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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P. (C) No.21222 of 2015

Birsa Minerex

at: Hudisahi, P.O.: Joda

District: Keonjhar – 758 034

...

Petitioner

Mr. Pranaya Kishore Harichandan, Advocate

-versus-

Sales Tax Officer

and another

...

Opposite parties

Mr. Susanta Kumar Pradhan, Additional Standing Counsel
for CT&GST Organisation

**CORAM:
THE CHIEF JUSTICE
JUSTICE M. S. RAMAN**

**ORDER
17.11.2022**

Order No.

M. S. Raman, J.

04. ***I.*** Invoking provisions of Article 226 of the Constitution of India, the petitioner-Birsa Minerex, a partnership firm, approached this Court assailing Order dated 28.01.2014 passed by the Sales Tax Officer, Barbil Circle, Barbil, who framed assessment under Section 9(2) of the Central Sales Tax Act, 1956 (for brevity, “CST Act”), read with Rule 12(4) of the Central Sales Tax (Odisha) Rules, 1957 (in short, (CST(O) Rules), raising a demand to the tune of Rs.39,68,397/- pertaining to the tax periods from 01.07.2007 to 31.03.2010. This apart, the petitioner also questioned the rejection of petition *vide* Order dated 28.01.2014 declining to exercise power under Section 81 of the Odisha Value Added Tax Act, 2004, for rectification of aforesaid Assessment Order under the CST Act.

The writ petition and contention of the counsel for the petitioner:

2. The Audit Assessment under Rule 12(3) of the CST(O) Rules had been concluded *vide* Order dated 05.08.2011 by the Sales Tax Officer, Barbil Circle, Barbil for the tax periods from 01.07.2007 to 31.03.2010, wherein the claim of exemption of penultimate sale in course of export under Section 5(3) of the CST Act was allowed on appreciation of Certificate of Export in Form H required to be furnished under Rule 12(10) of the Central Sales Tax (Registration and Turnover) Rules, 1957 (abbreviated as “CST(R&T) Rules”) to the extent of Rs.12,23,71,036/- as against disclosed total turnover of Rs.12,64,00,682/- representing such sales.

2.1. On the basis of certain discrepancies, like absence of foreign buyer's agreement in the record, purchase order from buyer and despatch of goods to foreign destination prior to date of agreement, pointed out with reference to Certificate of Export in Form H to the extent of Rs.1,36,25,062/- by the Auditor General, Odisha, the concluded Audit Assessment under Rule 12(3) of the CST(O) Rules has been sought to be reopened by exercising power under Rule 12(4) *ibid.* by issue of notice in Form IVA on 24.08.2013.

2.2. Though the books of account supported by the documents referred to above as noted in the objection note of the A.G. were produced before the Sales Tax Officer by the petitioner, the following is recorded by the Assessing Authority in the impugned order:

“The other documents like the invoices issued by the dealer-assessee could not be furnished by the dealer at this forum. Hence it is difficult to ascertain the authenticity of the above transactions in absence of the invoices. In addition the

form has not been filled completely. Hence the total value i.e. Rs.3,07,82,938/- is now taxed instead of Rs.1,36,25,062/- as suggested by A.G. Odisha.”

2.3. Accordingly, the reassessment proceeding under Rule 12(4) of CST(O) Rules culminated in demand to the tune of Rs.39,68,397/- comprising tax of Rs.13,22,799/- + penalty of Rs.26,45,598/-.

2.4. After suffering such demand in the reassessment proceeding, the petitioner filed petitions under Section 81 of the OVAT Act on 14.07.2014 and 29.10.2014 seeking leave of the Sales Tax Officer for rectification of defects pointed out by the A.G., Odisha. However, said petitions came to be rejected by the Sales Tax Officer *vide* Order dated 29.07.2015.

2.5. Aggrieved by aforesaid Order dated 28.01.2014 and Order dated 29.07.2015, the petitioner filed the writ petition before this Court *inter alia* raising following contentions:

i. The observation in the Audit Visit Report in Form VAT-303 (Annexure-3) is as follows:

“Dealer has effected export sale a tune of Rs.12,64,00,682/- and handed over at the time of audit 12 numbers of H Form amounting Rs.12,23,71,037/- without any associated docuemnts in the way of export sale to avail exemption of tax on export sale. Without production of relevant docuemnts the total export sale to be taxed @4% comes to 50,56,027.28 plus penalty two times comes to Rs.1,01,12,054.56, total comes to Rs.1,51,68,081.84 dealer is liable to pay as per provision of law. This is also admitted by the dealer.”

