sambalpur alleged shortage of 18.85 Quintals of paddy and 0.51 Quintals of rice which was explained away before the authorities for being on account of driage which is within the permissible limit and in respect of the other report on purchase suppression of 1899.15 Quintals of paddy and sales suppression of 4.88 Quintals of rice besides 01 Quintal of broken rice, the same was clarified by stating that the discrepancies have been due to improper stock taken on sampling basis by the inspecting officers and also on account of driage but then, the STO without accepting the above explanation, estimated suppression at Rs.9,00,204.75 and suppressed sales turnover at Rs.62,93,699.35 for the year 1997-98 by applying a multiplier of seven which resulted in extra tax demand of Rs.3,41,352/-. Such additional tax was directed to be paid by the Petitioner under the assessment order dated 4th September, 1998 (Annexure-1). The Petitioner preferred an appeal under Section 23 of the OST Act before the ACST, which, as earlier mentioned, was allowed partly and the assessed demand was reduced by Rs.2,51,748/-. In other words, the ACST accepted the stand of the Petitioner with regard to the allegation on purchase suppression. On the sales suppression, basing on detection of shortages or excess stock of

paddy, rice, broken rice, the ACST held that it could not be established and hence, waived the enhancement and deleted the demand of Rs.2,51,748/- by an order dated 30th June, 2000 (Annexure-2). Against that order, the State filed appeal before the Tribunal which led to the passing of the impugned order i.e. Annexure-3.

5. Heard Mr. Jagabandhu Sahoo, learned Senior Advocate appearing for the Petitioner and Mr. Sunil Mishra, learned ASC.

6. Whether, such enhancement directed by the Tribunal under Annexure-3 is legally justified? The Petitioner's contention is that the inspecting officers adopted sampling method while taking the weighment of stock which is impermissible but it was not properly appreciated by the Tribunal as it has also not considered the specific objection regarding the weight of each bag taken at 75 Kg as the paddy kept in the bags ranged from 62-75 Kg, as earlier the Vigilance Wing had taken the stock @ 64 Kg per bag but it has been erroneously pegged at 75 Kg each bag at the time of inspection and subsequently stood accepted by the authority concerned. Mr. Sahoo contends that the allegation of excess stock giving rise to the claim of purchase suppression is not valid and lawful for which the impugned enhancement of turnover by the Tribunal is manifestly illegal and arbitrary. It is submitted that the enhancement was directed by the Tribunal without due notice which is required as per Rule 50(3) of the Rules, and while claiming so, an order dated 12th March, 2008 of this Court in STREV No.245 of 2007 decided in *M/s Utkal Sales Corporation v. State of Orissa* and disposed on 12th March, 2008 **STREV No.109 of 2008**

is placed reliance. It is further contended that the appeal by the Tribunal was disposed of without complying Rule 57 of the Rules, whereby, notice is issued for filing of cross-objection. As regards, the sampling method which was adopted by the inspecting officers and later on approved by the Tribunal, Mr. Sahoo would contend that the stock discrepancy cannot be justified on such a ground and in that connection referred to the decision of *Mahabir Rice Mills supra*. It is the submission of Mr. Sahoo that same view as above has been expressed by this Court in *Yadurish Raj Jhunjhunwala v. SCT 67 STC 381* and *Laxminarayan Sawalram v. State of Orissa* (decided on 20th July, 1971 in O.J.C. No.286 of 1968). Mr. Mishra, learned ASC, on the other hand, submits that there is no error or illegality committed by the Tribunal in reaching at the conclusion under Annexure-3 and rightly the assessment was enhanced and additional tax was demanded, which is, therefore, calls for no interference.

7. One of the contentions of the Petitioner is that the Tribunal without issuing any notice under Rule 50(3) of the OST Rules enhanced the assessment, which is not permitted in law. The order of this Court in *M/s Utkal Sales Corporation* (supra) was referred to, while contending that a similar mistake has been committed by the Tribunal in the present case and therefore, the additional demand is unsustainable. On a bare reading of the impugned order under Annexure-3, it appears that the enhancement was directed not in compliance of Rule 50(3) of the Rules and therefore, in the considered view of the Court, the

basic principle of natural justice and the relevant provision in the OST Rules have not been followed. In a similar situation, the enhanced assessment directed by the Tribunal was interfered with in the case of *M/s Utkal Sales Corporation* and the matter was remanded for a fresh consideration in accordance with law.

8. As to the other grounds raised by the Petitioner that notice was not issued in terms of Rule 57 of the OST Rules, it is contended that the same was not complied while disposing of the appeal and hence, the enhancement is not tenable in law in view Section 23(3)(b) of the OST Act read with Rule 52 of the OST Rules for the purpose of filing of cross-objection. In any case, the Petitioner could have filed a cross-appeal, had it been aggrieved by any part of the order of the ACST. Nevertheless, the Tribunal had an obligation to issue a notice to the Petitioner for submission of cross-appeal as is required under Rule 57 of the OST Rules.

