IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) Nos. 2225, 2229 and 2233 of 2017

In W.P.(C) No.2225 of 2017

M/s. Sky Automobiles .... ***Petitioner***

Mr. Jagabandhu Sahoo, Senior Advocate
along with Ms. K. Sahoo, Advocate

-versus-

Deputy Commissioner of Commercial Tax, Cuttack II Circle, Cuttack and others .... ***Opposite Parties***

Mr. Sunil Mishra, ASC for Revenue Department

In W.P.(C) No.2229 of 2017

M/s. Sky Automobiles .... ***Petitioner***

Mr. Jagabandhu Sahoo, Senior Advocate
along with Ms. K. Sahoo, Advocate

-versus-

State of Odisha and others .... ***Opposite Parties***

Mr. Sunil Mishra, ASC for Revenue Department
and Mr. M. K. Khuntia, AGA for the State

In W.P.(C) No.2233 of 2017

M/s. Sky Automobiles .... ***Petitioner***

Mr. Jagabandhu Sahoo, Senior Advocate
along with Ms. K. Sahoo, Advocate

-versus-

State of Odisha and others .... ***Opposite Parties***

Mr. Sunil Mishra, ASC for Revenue Department
and Mr. M. K. Khuntia, AGA for the State

CORAM:
THE CHIEF JUSTICE
JUSTICE B. P. ROUTRAY

JUDGMENT
01.10.2021

Order No.

Dr. S. Muralidhar, CJ.

05. 1. These three petitions arise out of a common set of facts and are accordingly disposed of by this common judgment.

2. W.P.(C) No.2225 of 2017 filed by M/s. Sky Automobiles challenges a notice dated 11th January 2017 issued by the Deputy Commissioner of Sales Taxes (DCST), Cuttack-II Circle, Cuttack calling upon the Petitioner to appear before him on 19th January 2017 for the purposes of "re-computation of tax for the year 2002-03" under the Orissa Sales Tax Act, 1947 (OST Act).

3. A similar challenge has been raised in the companion petition i.e. W.P.(C) No.2229 of 2017 by the same Petitioner to the notice dated 27th December 2016 regarding payment of surcharge under the OST Act for the period 2000-01 as well as the re-computation order dated 28th January 2017 calling upon the Petitioner to pay Rs.31,05,765/- towards OST and surcharge.

4. In W.P.(C) No.2233 of 2017 by the same Petitioner, the challenge is to an identical notice dated 27th December 2016 and the consequential re-computation order dated 30th January 2017

for the period 1st April 2001 to 31st December, 2001. The demand for OST and surcharge for this period was Rs.16,79,686/-.

5. While directing notice to issue in these petitions on 27th March 2017, this Court passed an interim order staying the impugned demands and operation of the notice dated 11th January 2017 challenged in W.P.(C) No.2225 of 2017.

6. This Court has heard the submissions of Mr. Jagabandhu Sahoo, learned Senior Advocate appearing for the Petitioner and Mr. Sunil Mishra, learned Additional Standing Counsel for the Opposite Parties-Department.

7. The background facts are that for the year 2000-01, the Petitioner, a registered dealer under the OST Act, was assessed by the Sales Tax Officer (STO), Cuttack-II Circle under Section 12(4) of the OST Act by an order dated 21st February 2002 to Rs.4,98,533/-. In computing the surcharge under Section 5-A of the OST Act, the amount of entry tax payable under Section 4 (1) of the Orissa Entry Tax Act, 1999 (OET Act) was not set off from the sales tax payable.

8. Aggrieved by the above assessment order, the Petitioner preferred a first appeal before Assistant Commissioner of Sales Tax (ACST), Cuttack-II Range. By an order dated 20th February

2003, the ACST confirmed the above assessment order. The Petitioner then preferred a second appeal before the Orissa Sales Tax Tribunal, Cuttack (Tribunal) by SA Nos.319-319(A) of 2003-04.