ii. During the course of Audit Assessment under Rule 12(3) of the CST(O) Rules, books of account was

produced along with required documents and statements. Being satisfied, the Assessing Authority has recorded the following fact in the Assessment Order dated 29.07.2011 (Annexure-4) passed under Rule 12(3):

*“*** The dealer has disclosed the gross turnover at Rs.27,34,38,227/- as per the revised return filed. The dealer is allowed deduction of Rs.34,87,547/- towards collection of tax and Rs.12,23,71,036/- towards export sale supported by Form H, the balance turnover is determined at Rs.14,75,79,644/- ***”*

iii. Having not applied independent mind and formed opinion, the Sales Tax Officer is not competent to invoke power under Rule 12(4) of the CST(O) Rules by surrendering to the objection raised by the A.G., Odisha. As the Assessing Authority sought to review the matter in the garb of reassessment under Rule 12(4) of the CST(O) Rules and thereby change his opinion as has already been taken while framing Audit Assessment under Rule 12(3) of the CST(O) Rules.

iv. It is urged by Mr. Pranaya Kishore Harichandan, the counsel for the petitioner that the assessment order thus passed under Rule 12(4) of the CST(O) Rules is untenable in the eye of law as the statute is silent about conferment of power of “review”.

v. It is further contended that while passing Audit Assessment Order dated 29.07.2011 the Assessing Authority having verified the books of account and found

no discrepancy and accepted the return figures, he ought not to have initiated proceeding under Rule 12(4) of the CST(O) Rules on the self-same material fact.

Objection of the counsel for the Revenue:

3. Mr. Susanta Kumar Pradhan, Additional Standing Counsel (CT&GST) made valiant attempt to justify the action of Assessing Authority in proceeding with the reassessment and raising demand by rejecting the turnover relating to sales in course of export which was allowed by the Sales Tax Officer in the Audit Assessment. He pressed into service the observations made by the Sales Tax Officer in the reassessment order dated 28.01.2014 passed under Rule 12(4) of the CST(O) Rules wherein it is found mentioned that the dealer (petitioner) failed to produce “relevant documents” in support of Form H in connection with claim of exemption under Section 5(3) of the CST Act. Therefore, it is submitted by the learned Additional Standing Counsel that the order assailed herein is subject matter of appellate jurisdiction and urged not to entertain the writ petition.

Undisputed fact:

4. Audit Assessment was concluded under Rule 12(3) of the CST(O) Rules pursuant to objections contained in the Audit Visit Report by an Order dated 29.07.2011 relating to the tax periods from 01.04.2007 to 31.03.2010 after examination of books of account and consideration of written submission. It has been recorded as follows:

“On being confronted the authorized representative of the dealer submitted a statement which are verified and kept in the record. No other discrepancy is noticed from the books of account produced. In the absence of any other

point of allegation in AVR, the return figures are accepted.”

In the said Audit Assessment turnover of Rs.12,23,71,036/- has been treated to be exempted under Section 5(3) of the CST Act as the same is supported by Certificate of Export in Form H as prescribed under Rule 12(10) of the CST(R&T) Rules and the same was allowed as deduction from total turnover disclosed by the petitioner-assessee. On the basis of objection raised by the A.G., Odisha to the effect that said exemption/deduction was wrongly allowed by the Sales Tax Officer, Barbil Circle, Barbil while concluding Audit Assessment under Rule 12(3), proceeding under Rule 12(4) was initiated by undertaking re-assessment. While passing Reassessment Order dated 28.01.2014, the said Assessing Authority, not only reversed the already allowed claim of exemption of penultimate sale under Section 5(3) of the CST Act, but also varied with the figure of Rs.1,36,25,062/- and recomputed said figure as Rs.3,07,82,938/-.

Question raised for adjudication:

5. WHETHER the exercise of power under Rule 12(4) of the CST(O) Rules by the Sales Tax Officer is legally tenable basing on the objection raised by the A.G., Odisha on the ground that no documentary evidence is available in original record relating to Audit Assessment under Rule 12(3) of the said Rules wherein the claim of exemption on account of sale in course of export to the tune of Rs.12,23,71,036/- under Section 5(3) of the CST Act supported by Certificate of Export in Form H as prescribed under Rule 12(10) of the CST(R&T) Rules has been allowed?