9. Furthermore, the STO declined to accept the explanation offered by the Petitioner towards the shortage in stock to the extent of 1899.15 Quintals of paddy which was based on sampling method on the ground that on the date of inspection, the dealer was present and admitted that each bag of paddy weighed 75 Kg. However, the ACST held that the shortage in stock of paddy, rice, broken rice is bound to occur in course of storage and handling and that apart, the inspection unit counted it on eye-estimation by taking each bag of paddy at uniform rate of 75 Kg without weighment being done physically and while doing so, it should have been confronted to the Appellant with the

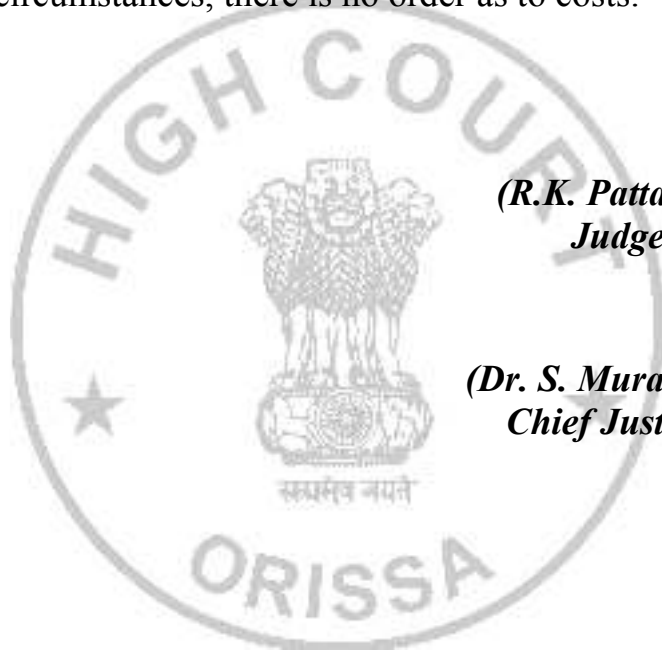
observation that the Vigilance Wing previously had taken the stock sample @ 64 Kg per bag and hence, rejected the allegation of sales suppression. The above conclusion was overruled by the Tribunal but then, it allowed the enhancement by Rs.2,46,937/- and the assessment order of the STO was thereby reduced by Rs.4,811/-. Apart from the above contentions raised by Mr. Sahoo, another ground is taken which is to the effect that even if the unexplained shortage of stock is shown, the enhancement of taxable turnover cannot be sustained unless it is further proved that the stocks were sold by the assessee, which is the view expressed by this Court in ***Laxminarayan Sawalram*** (supra) and the same was reiterated in STREV No.2 of 2008 in the case of ***M/s Gupta Distributors, Cuttack v. State of Orissa*** decided on 22nd March, 2022. When there has been an observation by the ACST that the Vigilance Wing previously had taken the stock on sample weightment @ 64 Kg per bag, in the opinion of the Court, to rely upon the report of the inspecting officers tagging each bag @ 75 Kg and that too measured on eye-estimation would not be proper, which is also claimed not to have been confronted to the Petitioner. Such eye-estimation is not a proper method while taking measurement of bags of paddy without real weightment being done at the time of inspection, the fact which was rightly appreciated by the ACST. In fact, in such measurement, a risk is involved to have the proper assessment as to the weight of each bag of paddy. The aforesaid aspect was not duly taken cognizance of by the Tribunal, while enhancing the assessment.

10. That apart, mere stock deficiency by itself could not be sufficient unless it is specifically shown that the suppressed stock was, in fact, sold by the assessee. In *Mahabir Rice Mills* as well as *Laxminarayan Sawalram* ibid, it has been categorically held and observed by this Court that shortage of stock simplicitor cannot alone be a ground for enhancement of turnover unless the Department is able to show that it was sold. In *M/s Gupta Distributors* case, this Court reiterated the said view, while interfering with the enhancement directed by the Tribunal, thereby, restoring the decision of the ACST. In the present case, there is no material brought on record from the side of the Department to suggest that the shortage stock was sold by the Petitioner. Therefore, in absence of any such evidence, it would not be just and proper to hold that there was deficiency in stock and so the suppression of sales by the Petitioner. Apart from that, the shortage in stock is based on mere eye-estimation of the inspecting officers, which as discussed earlier, may not be sufficient for the purpose of fixing liability against the Petitioner. In any case, since the shortage of stock, even if it is assumed, per se cannot be a ground for enhancement of turnover, since no material evidence is produced by the Department to further indicate that the same was sold by the Petitioner. Having said that, the Court reaches at a conclusion that the Tribunal was not right in interfering with the order of the ACST and directing enhancement.

11. Accordingly, for the discussions made herein above, the predominant issue with regard to the enhancement of turnover

and decision thereon by the Tribunal cannot be sustained. In other words, the issues involved are answered in favour of the assessee and against the Department.

12. In the result, the revision petition stands allowed. As a necessary corollary, the impugned order under Annexure-3 passed in S.A. No.1051 of 2000-01 by the Tribunal is set aside and the order of the ACST in STA Case No.AA153 (SAI) of 1998-99 dated 7th September, 2000 is hereby restored. However, in the circumstances, there is no order as to costs.



(R.K. Pattanaik)
Judge

(Dr. S. Muralidhar)
Chief Justice

KC Bisoi/ Secretary