IN THE ODISHA SALES TAX TRIBUNAL
CUTTACK

SA No.136 of 2010-11

M/s RELIANCE ENERGY LTD
PRESENT KNOWN AS M/s RELIANCE INFRASTRUCTURE LTD
FORTUNE TOWER, 6TH FLOOR, CHANDRASEKHARPUR
BHUBANESWAR-751023

Vs

STATE OF ORISSA
REPRESENTED BY THE
COMMISSIONER OF SALES TAX
ORISSA, CUTTACK

Suchismita Misra, Chairman
Subrata Mohanty, 2nd Judicial Member
P C Pathy, Accounts Member

Dated: April 04, 2019

Appellant Rep by: Mr A K Roy, Adv.
Respondent Rep by: Mr M S Raman, ASC

Orissa Sales Tax Act, 1947 - Section 12(4) & (8) - Central Sales Tax Act 1956 - Sections 3(a) & (b), 6(2)

Keywords - Audit report - Inter-State sale - Re-assessment under CST Act - Sale by outstate dealer

THE assessee company is a leading private enterprise engaged in power generation & development of infrastructure. During the relevant AY, the assessee executed works contract based on agreements entered into between itself and other contractees, for supply of goods on sale and for erection/service work. Assessment was originally completed u/s 12(4) of the Orissa Sales Tax Act (OST Act) and u/s 12(5) of the Central Sales Tax(O) Rules. Later, upon receipt of objection from the Audit team, the CST assessment was re-opened u/r 10 of the CST(O) Rules. While the assessee filed its explanations, it also carried the matter before the Apex Court, challenging such re-assessment. The Revenue then furnished a statement on oath, stating to have dropped the re-assessment proceedings u/r 10 of the CST(O) Rules.

Later, the Revenue later re-opened the assessment under the OST Act, based on the same Audit report, as per Section 12(8) of the OST Act. The AO noted that the agreements between the assessee & the contractees, though being two-fold and involving service contract as well as erection contract, were interlinked. It was noted that the responsibilities of the contractor in both contracts remained joint. The AO then considered the claim of transit sale. It was observed that the assessee received orders from the contractee,

then placed orders for the same with its outstate selling dealers, who manufactured the goods & sold them to the assessee. The assessee then sold these goods to the contractees. Hence the sale by the outstate dealer to the assessee was covered u/s 3(a) of the CST whereas the second sale to the ultimate buyer was treated as inter-State sale under OST. Hence the assessee's claim of transit sale u/s 3(b) r/w Section 6(2) of the CST were rejected & tax liability was calculated at about Rs 15.58 lakhs, with 10% surcharge as well as penalty of about Rs 1.99 crores. The total tax payable about Rs 3.70 crores. As the assessee had been assessed to pay tax of about Rs 25.21 lakhs on regular assessment, demand was raised for the balance amount of about Rs 3.45 crores. On appeal, the Commissioner of Sales Tax (Appeals) sustained the same.

On appeal, the Tribunal held that,

Whether re-assessment is sustainable where the requisite material was produced before the AO in regular assessment & the AO infers escapement of turnover from taxation based on wrong interpretation of legal provisions - NO: Tribunal Larger Bench

Whether the act of the AO in dropping re-assessment under the Central Sales Tax Act & subsequent re-assessment under the Orissa Sales Tax Act is legally tenable - NO: Larger Bench

++ perusal of provisions u/s 12(8) of the Orissa Sales Tax Act mandate that there must be a reason to believe that the turnover of a dealer has escaped or has been under assessed or tax has been compounded when not permissible under the Act and Rules. In *DCN v. State of Rajasthan* the conditions for reopening of assessment are laid down such as (i) there must be a reason for reopening, (ii) there must be escaped assessment or (iii) case of under assessment or (iv) case of compounding when not permissible under law. 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* Discovery of an inadvertent mistake or nonapplication of mind during assessment would not be a justified ground to reopen the assessment *(Commissioner of Tax v. Dinesh Chandra H. Shah);*

++ it is noticed that in spite of repeated opportunities, the LCR was not furnished. The formation of opinion of the assessing authority for reassessment though is a mandatory required under law but, in absence of the LCR or the copy of the order sheet, a negative inference against the Revenue must be taken. Further, when all the materials were produced before the AO in regular assessment and when there is no question of escapement of turnover but the escapement from the tax net for the wrong interpretation of the provisions under law by the taxing authority, it cannot be a good reason for opening the assessment. In *Indure Limited v. Commissioner of Sales Tax, Cuttack, Orissa and others*, it is held that, if an