Relevant provision contained in CST(O) Rules for undertaking reassessment under Rule 12(4):

6. At the relevant point of time Rule 12(4) stood as follows:

“(4)(a) Where, after a dealer is assessed under sub-rule (1), (2) or (3) for any period, the assessing authority, on the basis of any information in his possession, is of the opinion that the whole or any part of the turnover of the dealer in respect of any period or periods has escaped assessment, or has been under-assessed, or has been assessed at a rate lower than the rate at which it is assessable or that the dealer has been allowed wrongly any deduction from his turnover or exemption under the Act or has been wrongly allowed set off of input tax credit in excess of the amount admissible under clause (c) of sub-rule (3) of Rule 7 of these rules, he shall serve a notice in Form IVA on the dealer.

(b) The hearing of the dealer shall be concluded in accordance with the provisions of clauses (b) and (d) of sub-rule (3).

(c) The assessing authority shall, after hearing the dealer in the manner specified in clause (b), assess the amount of tax payable by the dealer in respect of such period or periods for which assessment proceedings has been initiated and if he is satisfied that the escapement is without any reasonable cause, he may direct the dealer to pay, by way of penalty, a sum equal to twice the amount of tax additionally assessed.

(d) Where a dealer fails to comply with the requirements of the notice referred to in clause (a), the assessing authority may make an ex parte assessment of the tax payable by such dealer and pass an order of assessment in writing, after recording the reasons therein.

(e) No order of assessment shall be made under this sub-rule after expiry of five years from the end of the period in respect of which the tax is assessable.”

Discussion and legal position:

7. From the fact and figure narrated in the foregoing paragraphs, it is *ex facie* manifest that the Sales Tax Officer has not formed any

“opinion” as required in Rule 12(4). Rather the context is indicative of fact that the Assessing Authority sought to review the Order dated 29.07.2011 passed under Rule 12(3) in the garb of exercise of power under Rule 12(4) of the CST(O) Rules. In the certified copy of Order Sheet enclosed to writ petition as Annexure-7, the following is recorded by the Sales Tax Officer on 24.08.2013:

“Issue notice for assessment of tax in Form IV-A of CST(O) Rules fixing date of hearing on 25.09.2013.”

7.1. Neither any reason is assigned prior to issue of said notice contemplating initiation of proceeding under Rule 12(4) of the CST(O) Rules nor the record of proceeding indicated independent application of mind. Such a course is not approved by this Court in the case of *Indure Limited Vrs. Commissioner of Sales Tax & Ors.*, (2006) 148 STC 61 (Ori).

7.2. This Court in the case of *Gopalpur Port Ltd. Vrs. Assistant Commissioner of Sales Tax & Ors.*, W.P.(C) No.17746 of 2012, disposed of *vide Order 19.08.2015* recorded the following facts:

“In the present writ application, the petitioner has sought to challenge the order dated 31.07.2012 passed by the Sales Tax Officer, Ganjam II Circle, Berhampur under Section 10 of the Orissa Entry Tax Act, 1999 for the period from 01.08.2007 to 31.12.2007 under Annexure-3, inter alia, on various grounds but, in particular, for the purpose of the present consideration, confines the argument to the issue that the petitioner had already for the self-same period under the O.E.T. Act been subjected to an earlier proceeding under Section 10 of the O.E.T. Act based on a ‘vigilance report’ and the said proceeding had concluded by an order dated 26.02.2011 holding that the procurement of 66393.87 mts of boulder from the petitioner’s own leased quarry and the purchase of boulder by the petitioner of 250977.78 mts from one M/s.

Start Trading Pvt. Ltd., Cuttack would not be made subject of levy of entry tax, since it was held that the boulder was not a schedule goods under the Orissa Entry Tax Act, 1999.

It is submitted on behalf of the petitioner that, once the authorities (based on a report of the vigilance authority) concluded the reassessment under Section 10 of the O.E.T. Act vide order dated 26.02.2011 under Annexure-1, it was no longer open for the Revenue to once again attempt to re-open the self-same issue for the self-same period and self-same turnover merely on the basis of having received an audit objection from the Auditor General of Orissa. It is further submitted on behalf of the petitioner that once the issue had become final by way of an order of reassessment under Section 10 of the O-E.T. Act, unless and until the same was in any manner questioned and/or reopened, a further proceeding under Section 10 of the O.E.T. Act, once again for the self-same period, quantity and turnover is not permissible under law.”

