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IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV Nos.26, 27 and 28 of 2013

M/s. Tree Nuts India (P) Ltd., Puri .... ***Petitioner***

Mr.K.K. Sahoo, Advocate

-versus-

State of Odisha .... ***Opp. Party***

Mr. Sunil Mishra, Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K.PATTANAIK

Order No.

ORDER
13.07.2022

Dr. S. Muralidhar, CJ.

04. 1. Though the matters i.e. STREV Nos.26 and 28 of 2013 are not listed today, on being mentioned by learned counsel for the Petitioner, they are taken up by separate notice.

2. These three revision petitions by the Assessee are directed against the judgment dated 16th October, 2012 passed by the Orissa Sales Tax Tribunal (Tribunal) allowing the State's Appeal S.A. Nos.302, 303 and 304 of 2008-09 thereby reversing an order dated 22nd December, 2007 of the Assistant Commissioner of Sales Tax (ACST), Puri allowing the Assessee's appeal against the demand raised by the Sales Tax Officer (STO) Puri Circle, Puri for the years 1997-1998 to 2000-01 respectively.

3. While admitting these revision petitions on 17th April, 2013, the following questions of law were framed for consideration by this Court:

> "a. Whether on the facts and in the circumstances of the case, the Sales Tax

Tribunal committed error of law and fact particularly when it has held that the assessing authority had mechanically issued the notice under Section 12(8) of the OST ACT?

b. Whether on the facts and in the circumstances of the case, the Tribunal is justified in holding that the fore below have not properly interpreted the provisions of law with reference to the exemption allowed by the DIC and objection raised by AG(O)?"

4. The background facts are that the Assessee/dealer is a processing unit dealing in finished products like salted and spiced cashew nuts which is makes from cashew kernel, oil, iodised salt and spices. For the years in question the STO initially completed the assessments after examining the books of the Assessee and raised nil demands on 25th January, 2001, 30th March, 2002 and 12th December, 2002 respectively. Subsequently, on the basis of an objection of the AG Audit, the assessment was reopened under Section 12 (8) of the Orissa Sales Tax, 1947 (OST Act) pursuant to which the Assessee appeared produced books of accounts. On the basis of the reopening, a fresh assessment order was passed by the STO for the three years in question raising demands on the basis that there had been an escapement of turnover.

5. The Assessee's appeals were allowed by the ACST pointing out that a stereo-typed order has been made in respect of all the years and the orders had been passed on the last day of the year in question just to avoid limitation. The formation of opinion by the STO was also without any signature on the order sheet. He simply stated "due to AG audit objection the initiation of the

proceeding under Section 12(8) was made for favour of information".

6. The State then filed the appeals before the Tribunal. The Tribunal in the impugned order agreed with the ACST that "the orders of assessment have been passed in hurry and communicated to the dealer respondent at a belated stage nearly after 1 and ½ years which has rightly been observed by the learned ACST." Further it was noted by the Tribunal that the STO "has also not mentioned the points of objection raised by the AG audit and just mechanically reopened the case under Section 12(8) of the Act for the year 1997-98 to 2000-01 with demand of taxes whereas the dealer respondent eligible to enjoy tax benefits both on purchase of raw materials and on the sale of finished products for a period of seven years from 25.8.97 to 24.8.04."

7. But the Tribunal also found the fault with the ACST for quashing the assessment orders without assigning reasons "with reference to the exact objection raised by AG" and according to the Tribunal, the STO and the ACST did not properly interpret the provision of law with reference to exemption allowed by the DIC and the objection raised by AG (O). As a result, the cases were remanded to the STO for a fresh adjudication.

8. This Court heard the learned counsel for the parties.

9. Section 12(8) of the OST Act reads as under

"12. Assessment of Tax:-

xx xx xx xx

> (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 permissible 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."

10. This has to be read with Rule 23 of the Orissa Sales Tax Rules, 1947 (OST Rules) which read as under:

> "23. Calling for return when turnover has escaped assessments or has been under assessed-(1) If for any reason the turnover of sales or the turnover of purchases of a dealer has escaped assessment or has been under assessed or has not been assessed due to the tax having been compounded when composition is not permissible under the Act and these rules and it is proposed to assess it, the Commissioner shall serve on the dealer a notice in Form VI calling upon him to furnish a return in Form IV within one calendar month from the date of receipt of such notice.
>
> (2) Such notice may also require the dealer to attend in person or by his agent at the office of the authority issuing the notice on the date specified therein and to produce or cause to be produced the accounts and documents specified in the notice."