AO 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 reassessment;

++ here, there was CST assessment reopened on the basis of A.G. (Audit) with the allegation that, the dealer's claim of subsequent sale as transit sale is not sustainable and then, in a later period the assessing authority dropped the proceeding with a view that, the reassessment should be done under OST Act. It is not understood why the reassessment under CST(O) Rules was dropped or not maintainable. when the dealer dropped the CST reassessment, it has deemed to have accepted the statutory declaration forms against the claim of CST sale, in that event, reopening as per sec.12(8) of the OST Act is not sustainable; the authority was not sure which assessment was to open on the basis of AG report. Acceptance of declaration forms under one act and rejection under another act amounts to gross illegality. It is not made clear why the disputed question could not have decided in the CST reassessment. However, once there is a CST assessment and the question of exemption the assessing authority could successfully had decided if the sale was covered u/s.3(b) read with sec.6(2) sale supported by the declaration form "C" and "E-1". Assessment under OST act should be consequential to assessment under CST act and rejection of claim of transit sale by not accepting declaration forms;

++ the peculiarity is, CST reassessment was open but later closed with a finding that the reassessment under OST Act would be done. This is not only an irregularity but also an illegality going to the root of the case. The order in CST assessment and the order in OST reassessment are contradictory and as well as mutually destructive to each other here, in the case in hand in particular. So, we are unable to accept the method, procedure adopted by the taxing authority and in view of the illegality and irregularity as committed by dropping the CST reassessment, it is believed that, the reassessment u/s.12(8) of the OST Act cannot stand in law.

Assessee's appeal allowed

Cases followed:

Commissioner of Tax v. Dinesh Chandra H. Shah* *2002-TIOL-2281-SC-IT

***Indure Limited v. Commissioner of Sales Tax, Cuttack, Orissa and others [2006] 148 STC 61 (Orissa)*,**

Binani Industries Limited v. Asst. Commissioner of Sales Tax (2007) 6 VST 783)

DCN v. State of Rajasthan (1980) 4 SCC 71

ORDER

In the reassessment u/s.12(8) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as, OST Act) when the dealer's claim to treat the sale of goods to purchaser/contractee i.e. electricity supply companies CESCO, NESCO

eligible for exemption u/s.6(2) of the Central Sales Tax Act, 1956 (hereinafter referred to as, the CST Act) was turned down by both the fora below, the confirming order of first appellate authority is called in question in this appeal by the dealer with a prayer to qualify the sales in dispute eligible for exemption u/s.6(2) read with 3(b) of the CST Act.

2. During assessment period in question i.e. 2001-02, the assessee-dealer had executed works contracts on the basis of agreement entered into between the dealer and the contractees like SOUTHCO Ltd., NESCO Ltd. and CESCO Ltd. for supply goods on sale and for erection/service job. Originally, assessment u/s.12(4) of the OST Act and u/s.12(5) of the CST(O) Rules were completed on 19.11.2004. But in a later period, on receipt of the objection from A.G. (Audit) team, the CST assessment was reopened u/r.10 of the CST(O) Rules. The dealer submitted his explanation, whereas, in the meanwhile the dealer carried the matter to the Hon'ble Court challenging the initiation of reassessment. The Revenue furnished statement on oath stating therein the fact of dropping the reassessment proceeding u/r.10 of the CST(O) Rules. Thereafter, Revenue initiated reopened the assessment under OST act on the basis of self same AG audit report as per u/s.12(8) of the OST Act. In the reassessment the assessing authority found the dealer entered into agreements/contracts with M/s. NESCO Ltd. dtd.05.05.1999, M/s. SOUTHCO Ltd. dtd.04.02.1999 and M/s. CESCO Ltd. on 05.05.1999. According to the assessing authority, the contract were two fold, one is supply contract and other one erection/service contract. However, both the contracts are interlinked and responsibilities of the contractor under the contracts remain joint. Keeping in view the aforesaid composite nature of the contracts, the authority considered the claim of transit sale. According to him, the aforesaid contractees placed purchase orders before the dealer-contractor for supply of materials and for erection work. Consequently, the dealer placed order before his outstate selling dealers. The outstate selling dealers on manufacturing of the goods as per the exclusive specifications sold those to the dealer. Thereafter, the dealer sold those goods received to, CESCO, NESCO and SOUTHCO, the ultimate buyer. The first sale by the outstate dealer to the instant dealer was covered under sec.3 (a) of the CST Act, whereas the second sale i.e. by the instant dealer in favour of contractees were treated as intrastate sale covered under OST. The dealers claim of subsequent CST/transit sale u/s.3(b) read with 6(2) of the CST was rejected. Resultantly, the assessing authority disallowed the claim of the dealer and fixed the tax liability calculated to Rs.15,58,632.84, surcharge @ 10% on it and then penalty a sum of Rs.1,99,48,740.96. Thus, the total tax due, surcharge and penalty added together came to Rs.3,70,93,702.25. The dealer being assessed to pay tax at Rs.25,21,239.14 in the regular assessment u/s.12(4) of the OST Act, was asked to pay the balance amount of Rs.3,45,72,463.00.