After noticing the case laws in Indure Ltd. Vrs. Commissioner of Sales Tax, Cuttack, Odisha & Ors., (2006) 148 STC 61 (Ori) and State of U.P. Vrs. Maharaja Dharmander Prasad Singh, AIR 1989 SC 997 this Court was pleased to opine as follows:

“On consideration of the submissions as recorded hereinabove, we are of the considered view that the second proceeding under Section 10 of the O.E.T, Act under Anenxure-3 to the writ application was merely based upon the audit conducted by the Auditor General which once again raised the issue as to whether boulder was a mineral or not. This turnover and the period was covered by the earlier order dated 26.02.2017 passed under Section 10 of the O.E.T. Act under Anenxure-1 and consequently having attained finality and no challenge having been made to the same, remains final and binding on all parties.

In view of the aforesaid conclusion arrived at, we find that the opposite party had no jurisdiction in this

matter to initiate a fresh proceeding under Section 10 of the O.E.T Act, resulting in passing of the order dated 31.07.2012 under Annexure-3. Therefore, we have no hesitation in directing quashing of Anenxure-3. This Court orders accordingly.”

7.3. This Court in the case of *Tree Nuts India (P) Ltd. Vrs. State of Odisha*, STREV Nos.26, 27 & 28 of 2013, vide Order dated 13.07.2022 made the following observation by analysing the fact:

*“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. ****

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.

(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 paragraph-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.”

7.4. A three-Judge Bench of Hon’ble Supreme Court of India in the case of *State of Uttar Pradesh & Ors. Vrs. Aryaverth Chawl Udyog & Ors.*, (2015) 17 SCC 234 culled out the following fact:

“9. The assessing Authority issued a notice under Section 21(2) of the Act to the assessee to show cause as to why should the claim of deduction of the purchase tax as paid on purchase of paddy, within the State of Uttar Pradesh, from the tax liability as computed on the inter-State sales of rice manufactured from such paddy not be inquired into and an order of reassessment ought not be passed accordingly, dated 26.03.2008.

10. The assessing Authority in its re-assessment order, dated 31.03.2008, rejected the claim of deduction of purchase tax already paid on the purchase of paddy within the State of Uttar Pradesh and created a demand of Rs.72,408/- in addition to the demand under original assessment order. However, keeping in view the pendency of writ petition before the High Court, the demand notice was not enforced.”

After reviewing legal position as set forth in earlier cases, the Hon’ble Apex Court in the aforesaid reported case has succinctly restated the law on the point of “change of opinion” in the context of reassessment as follows:

“29. The standard of reason exercised by the Assessing Authority is laid down as that of an honest and prudent person who would act on reasonable grounds and come to a cogent conclusion. The necessary sequitur is that a mere change of opinion while perusing the same material cannot be a “reason to believe” that a case of escaped assessment exists requiring assessment proceedings to be reopened. (See: Binani Industries Ltd., Kerala vs. Respondent: Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore and Ors., (2007) 15 SCC 435; A.L.A. Firm v. CIT, (1991) 2 SCC 558). If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to “change of opinion”. If an assessing Authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for re-assessment. Thus, reason to believe cannot be said to be the subjective satisfaction of the assessing Authority but means an objective view on the disclosed information in the particular case and must be based on firm and concrete facts that some income has escaped assessment.

30. In case of there being a change of opinion, there must necessarily be a nexus that requires to be established between the “change of opinion” and the material present before the assessing Authority. Discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to reinitiate proceedings under Section 21(1) of the Act on the basis of change in subjective opinion (CIT v. Dinesh Chandra H. Shah, (1972) 3 SCC 231; CIT v. Nawab Mir Barkat Ali Khan Bahadur, (1975) 4 SCC 360).”

7.5. This Court has, in the case of *Kalinga Institute of Industrial Technology (KIIT), Bhubaneswar, Vrs. Assistant Commissioner of Income Tax Exemption Circle, Bhubaneswar & Others*, W.P.(C) No.

4440 of 2022, disposed of vide Order dated 21.07.2022, observed as follows:

“7. *** Further the original assessment order in a tabular form sets out the cost of medicines and the selling price of the medicines as was done in identical terms in the reasons for reopening the assessment. This is a text book example of reopening of assessment being made on exactly the same materials that were available to the AO in the first instance.

8. This is precisely what has been disapproved by the Supreme Court of India in its decision in *Commissioner of Income Tax v. Kelvinator of India Ltd.*(2010) 320 ITR 561(SC) where it observed as under:

“.....post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words “reason to believe” failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of “mere change of opinion”, which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain pre-conditions and if the concept of “change of opinion” is removed, as contended on behalf of the Department, then, in the grab of reopening the assessment, review would take place. One must treat the concept of “change of opinion” as an in-built test to check abuse of power by the Assessing Officer.”