9. While the second appeal was pending, this Court in its judgment dated 5th January 2007 in ***M/s. Bajaj Auto Ltd. v. State of Odisha, 2007 ((I) OLR 415 (Ori)*** [hereafter ***Bajaj Auto (HC-1)***] concluded that surcharge had to be computed after setting off the entry tax against the gross tax assessed under the OST Act. This Court further held that the clarification on the contrary issued by the State Government had no legal sanctity.

10. Following the above decision of this Court, the Tribunal passed an order dated 29th November 2007 and directed the Department to re-compute the tax liability by allowing set off of entry tax from the tax due and thereafter levy surcharge on it. Accordingly, a re-computation order was passed by the STO on 25th July 2008 and the excess amount to the tune of Rs.29,57,232/- was refunded to the Petitioner. The above order of the Tribunal was for the years 2000-01 and 2001-02.

11. It may be noted here that the decision of this Court in ***Bajaj Auto (HC-1)*** (*supra*) case was challenged by the Department before the Supreme Court of India. In its judgment dated 28th

October 2016 in ***Commissioner of Commercial Taxes v. Bajaj Auto Ltd. AIR 2016 SC 5014*** [hereafter ***Bajaj Auto (SC)***], the Supreme Court reversed the order of this Court and held that the surcharge "under Section 5-A of the OST Act is to be levied before deducting the amount of entry tax paid by the dealer." As a result of the above judgment of the Supreme Court, the Department began issuing orders of the re-computation of the tax, surcharge and interest payable to all the Assessees.

12. In relation to the period 2003-04 as far as the present petitions are concerned, the judgment of this Court dated 5th January 2007 was common to the writ petition filed by the M/s. Bajaj Auto Ltd as well as the writ petition filed by the present Petitioner in relation to the levy of surcharge under the OST Act for the period 2003-04. When the Department challenged the judgment of this Court in ***Bajaj Auto (HC-1)*** in the Supreme Court, it also challenged the same common judgment in so far as it related to the present Petitioner for the period 2003-04 in Civil Appeal Nos.5913-5920 of 2008. Therefore, when the Supreme Court by its judgment dated 28th October 2016 in ***Bajaj Auto (SC)*** reversed the judgment of this Court in ***Bajaj Auto (HC-1)***, it also reversed the judgment of this Court in so far as it related to the present Petitioner for the period 2003-04.

13. This much has been admitted by the Petitioner itself in paragraph 3(h) in W.P.(C) No.2229 of 2017 and paragraph 3 (h) in W.P.(C) No.2233 of 2017.

14. The grievance of the Petitioner is that the Department cannot on the basis of the above judgment in ***Bajaj Auto (SC)*** seek to reopen the computation of surcharge for the periods 2000-01, 2001-02 and 2002-03. Mr. Sahoo, learned Senior Advocate for the Petitioner, submits that the earlier orders granting refund to the Petitioner for the aforementioned tax periods had attained finality and in fact refund was made to the Petitioner. This cannot be sought to be reopened after a long lapse of time. He further submitted that those orders which resulted in refund being granted to the Petitioner were appealable. However, the Department did not choose to either file an appeal or a revision in this Court. The Department in fact accepted those orders. Thus, long before the judgment of the Supreme Court in ***Bajaj Auto (SC)*** on 28th October 2016, the above issue pertaining to the Petitioner for the periods earlier to 2003-04 was laid to rest.

15. Mr. Sahoo submits that Section 28-B of the OST Act provides for the limitation period for re-opening of assessment and even this period had been crossed. He accordingly submits that in the absence of any statutory provision, the Department cannot revive the demand for those earlier periods by mere orders of re-

computation. He points out that there is no provision in the OST Act corresponding to Section 49-A of the Orissa Valued Added Tax Act, 2004 (OVAT Act) to enable the Department to issue a re-computation order to revive an enforceable demand. Having failed to invoke the statutory remedy available to it in law, the Department cannot take advantage of the subsequent judgment of the Supreme Court. Reliance is placed on the decision in ***Deputy Commissioner of Income Tax v. Simplex Concretes Piles (India) Ltd. (2013) 11 SCC 373.*** Reliance is also placed on the decision dated 12th January 2021 of the Tripura High Court in WP (C) No. 465 of 2020 (***Tripura Ispat v. Union of India***).