3. Being aggrieved, with the reassessment and demand as above, the dealer preferred appeal. The learned Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar/DCST as first appellate authority vide

the impugned order dtd.19.04.2010 confirmed the order of the assessing authority by declining the prayer of the dealer on the self same grounds taken by ld. AA.

4. When the matter stood thus, the dealer preferred this appeal. The contention of the dealer is, the order of reassessment is not permissible in law in the facts and circumstances of the case in hand. The dealer had sold the goods under the supply contract which was distinct from the service contract. On the basis of agreement for supply of plant and equipments and spare parts, the dealer placed purchase orders before the outstate suppliers. After placing the purchase order, the dealer obtained government way bills from different distributing companies for transportation of materials to the respective sites of the distributing companies and as per the direction of the dealer, the outstate selling-dealer dispatched the materials to the sites of respective distributing companies. All the LRs indicate the name of the consignee and the dealer in turn, endorsed the title of the goods on the backside of the LR. So, the second sales by the dealer to contractees are nothing but sales in transit effected after the first sale by the consignee M/s. B.S.E.S. Ltd. (outstate seller). So avoiding cascading effect the second sale under the CST Act is to be treated as exempted sale and as such, there is no question of any tax liability under the OST Act.

The appeal is heard without cross objection from the side of the Revenue. However, in the hearing the Revenue stood by the view of the fora below.

5. Following questions are struck for decision in this appeal are,

(i) whether in the facts and circumstances of the mode of transaction involved in this case, the sell by the assessee-dealer to ultimate buyer is to be treated as subsequent covered u/s.3(b) read with sec.6(2) of the CST Act or not?

(ii) whether in the particular case in hand, the reopening of the assessment is illegal and not sustainable in law;

6. In this case the undisputed facts, the instant dealer had entered into supply contract as well as erection/service contract with different intrastate companies. Under the supply contract, the dealer was required to sale goods with particular specifications to be utilized in the installation and erection. On the basis of an agreement between the dealer and the ultimate buyer, as per the requirements, the dealer placed purchase order before outstate sellers M/s. B.S.E.S. Ltd. who in turn manufactured goods as per the specifications. When the goods were ready for delivery, the instant dealer asked the selling dealer to send the goods directly to the worksite of the contractees. Accordingly, the goods were sent to the respective worksites. The impugned order is explicit that, it was not composite contract but two different contracts such as supply contract and service contract. As per the assessing authority both are interlinked and

interdependent and supply contract contain some service work also to be done by the dealer-contractor.

7. On this backdrop, it is to be seen, whether the second sale qualify the character of sale in transit sale or not ?

To appreciate the disputed question, the relevant provisions are reproduced herein below:-

2(g) 'sale', with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration, and includes,-

(i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) a delivery of goods on hire-purchase or any system of payment by installments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(vi) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,
but does not include a mortgage or hypothecation of or a charge or pledge on goods;"
Section 3 of the CST Act

"When is a sale or purchase of good said to take place in the course of inter-State trade or commerce.-

A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase-

"3(a) occasions the movement of goods from one State to another; or

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another."
Section "6(2) Notwithstanding anything contained in subsection (1) or sub-section (1A), where a sale of any goods in the course of inter-State trade or commerce has either occasioned the movement of such goods

from one State to another or has been effected by a transfer of documents of title to such goods during their movement from one State to another, any subsequent sale during such movement effected by a transfer of documents of title to such goods to a registered dealer, if the goods are of the description referred to in sub-section (3) of Section 8, shall be exempt from tax under this Act:

Provided that no such subsequent sale shall be exempt from tax under this sub-section unless the dealer effecting the sale furnishes to the prescribed authority in the prescribed manner and within the prescribed time or within such further time as that authority may, for sufficient cause, permit,-

(a) a certificate duly filled and signed by the registered dealer from whom the goods were purchased containing the prescribed particulars in a prescribed from obtained from the prescribed authority; and

(b) if the subsequent sale is made to a registered dealer, a declaration referred to in sub-section (4) of Section 8:
Provided further that it shall not be necessary to furnish the declaration referred to in clause (b) of the preceding proviso in respect of a subsequent sale of goods if,-

(a) the sale or purchase of such goods is, under the sales tax law of the appropriate State exempt from tax generally or is subject to tax generally at a rate which is lower than three per cent or such reduced rate as may be notified by the Central Government, by notification in the Official Gazette, under subsection (1) of Section 8 (whether called a tax or fee or by any other name); and

(b) the dealer effecting such subsequent sale proves to the satisfaction of the authority referred to in the preceding proviso that such sale is of the nature referred to in this sub-section."
Dealing with the provisions above in the case of *Tata Iron & Steel Co. Ltd. – vs- S.R. Sarkar (1960) 11 STC 655 (SC)*, Hon'ble Supreme Court has settled the following principles:

i) Mere contract of sale is not a sale within the definition u/s. 2(g) of CST Act, "56.

ii) An interstate sale can either be governed u/s. 3(a) if it occasions movement of goods from one state to another or u/s 3(b) if it is affected by transfer of documents of title after the commencement of movement. They are mutually exclusive.

iii) A sale (transfer of property) becomes an interstate sale u/s. 3(a) if movement of goods from one state to another is under contract of sale. It implies that not a contract of sale but the sale itself occasions the movement of goods and, therefore, any contemplation of endorsement of consignment note/RR is not permissible under 3(a) sale.

iv) Transfer of document of title to the goods will arise only in case of sale u/s. 3(b) and that too during its movement irrespective of when the contract of this second/subsequent sale has been made between second seller and the next/the final purchaser.

v) an agreement to sell and a sale of goods are two different concepts under the Sale of Goods Act, 1930.

vi) a sale falling u/s.3(b) takes place only when the transport documents are physically transferred or stand transferred by implication and obviously that by instruction.

The fact of the case in hand is quite similar to the fact involved in *M/s. State of Gujarat Vs. Haridas Mulji Thakker (84 STC 317) (Guj)* wherein the Hon'ble Gujarat High Court held the subsequent sale to be exempt u/s.6(2) of the CST Act. Similar view is also taken by the Hon'ble Madras High Court in *M/s. Duvent Fans P. Ltd. vs. State of Tamil Nadu (113 STC 431) (Mad.)*. Reliance can also be placed in the matter of *State of West Bengal & Others Vrs. Joshi Jute Corporation and Another (1996) 100 STC 17 (Cal)*.

On the other hand, in the matter of *Mitsubishi Corporation India P. Ltd. Vs. Value Added Tax Officer and another (2010) 34 VST 417* it is held that,

"In order to attract section 6(2) of the Central Sales Tax Act, 1956, it is essential that the sale concerned must be a subsequent inter-State sale effected by transfer of documents of title to the goods during the movement of the goods from one State to another and it must be preceded by a prior inter-State sale."

Again the Hon'ble Supreme Court in *A&G Projects And Technologies Ltd.Vs. State of Karnataka (2009) 19 VST 239 (SC)* = *2008-TIOL-227-SC-CT* held as follows:-

"The dividing line between sale or purchase under section 3(a) and those under section 3(b) is that in the former the movement of the goods is under the contract of sale or purchases but in the latter the contract comes into existence after commencement and before termination of the inter-State movement of the goods. Sale taxable as falling in clause (a) of section 3 will be excluded from purview of clause (b) of that section. In other words clause (a) contemplates a sale where under the contract of sale the goods sold are moved from one state to another. Clause (b) o the other hand contemplates a sale where the property in the goods sold passes by transfer of document of title during the movement of the goods from one state to another."

