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APP

THE HIGH COURT OF ORISSA : CUTTACK

STREV No.56 of 2013

In the matter of a revision under section 24(1) of the Orissa Sales Tax Act, 1947.

M/s. Kalinga Footwear Petitioner

-Versus-

State of Orissa Opp. Party

For Petitioner : M/s. Satyajit Pattanaik
and C.M.Singh

For Opp. Party : Mr. R.P.Kar
Standing Counsel for Revenue

P R E S E N T :

**THE HON'BLE MR. JUSTICE INDRAJIT MAHANTY
&
THE HON'BLE DR. JUSTICE D.P. CHOUDHURY**

Date of hearing- 03.11.2015 : Date of judgment: 18.11.2015

Dr. D.P. Choudhury, J. Challenge has been made to the order dated 08.03.2013 passed by the learned Odisha Sales Tax Tribunal (in short 'the Tribunal'), Cuttack in Second Appeal No. 221(VAT) of 2011-12.

FACTS

2. The factual matrix leading to the case of the petitioner is that the petitioner is a Proprietary Unit engaged in the business of Footwear and duly registered under the Value Added Tax Act, 2004 (hereinafter called OVAT Act) being assigned with the TIN No. 21111204678. For the period from 1.4.2005 to 15.10.2009 the learned Sales Tax Officer made audit assessment under section 42 of the OVAT Act. The learned Assessing Officer found excess stock worth Rs.3,52,00.28 and accordingly raised tax turnover by raising the same. The learned Assessing Officer directed the petitioner to pay Rs.1,42,831.15 under 12.5% taxable goods and Rs.7,81,717.16 under 4% taxable goods as excess amount. Thus, the dealer was to pay Rs.14,513.47 towards tax and Rs.29,269.94 towards penalty. The total due including tax penalty comes to Rs.43,540.41. Besides the amount of Rs.1,11,424.00 claimed by the dealer towards ITC is disallowed which is added to the above due.

3. Against the order of the learned Assessing Officer the petitioner preferred appeal before the learned Joint Commissioner of Sales Tax. The First Appellate Authority observed that the

learned assessing Officer committed error as the audit report does not reflect any stock discrepancy. He further held that the order of assessment has been passed without documentary evidence adduced for which, it cannot be sustainable in the eye of law. So he found the order of assessment was wrong. He observed that there is no evidence on record to establish the order of assessment. Since the order of assessment is wrong without being confronted the same with the dealer, he set aside the order by allowing the appeal.

4. Against the order of the learned First Appellate Authority Second Appeal was preferred by the appellant-petitioner before the tribunal. Learned Single Member of the tribunal after hearing observed that the First Appellate Authority without verifying any books of account of the petitioner passed order. He found that the impugned order is not a speaking order. He further found that the L.C.R. was not available in the case record, but remanded the matter to the learned Assessing Officer by setting aside the impugned order on allowing the appeal.

SUBMISSIONS

5. Learned Counsel for the petitioner submitted that without calling for the L.C.R. the learned Second Appellate

Authority erred in law by remanding the case for fresh assessment. He further submitted that the learned Second Appellate Authority without application of mind and without verifying the L.C.R. has remanded the matter to the Assessing Officer instead of confirming the order of the learned First Appellate Authority. It is also the submission of learned Counsel for the petitioner that the Tribunal has not applied his mind to the documents available before it at the time of hearing of the Second Appeal. Learned counsel for the petitioner further submitted that the Second Appellate Authority has committed error by observing that the impugned order does not reveal that the First Appellate Authority has verified the books of account of the dealer and by passing a non-speaking order. It is also stated that the learned Second Appellate Authority has erred in law by remanding the case, when all the materials were available before it for its consideration in the Second Appeal. On the whole it is submitted to allow the Revision by setting aside the order of the Tribunal.

6. Learned counsel for the Revenue opposing the submission of the learned counsel for the petitioner, submitted that the assessment order was correct and the First Appellate

Authority had failed to appreciate the facts of the case. He further submitted that remand order passed by the learned Second Appellate Authority is justified, in as much as the order of the learned First Appellate Authority was perverse, therefore a fresh assessment by the Assessing Officer was required. Ultimately he urged to dismiss the Revision.