9. This Court too has in similar circumstances, where there was a mere change of opinion on the same materials, set aside the reassessment notice and the consequential assessment order by its judgment dated 15th February, 2022 in Writ Petition (Civil) No. 25229 of 2017 (*M/s. Tuff Tubes (Orissa) Pvt. Ltd. v. The Deputy*

Commissioner of Income Tax, Corporate Circle-1(2), Bhubaneswar).”

7.6. In the matter of *Sri Jagannath Promoters & Builders, Giri Road Berhampur, Ganjam Vrs. Deputy Commissioner of Income Tax, Berhampur Circle, Berhampur, Ganjam and others, W.P.(C) No. 14603 of 2014*, this Court vide Order dated 26.10.2021 held as follows:

“13. In the present case, the reasons for reopening the assessment do not point to any new material that was available with the Department. What appears to have happened is that the same material viz., the accounts produced by the Assessee were re-examined and a fresh opinion was arrived at by the Opposite Party No.1 regarding the claim of the deduction of Rs.48,183/- on account of the loss of sale of assets. This had already been disclosed in the detailed accounts filed by the Assessee. In fact, a questionnaire had been issued by the AO in the course of the original assessment proceedings to the Assessee which was responded to by the Assessee. In other words, there was conscious application of mind by the AO to the said materials. Therefore, the inevitable conclusion as far as the present case is concerned is that the ‘reason to believe’ of Opposite Party No.1 that income for the AY in question had escaped assessment is based on a mere ‘change of opinion’.

14. In this context, the following observations of the Delhi High Court in Jindal Photo Films Ltd. v. the Deputy Commissioner of Income Tax (1998) 234 ITR 170 (Del) are relevant:

“Following the settled trend of judicial opinion and the law laid down by their Lordships of the Supreme Court time and again different High Courts of the country have taken the view that if an expenditure or a deduction was wrongly allowed while computing the taxable income of the Assesses, the same could not be brought to tax by reopening

the assessment merely on account of subsequently the assessing officer forming an opinion that earlier he had erred in allowing the expenditure or the deduction.”

“Though he has used the phrase ‘reason to believe’ in his order, admittedly, between the date of orders of assessment sought to be reopened and the date of forming of opinion by the ITO nothing new has happened. There is no change of law. No new material has come on record. No information has been received. It is merely a fresh application of mind by the same assessing officer to the same set of facts.””

7.7. The Hon’ble Supreme Court in the case of *Income Tax Officer Vrs. Techspan India Ltd. & Anr.*, (2018) 6 SCC 685 has dealt with the law on the point of “change of opinion” in the context of reassessment to the following effect:

“16. To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The word change of opinion implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.

18. Before interfering with the proposed re-opening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed re-assessment

proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the re-assessment proceedings.”

7.8. The expression “change of opinion” has been explained by this Court in the case of *Bharat Petroleum Corporation Ltd. Vrs. Sales Tax Officer*, (2012) 52 VST 137 (Ori), wherein it has been laid down as follows:

“17. Before proceeding further, it is necessary to know what is the meaning of making assessment on ‘change of opinion’ under direct or indirect tax. It means, in respect of a particular income/transaction if the Assessing Officer after application of mind, takes a view that the particular goods or income is not liable to tax and completed the assessment, reopening of said assessment is not permissible by mere change of opinion of the Assessing Officer to levy tax on such goods or income.

18. The Hon'ble Supreme Court in the case of Binani Industries Ltd. vs. Asst. Commissioner of Commercial Taxes, [2007] 6 VST 783 (SC), held that reopening of assessment is not permissible by mere change of opinion of the Assessing Officer. Merely because the Assessing Officer changes his opinion that cannot have any effect on the assessment which has been completed on the basis of the view taken on turnover considered in the earlier assessment.”

7.9. In *Goyal Traders Vrs. Sales Tax Officer, Sambalpur-I Circle, Sambalpur*, W.P.(C) No.3821 of 2013, vide Order dated 22.03.2021, this Court laid down as follows:

“2. Perusal of Form E-32 (A-3) which reflects the decision of the Assessing Officer to reopen the assessment gives simply one reason ‘that case has been reopened due to receipt of objection raised by the A.G., Odisha,

Bhubaneswar'. There is no indication of what the objection was. Even the order-sheet of 9th November, 2002 simply states issue notice to appear and in the note call, again reference simply is made to report receipt from A.G., Odisha, Bhubaneswar on 6th November, 2012 without actually indicating what was in the said objection raised by the A.G., Odisha.