In this case Hon'ble Supreme Court again laid down almost the same principles of law in same languages excepting that in earlier judgment (Tata Iron & Steel Co. Ltd. etc.) the sale contemplated u/s. 3(b) of CST Act is held to be one which is effected by transfer of documents of title to the goods during their movement from one state to another where contract comes into existence only after the commencement and before the termination of the interstate movement of goods.

It is pertinent to mention here that, the West Bengal Govt. has issued an explanatory circular regarding to set out the position in this regard. It has been explained in the circular that in A & G technology case (supra) it was held that pre determination of contract of subsequent sales before the movement of goods starts may result in denial of exemption u/s 6(2) of CST Act but it cannot be understood to mean there cannot be predetermination of the buyer especially in case of tailor made goods and predetermination of buyer or receiving of an order from the subsequent buyer will not result in denial of exemption u/s 6(2) of CST Act. The fact cannot be denied that, in the commercial world, substantial number of transactions of subsequent sales takes place particularly for specially made goods where a dealer first collects order from his outside state customer and thereafter places his corresponding purchase order either to inside state supplier or to outside state supplier. Therefore, there exists one pre-existing order or predetermined party at the hands of a subsequent seller when he is making agreement of purchase/sale with the inside state or outside state supplier.

8. The intention of the parties to an agreement is to be gathered from the terms of the agreement itself.

Section 19, The Sale of Goods Act, 1930

Property passes when intended to pass.-

(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.
In the case in hand, the mode of sale transactions indicates because of the fact that, goods of specific character, size and specification were to be supplied/sold, there was an agreement between the contractee companies with the instant dealer-contractor. Instant dealer thereafter placed order for manufacture of those goods which can be said as tailor made goods. If the goods are not up to the specification as per the requirement then, the ultimate buyer had the right to return the goods. Thus, the demand placed by the contractees here are not concluded contracts qualifying the nature of pre-existing contracts. Here, the buyer is pre-identified buyer only. The outstate seller when manufactured the goods as per the specification, the instant dealer gave a direction to sent those tailor made goods directly to the ultimate buyer and in that event the first sale between the manufacturer seller and the instant seller necessarily covered CST sale as per sec.3(a) of the CST Act whereas, the second sale became complete only when the goods were delivered to ultimate buyer. There is no occasion for the instant dealer

to receive the goods inside the State and then to sale the goods to the ultimate buyer. The instant dealer had never taken the physical control over the goods from his seller inside the State. The possession of the goods was handed over to the instant dealer out of State as it was directly sent to ultimate buyer. From the discussion above, since the goods sold are tailor made goods and in no case it can be said that, there was any pre-existing concluded contract for such sale, the sales in question covered under the category of sale u/s.3(b) read with sec.6(2) of the CST Act.

9. The dealer's plea is, reopening of the assessment u/s.12(8) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as, OST Act) is not sustainable in law on two counts, (i) it is mere change of opinion keeping view the acceptance of the dealer plea in expressed terms in the assessment u/s.12(4) of the OST Act, (ii) the dealer cannot be assessed invoking provision u/s.12(8) of the OST Act for the reason that on the basis of fraud case report the dealer was assessed under the Central Sales Tax Act, 1956 (hereinafter referred to as, the CST Act) and the proceeding was dropped in a later period, thereby it is presumed that, the dealer's subsequent sell was accepted as sale covered u/s.3(b) read with sec.6(2) of the CST Act.

To appreciate the question, it is pertinent to peruse the intendment of the legislature behind the provision u/s.12(8) of the OST Act. The provision reads as under-

"(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."
The provision above as contemplates there must be a reason to believe that the turnover of a dealer has escaped or has been under assessed or tax has been compounded when not permissible under the Act and Rules. In *DCN v. State of Rajasthan (1980) 4 SCC 71* the conditions for reopening of assessment are laid down such as (i) there must be a reason for reopening, (ii) there must be escaped assessment or (iii) case of under assessment or (iv) case of compounding when not permissible under law. 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

nonapplication of mind during assessment would not be a justified ground to reopen the assessment *(Commissioner of Tax v. Dinesh Chandra H. Shah (1971) 82 ITR 367 (SC))* = *2002-TIOL-2281-SC-IT* relied.