DISCUSSION

7. We have considered the respective submissions of both parties, perused the petition, counter and copy of the impugned order. It is the admitted fact that the petitioner is a dealer in footwear. The order of assessment shows that the petitioner was dealing with 4% and 12.5% of taxable goods. On verification of the accounts the learned Assessing Officer found that 12.5% taxable turnover of goods sold by the Respondent came to be Rs.11,25,049.22 and the turnover of 4% taxable goods was found to be Rs.1,92,08,574.01. Since the petitioner was found to have excess stock worth Rs.3,52,005.28, the petitioner was directed to pay Rs.9,24,550.00 payable against which the petitioner has paid VAT for Rs.3,54,487.00 and there was claim of ITC of Rs.5,55,549.84.

At the same time the learned Assessing Officer directed the petitioner to pay Rs.14,513.47 towards tax and Rs.29,026.94 towards penalty. At the same time he disallowed ITC of Rs.1,11,424.00.

8. The order of the learned First Appellate Authority shows that no discrepancy was found in stock during audit assessment and there has been no service of notice upon the petitioner for production of necessary documents. He observed that when the books of account were not produced by the petitioner obviously there could be no examination of the books of account by the Assessing Officer. He observed that, order of assessment was passed without any documentary evidence and without justification for which the same was set aside by allowing the Appeal.

9. It is revealed from the impugned order preferred against the order of the First Appellate Authority, that the learned Tribunal has observed that no notice under section 42 of the OVAT Act was issued before taking up the assessment. At the same time it has been observed in the impugned order that the First Appellate Authority has verified the books of account and he found the impugned order is not a speaking order. It is true that

a proceeding before the First Appellate Authority is a continuation of the original proceeding, but the order of the First Appellate Authority shows that he has gone through the materials available on record. Moreover, the observation of the learned Second Appellate Authority that "L.C.R. is not available" in the case records is clearly surprising. If the L.C.R. was not available though called for it was not proper on the part of learned Second Appellate Authority to proceed with the Second Appeal. It would have been appropriate for the learned Tribunal to insist upon the production of the L.C.R. and then proceed to dispose of the case on merit after going through the L.C.R. In such circumstances the order of remand is not sustainable.

10. The First Appellate Authority and the Assessing Officers are Officers of the Finance Department, who are also quasi-judicial authority. When the Second Appeal provision was added to the statute to prefer appeal against the First Appeal, such Tribunal being the second Appellate Authority was constituted under section 3 of the Orissa Sales Tax Act having Revenue Officers and Judicial Officers together to decide the Second Appeal. The very purpose of constitution of the Tribunal having Judicial Officer as Chair Person and Member, is to uphold the sanctity of

the tribunal with judicial flavor, so that right of the parties can be well adjudicated. On the other hand, the constitution of Tribunal having Judicial Member requires judicial propriety is to be maintained. The Second Appellate forum being the final court of facts ought to call for the L.C.R. and dispose of the matter, so that justice is not only done but also appears to be done. It should not be forgotten that the Sales Tax Tribunal being the apex body on the Commercial Tax matter and manned with equal number of Judicial Member, one will expect that the procedure of law as prevalent in judicial course is maintained to the extent possible, even if it is a quasi-judicial Tribunal. No appellate court ought to dispose the appeal without going through the L.C.R. So the Tribunal ought not to proceed to dispose without L.C.R. being available before it. So in the instant case we are constrained to observe that disposal of the Second Appeal without perusing L.C.R. is not only vulnerable, but also affects the rights of the parties.

11. We therefore without expressing any opinion on the merits of the case remand the matter to the Tribunal for fresh disposal in accordance with law. In the facts and circumstances of the case and submissions of learned counsel for the respective

parties, it is proper for the learned Second Appellate Authority to call for the L.C.R. and dispose of the case after hearing both the parties. Hence we hereby set aside the order of the learned Second Appellate Authority and direct the Tribunal to dispose of the appeal after going through the L.C.R. and upon hearing the parties preferably before the end of January, 2016.

12. The revision petition is allowed to the extent indicated herein above.

Sd/- Dr. D. P. Choudhury, J

I. Mahanty, J.

I agree.

Sd/- G. Mahanty, J

ORISSA HIGH COURT : CUTTACK
The 18th November, 2015/DNP

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[Signature]
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