3. An order reopening the assessment must reflect the reasons for such reopening in the body of the order itself. The reasons cannot be supplied later. If the reason is simply due to the 'objection raised by the A.G., Odisha', it must state what the nature of such objection was. Only then will the assessee be in a position to answer the notice issued effectively. Since this basic principle has not been adhered to, the Court sets aside the impugned order reopening the assessment."

7.10. This Court on perusal of the Order Sheet at Annexure-7 finds that no reason whatsoever has been assigned in the Order dated 24.08.2013 while issuing "notice for assessment of tax in Form IVA of CST(O) Rules".

7.11. This Court in the case of *Essel Mining & Industries Ltd. Vrs. State of Odisha, 2017 (Supp.-II) OLR 825* in the context of non-assignment of reason observed as follows:

"11. Franz Schubert said—

"Reason is nothing but analysis of belief"

In Black's Law Dictionary, reason has been defined as a —

"faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from propositions."

It means the faculty of rational thought rather than some abstract relationship between propositions and by this faculty, it is meant the capacity to make correct inferences

from propositions, to size up facts for what they are and what they imply, and to identify the best means to some end, and, in general, to distinguish what we should believe from what we merely do believe.

12. *In Union of India v. Mohan Lal Capoor, AIR 1974 SC 87 it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.*

Similar view has also been taken in Uma Charan v. State of Madhya Pradesh, AIR 1981 SC 1915.

13. *Reasons being a necessary concomitant to passing an order, the appellate authority can thus discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference to those given by the original authority."*

7.12. *In Steel Authority of India Ltd. Vrs. Sales Tax Officer, (2008) 16 VST 181 (SC) with regard to order bereft of reason, the following has been stated:*

"Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same it becomes lifeless. (See Raj Kishore Jha v. State of Bihar (2003) 11 SCC 519).

Even in respect of administrative orders Lord Denning M. R. in Breen v. Amalgamated Engg. Union U97U 1 All ER 1148, observed : 'The giving of reasons is one of the fundamentals of good administration.' In Alexander Machinery (Dudley) Ltd. v. Crabtree (1974) ICR 120 (NIRC) it was observed: 'Failure to give reasons amounts to denial of justice'. 'Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at.' Reasons substitute subjectivity by

objectivity. The emphasis on recording reasons is that if the decision reveals the ‘inscrutable face of the sphinx’, it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The ‘inscrutable face of the sphinx’ is ordinarily incongruous with a judicial or quasi-judicial performance.”

7.13. In the case of *Prabhat Agarwal Vrs. Deputy Commissioner of Income Tax*, 2018 SCC OnLine Del 10598, the Hon’ble Delhi High Court was in seisin of reassessment notice under Section 147/148 of the Income Tax Act, 1961 and exercised writ jurisdiction under Article 226 of the Constitution of India held as follows:

“11. This Court has considered the record. The reassessment notice is based on reasons, which the revenue asserts, was recorded on 28 May, 2007. The question is whether the assessee is correct in asserting— as he does in this case, that these reasons were inserted later and did not exist, or were not reflected when the notice was issued. In other words, the veracity of the revenue’s position that reasons existed on the file, before the notice was issued, is disputed.

16. It goes without saying that whilst the ‘reasons’ shown to the court and the petitioner may ipso facto not be faulted, yet the file tells a different story; they were not recorded before the impugned notice was issued. In fact, the revenue played a subterfuge, in trying to cover up its omission, and in ante-dating the record., in the attempt to establish that such reasons existed...”

7.14. As is manifest from bare reading of provision as it existed in Rule 12(4) of the CST(O) Rules, 1957, at the relevant point of time

that the Assessing Authority is empowered to serve notice in Form IVA on the dealer to proceed with the reassessment, if “on the basis of any information in his possession” he is “*of the opinion*” that the whole or any part of the turnover of the dealer in respect of any period(s) has escaped assessment, or has been under-assessed, or has been assessed at a rate lower than the rate at which it is assessable or that the dealer has been allowed wrongly any deduction from his turnover or exemption under the Act or has been wrongly allowed set off of input tax credit in excess of the amount admissible under clause (c) of sub-rule (3) of Rule 7. Whereas formation of “opinion” is *sine qua non* for initiation of proceeding under Rule 12(4) of the CST(O) Rules, assignment of reason for such forming “opinion” is necessary concomitant factor. In the instant case, scrutiny of Order Sheet at Annexure-7 shows that *vide* Order dated 24.08.2013 the Assessing Authority merely directed for issue of notice in Form IVA without forming any “opinion” much less ascribing “reason”. This is indicative of non-application of mind and mechanical application of mind.