Keeping in mind the ratio above adverting to the case in hand it is noticed, in spite of repeated opportunity/direction, the LCR could not be furnished. The formation of opinion of the assessing authority for reassessment though is a mandatory required under law but, in absence of the LCR or the copy of the order sheet, we are constrained to take negative inference against the Revenue.

Further, when all the materials were produced before the assessing authority in regular assessment and when there is no question of escapement of turnover but the escapement from the tax net for the wrong interpretation of the provisions under law by the taxing authority, it cannot be a good reason for opening the assessment. In *Indure Limited v. Commissioner of Sales Tax, Cuttack, Orissa and others [2006] 148 STC 61 (Orissa)*, it is held that, 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 reassessment.

10. In the case in hand, it is found that, the assessing authority in the assessment u/s.12(4) of the OST Act has accepted the disclosure made by the dealer regarding transit sale and claim of exemption and it was consequential to the CST assessment. The order of assessment had not addressed the disputed question in explicit term that, any particular sale can be treated as transit sale or not. However, when there was no question of suppression then, it is believed that the view of the assessing authority to treat the disputed sale as transit sale is implied from the assessment order.

11. Learned Counsel for the dealer argued that, the dealer was originally assessed under both the Acts. In the original assessment the dealer's claim of subsequent sale as interstate sale exigible to exemption u/s.3(b) and sec.6(2) of the CST Act was accepted in the CST assessment. On the very same day, the same officer also passed assessment u/s.12(4) of the OST Act and in that assessment also the sale of goods in dispute was not treated as intrastate sale exigible to OST Act. At a later period, on the basis of objection raised by A.G. (Audit) team the assessing authority reopened the assessment under CST Act as per sec.10 of the CST Act. It was preceded by the notice of show cause and reply of the dealer but, in a later period the reassessment u/r.10 of the CST(O) Rules was dropped and on the other hand, assessment u/s.12(4) of the OST Act was reopened invoking provision u/s.12(8) of the OST Act.

Learned Counsel for the dealer vehemently argued that, once the reassessment under the CST (O) Rules basing the self-same A.G. (Audit) report was taken up and dropped then, there is no scope for the authority to reopen the OST assessment on the basis of the self-same A.G. (Audit)

report. Per contra, learned Addl. Counsel, Mr. Raman for the Revenue argued that, the reassessment under CST(O) Rules was dropped as the department had decided to initiate proceeding u/s.12(8) of the OST Act and the fact was accordingly placed before the Hon'ble Court in *W.P.(C) No.3066 of 2007*. So, it never can be said that, the reassessment under CST(O) Rules was an order deciding the disputed question on merit, in that case the reassessment under OST Act is maintainable.

Here, there was CST assessment reopened on the basis of A.G. (Audit) with the allegation that, the dealer's claim of subsequent sale as transit sale is not sustainable and then, in a later period the assessing authority dropped the proceeding with a view that, the reassessment should be done under OST Act. It is not understood why the reassessment under CST(O) Rules was dropped or not maintainable. when the dealer dropped the CST reassessment, it has deemed to have accepted the statutory declaration forms against the claim of CST sale, in that event, reopening as per sec.12(8) of the OST Act is not sustainable.

We are afraid to say that, the authority was not sure which assessment was to open on the basis of AG report. Acceptance of declaration forms under one act and rejection under another act amounts to gross illegality. It is not made clear why the disputed question could not have decided in the CST reassessment. However, once there is a CST assessment and the question of exemption the assessing authority could successfully had decided if the sale was covered u/s.3(b) read with sec.6(2) sale supported by the declaration form "C" and "E-1". Assessment under OST act should be consequential to assessment under CST act and rejection of claim of transit sale by not accepting declaration forms.

Here, the peculiarity is, CST reassessment was open but later closed with a finding that the reassessment under OST Act would be done. This is not only an irregularity but also an illegality going to the root of the case. The order in CST assessment and the order in OST reassessment are contradictory and as well as mutually destructive to each other here, in the case in hand in particular. So, we are unable to accept the method, procedure adopted by the taxing authority and in view of the illegality and irregularity as committed by dropping the CST reassessment, it is believed that, the reassessment u/s.12(8) of the OST Act cannot stand in law.

In the wake of above, here it is held that the reassessment is bad both in law and facts. Accordingly, it is ordered.

The appeal is allowed on contest. The impugned order is set aside and the reassessment is hereby annulled.

Dictated & corrected by me,