11. Further, the third paragraph of Form VI in which notice is issued reads as follows:-

> "Whereas I have reason to believe that your turnover of sales and/or purchases for the quarter/year ending 94-95 on which Tax payable under the Orissa Sales Tax Act, 1947 has escaped assessment/has been under assessee/has not been assessed due to the tax having been compound when composition is not permissible."

12. The jurisdictional requirement of the STO having to form an independent opinion regarding the escapement of assessment was explained by this Court in ***The Indure Limited v. Commissioner of Sales Tax (2006) 148 STC 61 (Ori)***. In that case also the assessment was sought to be reopened by the STO under Section 12 (8) of the OST Act only on the basis of audit objection without forming any independent opinion himself regarding escapement of turnover. This Court referred to the judgment of the Supreme Court in ***Sales Tax Officer, Ganjam v. Uttareswari Rice Mills, MANU/SC/0556/1972*** where it had been explained that the difference in phraseology between "for any reason" appearing in Rule 23(1) of the OST Rules and "if the sales tax authority has reasons to believe" does not make much of difference. It was also noticed that an earlier Division Bench of this Court in ***Bindlish Chemical and Pharmaceutical Works v. Commissioner of Sales Tax, Orissa (1993) 89 STC 102*** had not noticed the above decision of the Supreme Court in ***Uttareswari Rice Mills*** (supra). In ***Indure Limited*** (*supra*), this Court also noticed the subsequent decision of Division Bench of this Court in ***State of Orissa v. Ugratara Bhojanaya (1993) 91 STC 76 ORI*** which explained the requirement of Section 12(8) of the

OST Act in consonance with the decision of the Supreme Court in ***Uttareswari Rice Mills*** (*supra*).

13. In ***The Indure Limited*** (*supra*) the Division Bench of this Court proceeded to hold as under:

> "(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.
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> (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."

14. Again in pagraph-18 of the ***Indure Limited*** (*supra*), it was explained as under:

> "18. The importance of this doctrine lies in the fact that if a statutory functionary is vested with a power to act, it is that statutory authority alone who will form the necessary objective opinion for exercising its power. In doing so, it may take into consideration whatever is relevant. As in the instant case audit objection may be a relevant consideration. Taking that objection into consideration, the Sales Tax Officer has to form his objective opinion. But the Sales Tax Officer cannot totally abdicate or surrender his discretion to the objection of the audit party by mechanically re-opening assessment under Section 12(8) as has been done in this case. This was frowned upon again by Justice Hegde again while delivering the judgment of the Apex Court in *The Purtabpur Company Ltd. v. Cane Commissioner of Bihar and Ors*., The Supreme Court quashed the order of the Cane Commissioner as it found that the Cane Commissioner virtually worked as the mouth piece of the Chief Minister."

15. Ultimately in ***The Indure Limited*** (*supra*) the impugned notice of reassessment was quashed since the Sales Tax Officer had "blindly initiated" the assessment proceeding on order to objection "without any independent application of mind."

16. The facts of the present case are more or less similar. Here again it is seen from the order of the ACST, that the reopening assessment was made by the STO only on the basis of an audit objection and without any independent application of mind as to whether there had been an escapement of turnover for the

periods in question. Following the decision in ***The Indure Limited*** (*supra*), this Court is of the view that the reassessment orders of the STO cannot be sustained in law. The Tribunal erred in remanding the matters to the STO while the jurisdictional requirement of independent satisfaction by the STO in the manner explained in ***The Indure Limited*** (*supra*) was not existent in the present cases.

17. Consequently, the question (a) framed by this Court is answered in affirmative by holding that the STO had mechanically issued the notices under Section 12(8) of the OST Act. The impugned assessment orders are hereby set aside.

18. In view of the conclusion in question (a) as a result of the impugned reassessment orders have been set aside by this Court the discussion on question (b) is rendered academic and it is not required to be dealt with.

19. In the result, the orders of the STO and the Tribunal are hereby set aside and the order of the ACST is restored to file.

20. All the revision petitions are disposed of in the above terms.

(Dr. S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

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