Decision on the issue of forming opinion prior to issue of notice in Form IVA as per Rule 12(4) of the CST(O) Rules:

8. Considering the facts of the instant case in the above perspective, it is apparent from Order Sheet that no opinion has been formed by the Assessing Authority prior to or at the time of issue of notice for reassessment under Rule 12(4) of the CST(O) Rules. Further the Assessing Authority while framing Audit Assessment under Rule 12(3) *vide* Order dated 29.07.2011 has taken into consideration the objection pertaining to erroneous claim of

penultimate sale in course of export under Section 5(3) of the CST Act as contained in the Audit Visit Report dated 04.12.2010 submitted in Form VAT-303 and accordingly, after examining the books of account being produced before him by the petitioner during the course of said Audit Assessment allowed such claim of exemption under Section 5(3) of the CST Act in respect of impugned turnover representing penultimate sale in course of export. By recording following reason in the said assessment order, the Assessing Authority arrived the such conclusion:

“On being confronted the authorized representative of the dealer submitted a statement which are verified and kept in the record. No other discrepancy is noticed from the books of account produced. In the absence of any other point of allegation in AVR, the return figures are accepted.”

8.1. In absence of power of review conferred by or under the statute, in the garb of reassessment, the concluded assessment could not be reopened by the Assessing Authority. As the material available on record does not show independent application of mind of the Assessing Authority having regard to the material in his possession, if any, merely based on objection of Auditor General, Odisha issue of notice in Form IVA in exercise of power under Rule 12(4) of the CST(O) Rules for reopening Audit Assessment concluded under Rule 12(3) on examination of books of account, *etc.* is impermissible in law and such an action is without jurisdiction.

Availability of alternative remedy:

9. Noteworthy here that way back in 2016, *vide* Order dated 04.01.2016 while issuing notice in the writ petition, this Court passed the following Order:

“Misc. Case No.19771 of 2015

Heard.

It is directed that the impugned demand shall remain in abeyance till disposal of the writ application.

The Misc. Case is disposed of.”

9.1. Though more than 6 years have been elapsed in the meantime neither record is produced nor does the CT&GST Organisation-opposite parties file counter-affidavit in the matter. Therefore, this Court is inclined to proceed with the matter on its merit on the basis of material as available on record.

9.2. Conspectus of enunciation of law on the subject as discussed in the preceding paragraphs applied to the fact-situation of the instant case *vis-à-vis* Order dated 24.08.2013 as maintained in the Order Sheet *vide* Annexure-7 drives this Court to safely conclude that the initiation of proceeding for reassessment was not in consonance with the statutory requirement. This view is further fortified by proposition as propounded by the Hon’ble Supreme Court of India in the case of *Commissioner of Income Tax Vrs. Chhabil Dass Agarwal*, (2014) 1 SCC 603 = (2013) 357 ITR 357 (SC), in the context of exercise of writ jurisdiction under Article 226 of the Constitution of India when alternative statutory remedy is available. The Hon’ble Supreme Court has recognized some exceptions to the rule of alternative remedy, *viz.*, where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice.

9.3. There is no quarrel over the proposition that availability of alternative remedy under the statute is not absolute bar for exercise of power under Article 226 of the Constitution of India, more so when the facts are not disputed and in identical fact-situation this Court earlier accepted the writ petition.

9.4. The Hon'ble Supreme Court of India in the case of *Dr. (Smt.) Kuntesh Gupta Vrs. Management of Hindu Kanya Mahavidyalaya, Sitapur (UP) and Ors.*, (1987) 4 SCC 525 held that "review" by quasi judicial authority in absence of statutory prescription being without jurisdiction, exercise of power under Article 226 of the Constitution of India is permissible.