16. On the other hand, Mr. Mishra, learned Additional Standing Counsel for the Department has placed reliance on this Court's order dated 31st March 2021 in W.P.(C) No.3804 of 2018 (***M/s. Bajaj Auto Ltd. v. The Deputy Commissioner of Sales Tax, Sambalpur-II Circle*** [hereafter ***Bajaj Auto (HC-2)***] and on the decision in ***M/s Shenoy & Co v. Commercial Tax Officer, Circle II, Banagalore (1985) 2 SCC 512***. He submitted that the present case was different from the facts involved in the decision dated 26th August 2021 of this Court in W.P.(C) No.14486 of 2021 (***M/s. Neelam Motors v. Deputy Commissioner of Sales Tax, CT & GST Circle, Balasore)****;* the order dated 1st September 2021 of this Court in W.P.(C) No.4538 of 2017 (***M/s. Seetal Automobiles v. The Commissioner of Commercial Taxes, Orissa)***. According to

him the present Petitioner stands on a different footing since the judgment of this Court in ***Bajaj Auto (HC-1)***, which was common to the present Petitioner for the period 2003-04 was in fact challenged before the Supreme Court and was reversed by it in ***Bajaj Auto (SC)***.

17. The above submissions have been considered. It should be noted at the outset that there are two distinct categories of cases in which re-computation orders had been passed by the Department consequent upon the judgment of the Supreme Court in ***Bajaj Auto (SC)*** (supra). One category of cases is where the Department did not question the decision of this Court in ***Bajaj Auto (HC-1)*** qua an Assessee before the Supreme Court, or the orders granting refund to such Assessee on the basis of this Court's judgment in ***Bajaj Auto (HC-1)*** but still went ahead and issued re-computation orders after the judgment of the Supreme Court in ***Bajaj Auto (SC)***. This category includes ***M/s. Neelam Motors*** (*supra*) and ***M/s. Seetal Automobiles*** (*supra*). In those cases, this Court has by the aforementioned orders set aside the re-computation orders since the earlier orders granting those Assessees refunds had become final.

18. The second category of cases which included M/s. Bajaj Auto Ltd. itself was where the Department did question the order qua an Assessee. This Court in ***Bajaj Auto (HC-2)*** has upheld the re-

computation orders although they may have related to periods different from the one which formed the subject matter of the challenge before the Supreme Court. The present Petitioner's case falls in this category. The Department did go in appeal to the Supreme Court against the order of this Court in the Petitioner's favour for the year 2003-04 [covered by the judgment in ***Bajaj Auto (HC-1)***]. That judgment was reversed by the Supreme Court in ***Bajaj Auto (SC)***. Consequently, the reasoning in this Court's judgment in ***Bajaj Auto (HC-2)*** is squarely applicable to the facts of the present cases.

19. The present Assessee could not have been taken by surprise when it received notices for re-computation of tax following the judgment of the Supreme Court in ***Bajaj Auto (SC)***. This is because the Petitioner was a party to that judgment. The decision in its writ petition by this Court in ***Bajaj Auto (HC-1)*** was common to the Petitioner and Bajaj Auto Ltd. and was the subject matter of the challenge before the Supreme Court.