9.5. This Court has already found that the Assessing Authority has reviewed order of assessment dated 29.11.2011 (Annexure-4) passed under Rule 12(3) of the CST(O) Rules and passed order of reassessment dated 28.01.2014 under Rule 12(4) *ibid.* reconsidering same transaction. In this respect, reliance is placed on the ruling of the Hon'ble Apex Court as laid down in *Dr. (Smt.) Kuntesh Gupta (supra)*:

"11. It is now well established that a quasi judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. The Vice-Chancellor in considering the question of approval of an order of dismissal of the Principal, acts as a quasi judicial authority. It is not disputed that the provisions of the U.P. State Universities Act, 1973 or of the Statutes of the University do not confer any power of review on the Vice-Chancellor. In the circumstances, it must be held that the Vice-Chancellor acted wholly without jurisdiction in reviewing her order dated January 24, 1987 by her order dated March 7, 1987. The said order of the Vice-Chancellor dated March 7, 1987 was a nullity.

12. *The next question that falls for our consideration is whether the High Court was justified in dismissing the writ petition of the appellant on the ground of availability of an alternative remedy. It is true that there was an alternative remedy for challenging the impugned order by referring the question to the Chancellor under section 68 of the U.P. State Universities Act. It is well established that an alternative remedy is not an absolute bar to the maintainability of a writ petition. When an authority has acted wholly without jurisdiction, the High Court should not refuse to exercise its jurisdiction under Article 226 of the Constitution on the ground of existence of an alternative remedy. In the instant case., the Vice-Chancellor had no power of review and the exercise of such a power by her was absolutely without jurisdiction. Indeed, the order passed by the Vice-Chancellor on review was a nullity; such an order could surely be challenged before the High Court by a petition under Article 226 of the Constitution and, in our opinion, the High Court was not justified in dismissing the writ petition on the ground that an alternative remedy was available to the appellant under section 68 of the U.P. State Universities Act.*

13. *As the impugned order of the Vice-Chancellor is a nullity, it would be a useless formality to send the matter back to the High Court for disposal of the writ petition on merits. We would, accordingly, quash the impugned order of the Vice-Chancellor dated March 7, 1987 and direct the reinstatement of the appellant forthwith to the post of Principal of the Institution. The judgment of the High Court is set aside and the appeal is allowed. There will, however, be no order as to costs."*

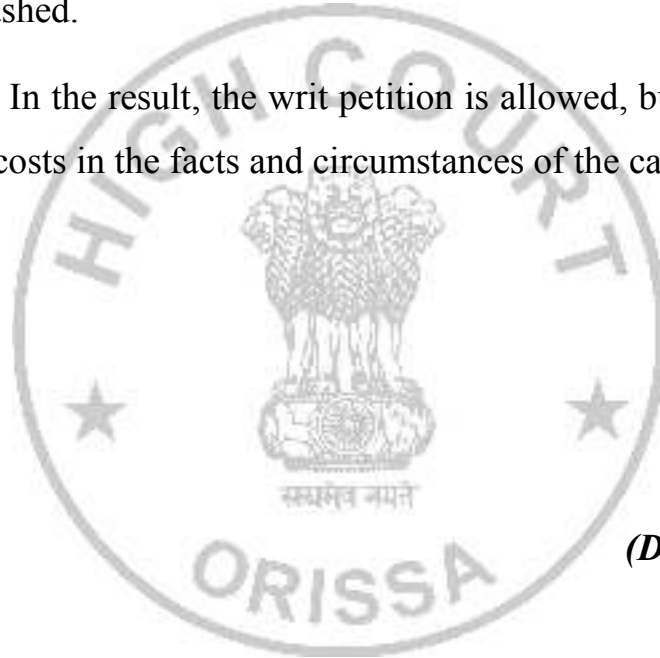
9.6. Under the above premise, the objection as raised in connection with the maintainability of writ petition and exercise of power under Article 226 of the Constitution of India by Sri Susanta Kumar Pradhan, learned Additional Standing Counsel (CT&GST) is overruled. Taking into consideration the legal position as well as undisputed factual position, this Court is inclined to entertain this writ petition.

ORDER:

10. For the reasons stated above, the Assessment Order dated 28.01.2014 passed under Rule 12(4) of the Central Sales Tax (Odisha) Rules, 1957, by the Sales Tax Officer, Barbil Circle, Barbil pertaining to tax periods from 01.07.2007 to 31.03.2010 is set aside.

10.1. Since the Assessment Order itself is set aside, the Order dated 29.07.2015 refusing to entertain petitions dated 14.07.2014 and 29.10.2014 to rectify the defect(s) does not survive, hence, the same is quashed.

10.2. In the result, the writ petition is allowed, but there is no order as to costs in the facts and circumstances of the case.



(M. S. Raman)
Judge

(Dr. S. Muralidhar)
Chief Justice

AKS/Laxmikant