20. The very same submissions that have been advanced before this Court by Mr. Sahoo have been negatived by this Court in ***Bajaj Auto (HC-2)*** with the following reasoning:

> "7. This Court is unable to agree with the above submission. The very basis of the subsequent orders of this Court for the AYs in question, in favour of the assessee, was the judgment dated 5th January 2007 of this Court. In other words, there

> was no other basis for accepting the plea of the assessee for the AYs in question. That very basis of the orders passed by this Court has been rendered non-existent by the judgment of the Supreme Court in ***Bajaj Auto Ltd. (supra)*** setting aside the order dated 5th January, 2007 of this Court. The aforementioned declaration of the law by the Supreme Court is binding on all the authorities in terms of Article 141 of the Constitution. Consequently, the impugned orders that have been passed, re-computing the tax payable to give effect to the judgment of the Supreme Court, which the authorities were bound to do, cannot be termed illegal."

21. Even as regards the limitation the plea was rejected in ***Bajaj Auto (HC-2)*** for the following reasons:

> "9. As far as the limitation is concerned, considering that the decision of the Supreme Court was rendered on 28th October, 2016, the re-computation orders having passed not very long thereafter, in December 2017, and in the absence of any specific period of limitation prescribed for re-computation, it cannot be said that the said orders are time barred."

22. The facts in ***Tripura Ispat*** (*supra*) are closer to those in ***M/s. Neelam Motors*** (*supra*). In fact the legal position explained there has been followed by tis Court in ***M/s. Neelam Motors*** (supra). Likewise, the decisions relied upon by the Tripura High Court in ***Tripura Ispat*** viz., ***Collector of Central Excise v. Flock (India) Pvt. Ltd (2000) 6 SCC 650*** and ***Priya Blue Industries Ltd. v.***

Commissioner of Customs, AIR 2004 SC 5115 would have no application as far as the present case is concerned.

23. Turning to the decision in ***Deputy Commissioner of Income Tax and Ors. v. Simplex Concretes Piles (India) Ltd.*** (*supra*), the Court again finds that it turned on its own facts. The observation that "the subsequent reversal of the legal position by the judgment of the Supreme Court does not authorize the Department to reopen the assessment, which stood closed on the basis of law, as it stood at the relevant time" would not apply *ipso facto* to the present case since the Petitioner here itself was a party to the judgment of the Supreme Court which reversed the judgment of this Court in ***Bajaj Auto (HC-1)***. For the same reason, the Court finds that the judgment in ***Padmausundara Rao v. State of Tamil Nadu*** (*supra*) also does not apply to the facts of the present case.

24. As regards interest on surcharge, the Petitioner is entitled to the same benefit that was granted to a similarly placed Assessee in ***Bajaj Auto (HC-2)***. The same reasoning as is contained in paragraph 10 of this Court's order in ***Bajaj Auto (HC-2)*** apply here as well and that reads as under:

> "10. However, as regards the levy of interest, since the legal position got clarified by the Supreme Court only on 28th October 2016, the Petitioner is justified in contending, on the strength of the judgment of the Supreme Court in ***Food Corporation of India v. State of Haryana, (2000) 119 STC 7 (SC),*** that such interest is payable only

> for the period subsequent to the judgment of the Supreme Court and not prior thereto. Consequently, the impugned demand notices are modified only to the extent that the interest on the differential tax amount will be payable by the Petitioner for the period subsequent to the judgment of the Supreme Court i.e. 28th October 2016, till the date of payment."

25. This Court accordingly upholds the impugned re-computation orders of the Department as well as the notice dated 11th January, 2017 except to the extent of interest on surcharge. A direction is therefore issued to the DCST to issue fresh orders re-computing the amount payable on the basis of the limited modification as regards interest, not later than 1st November, 2021. It is made clear that it would not be open to the Petitioner to again challenge the said order as long there is in conformity with the directions issued in the present judgment of this Court.

26. The writ petitions are accordingly disposed of with no order as to costs.

27. Urgent certified copy of this judgment be granted as per rules.

(Dr. S. Muralidhar)
Chief Justice

(B.P. Routray)
Judge

S.K. Guin